SPECIAL COMMUNICATION

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Am I My Brother's (or Customer's or Tenant's) Keeper? Economic and Ethical Aspects to the California Supreme Court's Struggle with the Issue of Landowner's Standard of Care*

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ABSTRACT: The Supreme Court of California has ruled on several cases involving the question of to what extent a possessor of land is liable for the harm to customers or tenants occurring when a third party commits a criminal act against the customers or tenants present on the land. This paper reviews the historical development of this aspect of negligence law and analyzes the ethical and economic efficiency implications of ascribing legal responsibility for such crimes to: *a*) local government, *b*) the possessor of land, *c*) the customer, and *d*) the criminal. For example, is there an effort by the judicial system to substitute deterrence from criminal acts provided by possessors of land (i.e., specific deterrence) for the general deterrence traditionally provided through the use of police powers by local government? Analysis indicates that specific deterrence may be more effective in changing the location of criminal acts than in reducing the level of criminal activities. Also, the expense of complying with the legal responsibilities of protecting customers and clients may be especially high in high-crime, low-income areas, thus forcing commercial establishments to move or go out of business.

Thus, we have a troubling tradeoff: compensating individual crime victims in a high-crime area could ultimately deprive the residents of basic economic opportunities.

KEYWORDS: forensic science, ethics, standard of care, economic efficiency, landowner's liability

The purpose of this paper is to focus on a specific legal issue regarding the recent judicial trend, particularly in California, to expand the liability of possessors of land for the harm done to customers or tenants by the criminal acts of third parties. We examine the evolution of this trend and consider some of its likely economic and ethical consequences. Hence, the reader should not expect a strictly formal economic analysis whereby some behavioral objective is defined, subjected to one or more formal resource constraints, and a solution is offered for the optimal achievement of the behavioral objective. Nor should the reader expect a purely philosophy-based ethical inquiry instead of the more practical application of ethical criteria, which follows.

In Western culture, the study of ethics as a formal discipline, or an examination into what human behaviors are to be considered morally right or wrong, begins with the early philosophers such as Aristotle and continues to concern philosophers. The law and the study of economics, as formal disciplines, began as offshoots of ethical inquiry.

Ethical inquiry addresses a number of moral questions such as what behavior is good. Different schools of ethical thought offer different criteria for evaluating whether a given behavior is good. One such school, *utilitarianism,* would evaluate the goodness of an act according to whether the consequences of that act are more favorable than unfavorable for the community at large. The desire to advance our understanding of economic and legal arrangements sprang from this type of ethical inquiry. For instance, economics is about how the details of society's activities and arrangements add to, or subtract from, the material well-being of the community and its internal harmony. The most fundamental of these social arrangements is the law.

Adam Smith, a long time Professor of Moral Philosophy at the University of Edinburgh, is credited with crafting economics as an apparently distinct discipline. In fact, it has been argued (1) that if Smith had never written Wealth of Nations (2), he would nevertheless be remembered for his contributions to moral philosophy. In Smith's exposition of why a market system produces social harmony and material advancement, he presupposes certain legal arrangements, most prominently private property and the enforceability of contracts.

Smith's defense of private property and his emphasis on the enforceability of contracts stem from John Locke. Locke's views on property, in turn, are a refinement of the ethical propositions of Aristotle (3), and contrast with the defense of private property offered by Thomas Hobbes. Locke favored private property in the belief that the owner of such property would extract greater bounty from it if he/she would be able to dispose of the fruits of that property. Hobbes

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defended private property as part of the social contract whereby individuals cede resources and freedoms to the king (or government) in return for social and political stability and as an escape from life under a state of nature which is solitary, poor, nasty, brutish, and short (4). Locke and Smith defend the institution of private property on the basis of utilitarian arguments to the effect that it advances society's material well-being (*i.e., achieves greater efficiency*). Locke's defense can also be said to appeal to the ethical principle of advancing autonomy—the idea that the individual should control his/her destiny through freedom to identify options, make choices from among those options, and accept responsibility for those choices. Locke, in considering the ethical aspects of private versus communal property states that God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience (5). Smith says that the highest and best use of land and other resources will be achieved through a market system and through application of the profit motive. However, profit and its resulting prosperity would attract criminals. When the law, as we shall discuss in the *Isaacs* v. *Huntington Memorial Hospital* (6) case, seeks to shift liability for the criminal acts of third parties from the criminals to the possessors of land, society is prevented from fully realizing the Lockeian and Smithian ideals of putting land to its highest and best advantage.

The trend in the law represented by the *Isaacs* v. *Huntington Memorial Hospital* (6) case highlights a policy choice and an implicit ethical dilemma that must now be addressed by the California Supreme Court and society at large. Do we wish to preserve the traditional meaning and scope of negligence? The traditional interpretation makes the possessor of land liable for damages only when these damages are the result of a breach of legal duty on the part of the possessor of land. Or, do we wish to significantly broaden the legal concept of negligence such that the possessor of land is liable for damages to customers, tenants, or even passers-by if a trespassing criminal third party committed the acts that caused the damages?

The ethical dilemma implicit in this policy choice is that if we maintain the traditional interpretation, then the victims of such criminal acts would suffer an inequitable and perhaps permanent loss. Should these victims alone bear the costs stemming from the behavior of others (the criminals)? Is it not also the government's responsibility to prevent such crimes? Are we to, in effect, hold the victims responsible for the failures of the government or should the law transfer at least part of the costs from the victim to the possessor of land? The ethical case for a broader interpretation of negligence leading to victim compensation may also appeal to the Golden Rule. If each of us would wish to be compensated in the event of an unfortunate victimization, then each of us should endorse the general principle of indemnifying all crime victims. The effort to indemnify victims of criminal acts is also consistent with the moral virtues of empathy (putting one's self in the circumstances of another), dignity (assuring that others are treated with respect), and generosity or beneficence (attempting to improve the well-being of others, particularly the less fortunate). Less altruistically, many of us may prefer that the victims of crime receive such material compensation rather than perhaps falling to a state of indigency which might, in turn, lead them to become a burden, randomly chosen, on other individuals (e.g., panhandling) or even take up a life of crime themselves.

On the other hand, if we abandon the traditional meaning and scope of negligence, we undermine the ethical principle of autonomy, as well as society's efforts to achieve the utilitarian goal of a higher living standard through a reliance on economic efficiency. Again, autonomy expresses the ideal that each individual is in the best position to evaluate which possible acts are in the individual's best interest and that such an individual should therefore be able to determine for himself/herself which acts to undertake or choices to make. Implicit in this notion is that the individual should be responsible for the outcomes of one's choices. Implicit in this latter notion is that the individual stands to gain if his/her choices were wise, but lose if his/her choices were ill-considered.

It is here that the ethicist's view of autonomy as an ethical virtue coincides with the economist's (or utilitarian's) view of efficiency as a practical virtue. The perspective that the individual should be responsible for his/her choices and materially gain or lose in proportion to the wisdom and productivity of those choices is the basis of the contribution standard of income distribution. This standard is widely regarded as the most efficient method of distributing income or wealth. It structures rewards and penalties so as to offer the maximum incentive for individuals and groups to offer productive effort. Productive effort is accomplished through more intensive work effort and through decisions to produce those goods and services that are most highly valued by consumers.

An argument is offered in this paper that the abandonment of the traditional meaning and scope of negligence would weaken the link between productive effort (as evidenced by the development and production of new products) and reward. This attenuation could be expected to have adverse consequences for economic efficiency, autonomy, and other ethical objectives. It is further argued that the abandonment of the traditional meaning and scope of negligence, with its attendant undermining of personal autonomy, forces the possessor of land/entrepreneur to adopt a series of protective and precautionary measures. Such measures are unlikely to be effective in discouraging the intrusion of the criminal on the possessor's property or in reducing the overall level of crime in the community. This pattern may also undermine efforts of social generosity by imposing a disproportionate burden on the least advantaged segments of society.

The Supreme Court of the State of California has ruled on several cases involving the extent to which a possessor of land (e.g., a landlord, store owner, or retailer who has leased his/her place of business) is liable for the harm to customers or tenants occurring on that land when a third party commits a criminal act against the customers or tenants. The Court's ruling in the *Isaacs* v. *Huntington Memorial Hospital* (6) case involved a plaintiff physician suing a hospital for negligence in failing to adequately protect the physician from the act of a criminal who shot and wounded him in a hospital parking lot. The Court's decision for the plaintiff set aside a lower court's narrower "prior similar incidents" rule in favor of the "totality of the circumstances" rule for assessing the liability of the possessor of land. The *Isaacs* decision was consistent with a judicial trend that was just emerging in the late 1970s and 1980s, in California and other states, to expand the liability of the possessor of land for the criminal acts of third parties.

The prior similar incidents rule ascribes liability for the loss suffered by a customer or tenant to the possessor of land if a criminal act occurs on the possessor's property and the possessor did not foresee the need for greater security based on earlier, similar crimes on that property. The more inclusive totality of the circumstances rule fixes liability on the possessor of land if he/she did not foresee the need for, and provide greater security based on such factors as the overall level of crime in the area (7), the lighting (8), the physical layout (9), and the security efforts that the possessor of land had already made (6,10). A possible landmark California Supreme Court case (*Ann M.* v. *Pacific Plaza Shopping Center*) (11) involved a plaintiff who was raped in her place of employment, al-

legedly located in a secluded area of a shopping center. The Court affirmed the trial court's grant of a summary judgment in favor of the shopping center. According to a dissenting opinion, the Court retreated from the totality of the circumstances rule toward the prior similar circumstances rule. Given the hypothesis that the *Ann M.* decision signaled a possible reconsideration of the judicial trend toward the expansion of liability of the possessor of land, it is hoped that the following analysis of some of the ethical and efficiency aspects of this trend will be seen as timely.

By way of background to the main issue of the paper, the likely economic and ethical effects of an expansion of liability to the possessor of land, Section II, provides a summary of the development of the legal concept of negligence. Section III offers a consideration of some of the efficiency and ethical consequences of the trend in the interpretation of negligence. Section IV considers some of the practical economic and ethical aspects of the attendant shift in the responsibility for deterring crime from the public sector to the private sector. Section V offers a summary and conclusions.

The Traditional Negligence Analysis

Negligence, like any tort action, may be analyzed in terms of a list of elements that must be proved by a preponderance of the evidence. (See Karnowski (12), Crouse (13), Cabrera (14), and Sharp (15) for a more thorough analysis of the relevant legal issues in the judicial trend toward the expanded liability of the possessor of land and the legal objections that have been raised to that trend.) The plaintiff must prove: 1) that there is a legally recognized relationship that imposes a duty of care toward the plaintiff on the part of the defendant; 2) that the defendant failed to meet the implied minimum standard of precaution, and therefore breached his duty to the plaintiff; 3) that the defendant's failure to meet the minimum standard of precaution was the cause in fact of some injury to the plaintiff; 4) that there are no reasons of public policy to relieve the defendant of liability so that his breach of duty is also the proximate cause (also sometimes called legal cause) of the plaintiff's harm; and 5) that the plaintiff suffered legally compensable harm as a result of the defendant's act or omission.

In general, the legal concept of duty requires that due care be used to avoid creating an unreasonable risk of harm to others. It does not require that no harm ever comes to another, but only that a reasonable level of precaution be taken to guard foreseeable plaintiffs from foreseeable risk *stemming from one's own conduct or activities.* In general, there is no duty to safeguard others from the acts of third parties. (There are exceptions to the general rule that one has a duty to regulate only one's own conduct.)

If there were such a duty, where would it end? In the case of certain possessors of land, the Restatement (Second) of Torts §344 (the second version of an attempt by the American Law Institute, a group of distinguished lawyers, judges, and law professors, to codify the current state of the law and what they think the law ought to be) answers that question (16) by stating:

> A possessor of land who holds it open for entry for his business purposes is subject to liability to members of the public *while they are on the land* for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons. . . . (emphasis added)

If a duty exists to take reasonable precaution as against the acts of all third parties, even ones who have no relationship to the possessor of the land whatsoever and who may themselves be trespassers, then why is it logical for that duty to begin and end at the boundary of real property? Does a possessor of land not deliberately attract and entice its customer to traverse over land of others, including public land, to get to the business? Should not the duty, therefore, begin at the moment the member of the public forms the intention to visit the possessor of land's business? If one is under an obligation, in effect, to control the acts of third parties, including muggers, should not that duty be in effect the entire time members of the public are imperiled by the third parties?

In *Isaacs* v. *Huntington Memorial Hospital* (6), the Supreme Court of California was not troubled by the abandonment of the concept of duty based on relationships and the extension of the concept of duty to include the acts of third parties. The Court moved the analysis immediately to another aspect of duty—foreseeability. In general, the law of negligence imposes an obligation to avoid acting in a manner that creates foreseeable risks to foreseeable plaintiffs. It is easy to confuse duty with proximate cause. In general, it is useful to think of the proximate cause element as a limitation on the scope of duty.

The *Isaacs* opinion seems to be discussing four approaches to handling the question of whether the foreseeability of an event gives rise to a duty to take precaution against it. In reality, there are really only two approaches, but the Isaacs opinion left this so unclear that the matter had to be "revisited" by the Supreme Court of California eight years later in *Ann M.* The first approach in *Isaacs,* which is dismissed summarily, is the common law view that there is no duty, absent a special relationship, to deter the criminal acts of another. The second approach conditions the duty to take reasonable precautions to deter the criminal acts of third parties on the foreseeability of those acts.

If there had been one or more prior crimes on the premises of the same nature as the act complained of by plaintiff, then the defendant had a duty to take precautions against a repetition of that act. This fact pattern was termed by the *Isaacs* court as the "prior similar incidents" rule. This standard of foreseeability was criticized by the Court in five separate respects. One of those respects was the failure to serve "the important policy of compensating injured parties." The reason the "prior similar incidents" rule leads to this result is that the first victim, the one whose "incident" is the predicate for the application of the rule in favor of the second and subsequent victims, can point to no prior similar incident to trigger the duty to take precautions against a criminal act of the type the first victim suffered. The *Isaacs* court noted a general reluctance to remove foreseeability questions from the jury, which was itself notable because elsewhere in the same opinion, and eight years later in *Ann M.* v. *Pacific Plaza Shopping Center* (11), the question of the existence of duty was a question of law for the trial court. Next, the *Isaacs* court said that the question of foreseeability ought to be judged in light of "the totality of the circumstances." Also, the trial court was directed, on remand, to admit evidence of any incident which had probative value on the question of whether the defendant was, or reasonably could have been, on notice to take precautions against the crime perpetrated against the plaintiff. Evidence of a "prior similar incident" certainly would trigger the existence of the duty under the "totality of the circumstances" rule.

The "totality of the circumstances rule," by itself, says only that every case must be judged on the basis of its own specific facts. In *Ann M.,* the Supreme Court of California offers some guidance as to what facts should give rise to a duty to take reasonable precautions under the "totality of the circumstances" rule. That guidance is that the trial court (not the jury) must balance the foreseeability of the harm caused by the criminal's act against the burden of the precau-

tionary measures required. This standard of judging when the "totality of the circumstances" gives rise to the duty to take precautions has come to be known as the "foreseeability guideline" rule.

After *Isaacs,* it is apparent that there are different standards by which to judge whether the possessor of land owes a duty to take precaution against the commission of crimes. Of these standards, the least favorable to the plaintiff is the "prior similar incidents" rule. If nothing else, this rule has the virtue of being related only to the issue of whether a duty existed at the time of the criminal attack on the present plaintiff. The "totality of the circumstances" standard drops the requirement of prior similar incidents and confuses the concept of duty with the concept of breach of duty by allowing consideration of the nature of the crime suppression conduct (e.g., lighting and other security measures) taken by the defendant in deciding whether a duty existed. The amount and kind of crime suppression measures taken by the defendant are relevant in deciding whether the defendant's duty was breached, not whether it existed in the first place. Finally, there is the "foreseeability guideline" standard, which combines the "prior similar incidents" and "totality of the circumstances" rules, and results, effectively, not in an identifiable rule but in vesting the finder of fact with unfettered discretion to find negligence whenever it is "in the air."

It is easy to see why the lower courts were both confused by *Isaacs* and dissatisfied with the results that it produced. (See *Miller* v. *Pacific Shopping Center* (17) and *Nola M.* v. *University of Southern California* (9)). Even if the defendant owed a duty to the plaintiff to take precautions against third parties mounting a criminal attack on the plaintiff, and even if that duty were breached, the plaintiff must, in traditional negligence analysis, prove that the defendant's breach of duty was the cause in fact of the harm suffered by the plaintiff. That is, the plaintiff must show that "but for" the breach of duty, the harm would not have occurred. The Restatement (Second) of Torts §344 (16) resolves this question in favor of the plaintiff by imposing liability on the possessor of land for physical harm to anyone present on the land caused by the acts of third parties. This, of course, stands traditional analysis on its head. It infers duty and breach of duty from the fact that the plaintiff suffered physical harm. Thus, all harm suffered by a plaintiff results in liability for the possessor of land in spite of the fact that even the most elaborate security precautions can be breached by a determined and clever assailant.

That being so, only the concept of proximate cause remains to bar recovery by the plaintiff, assuming that there are no affirmative defenses raised by the defendant. In the traditional analysis of proximate cause, a distinction is made between direct and indirect causes. Direct causation concerns cases in which nothing intervened between the defendant's negligence and the harm suffered by the plaintiff. Indirect causation concerns cases in which any force or act of another (of an animal, or of nature, or of another person) occurs *after* the defendant's negligence. It forms a necessary link in the chain of causation between the defendant's negligence and the harm suffered by the plaintiff. In indirect causation cases, foreseeability is the key factor in the analysis of proximate cause. The basic rule is that if the defendant could reasonably foresee the intervening force or act, then the intervening force or act does not supersede the defendant's negligence as the proximate cause of the plaintiff's harm. In traditional analysis of proximate cause, the criminal act of a third party would be treated as a superseding intervening cause, breaking the direct chain of causation between the defendant's breach of duty and the harm suffered by the plaintiff. The modern view of indirect causation is that if the defendant could reasonably foresee the intervening act, even a crime by an unknown third party, then it is not superseding, and the defendant is liable if all the other elements are present. Indeed, the modern view goes further to maintain that even if the *particular* intervening act or force operating in a given case was not foreseeable, if the *ultimate result was foreseeable,* then the defendant's breach of duty was the proximate cause of the plaintiff's harm. Thus, the degree of directness of the connection between the defendant's negligence and the plaintiff's harm required for the plaintiff to prevail is being reduced steadily.

Crime as a Stochastic Event

The Restatement (Second) of Torts §344 (16) does not reveal, in its literal language, whether the theory of the plaintiff's action is negligence or strict liability. Even under a strict liability theory, though, the plaintiff would normally have to show that some act or omission on the part of the defendant was both the cause in fact and the proximate cause of his harm. Therefore, the courts may be expected to handle those elements of a strict liability action in the same manner as they would be handled in a negligence action. In a traditional analysis of either case, the defendant's act or omission must be a cause in fact of the plaintiff's harm for the plaintiff to prevail. In the modern "foreseeability" analysis of causation, it is as if the courts are saying that crime is not a voluntary act of an individual, but rather a probabilistic event; a casualty akin to being struck by lightening, but one more likely to occur.

Once that analysis is adopted, the only remaining question is how the law should apportion the risk of being visited by the peril of crime. The law of torts has certain well-known policy objectives, the most prominent of which is that victims should be indemnified. It is the purpose of the remainder of this paper to examine the question of whether the policy of the law of torts, as it stands on the issue of third party criminal attacks, leads to economically efficient and ethical results in terms of the implied balance between risk and precaution for each party and for society's production of crime suppression.

Negligence Versus Strict Liability Approaches to Third Party Damages

Efficiency Implications

The concept of negligence, as originally developed, was a response to the very restrictive limits dictated by strict liability. Strict liability was seen as preventing industrial development and the prospective surge in living standards that greater industrialization promised. Strict liability was an impediment to the introduction of better technologies because it imposed liability without fault. Whoever undertook any novel productive activity, even while exercising considerable care and caution to avoid harm to others, would be visited with liability should any harm occur. Many things that are commonplace today (e.g., reliance on steam engines, automobiles, chemical products, or even new devices utilizing electricity) would not have been developed, or would have been developed much later, because of the extra financing involved in providing for the contingent liability.

The key difference between the concept of strict liability and the concept of negligence is the notion of fault—the breach of a duty of reasonable care. Negligence, as it was originally conceived, allows industrial experimentation and learning to take place. Therefore, new technologies and products could be introduced without the paralyzing fear of liability without fault, should any unforeseen negative consequences flow from such activities (18).

More recently, however, the notion of a fault requirement in negligence has come under attack. This has happened in three ways: (1) expansion of the landowner's scope of duty, (2) reduction in the required directness of the causal connection between the breach of duty and the harm that may have actually occurred, and (3) reduction in the availability of defenses, particularly the defense that the plaintiff had assumed a known risk. (See *Liebeck* v. *McDonalds* (19) and *Crocker* v. *Winthrop Laboratories* (20).) There are a number of recent cases that suggest fault may no longer be a necessary element of negligence. This deemphasis of the concept of fault may spring from an ethical urge to indemnify victims of misfortune. These recent cases reveal the tendency to return, however implicitly, to the theory of strict liability. The consequences of this could be far reaching indeed. The implications for technological development, industrial employment, and remaining on the frontiers of world living standards are all negative.

Will entrepreneurs be as willing to innovate if they have to expose themselves to these liability risks? Capital will be more difficult to raise. Insurance will be more expensive or more difficult to obtain, or both. The center of innovation (i.e., the United States) would tend to move to other jurisdictions. Were American businesses to obtain modern technology, they would have to buy it elsewhere. Or, they would not be able to buy it until many years after its introduction because of the expansion of liability. They would have to wait for sufficient experience to render the operation or the technology absolutely foolproof. That could take decades and might never happen at all (21,22). As a result, everything would be more expensive than it would have been otherwise, or not available at all.

Ethical Implications

We suggest that there is a tradeoff between the ethical urge to indemnify victims of crime and the ethical principle that liability should stem from fault, (i.e., that fault should precede liability). The elimination of fault as a necessary element of negligence can be expected to retard the introduction of new technologies, which in almost every way improves living standards.

We also suggest that in return for the indemnification of presently living individuals, a sacrifice is being made in the form of lower living standards for succeeding generations. These unborn have, of course, no voice in the resolution of this tradeoff. What are the ethics of bargaining away the choices of future generations? They, if allowed a voice in these decisions, might choose a completely different set of alternatives.

In this tradeoff between the ethical desire to indemnify crime victims and the ethical principle that fault should precede liability, it is not clear that any reduction in crime victimization has been obtained or could be obtained. That is, there would have to be a sufficient increase in both the depth and the breadth of specific deterrence to obtain a significant reduction in crime and its resulting victimization. This hypothetical decrease in crime victimization (it is difficult to measure what did not happen) would have to offset the likely increase in victimization induced by the moral hazard problem discussed in Section IV.

The social contract in the United States and other Western nations is predicated on the notion that a central purpose of the state is to promote liberty by, among other things, suppressing crime. The state has a contractual and, therefore, moral obligation to do so. To the extent that the policy of Section 344 of the Restatement of Torts (Second) (16) transfers this obligation to the possessor of land, it allows the state to breach its ethical duty to keep its covenant with its citizens.

Suppressing Crime through General Deterrence or Specific Deterrence

Efficiency Implications

The effort to consider economic efficiency aspects of crime suppression activities has experienced a significant resurgence since Becker's (23) seminal paper offering an economic perspective on criminal activity and societal efforts to combat crime. However, as Ehrlich (24) has recently written, "The economic literature has focused mainly on the determination of optimal means of law enforcement and crime control, rather than the basic rationale for public rather than private enforcement of laws." However, there have been several economic studies that have addressed the question of the allocation of crime suppression activities between the public and private sectors. (See Ben-Shahar and Harel (25), Cowen (26), Lacroix and Marceau (27), and Shavell (28) for a somewhat abstract overview of some of the public-private allocation issues. Clotfelter (29,30) and Friedman et al. (31) consider the public-private allocation issues in terms that are more relevant to the current analysis.)

The reinterpretation of the law of torts increases the possessor of land's liability for the damages done to customers, tenants, or other invitees as a result of the criminal acts committed by third parties. Therefore, it imposes a greater relative responsibility for the suppression of crime on private economic entities in relation to the local police force, judicial system, and correctional facilities. In this section we analyze the economic efficiency and ethical implications of a reallocation of the production of crime suppression so as to substitute "specific" deterrence for "general" deterrence.

General deterrence is directed at suppressing crime for society at large (i.e., reducing the overall level of crime), whereas specific deterrence is undertaken by a given economic unit (e.g., business or household) and is aimed at shifting the costs of criminal activities to someone else. This is done by taking steps to better protect one's property (e.g., better locks, lights, dogs, video surveillance equipment, burglar alarms, and security guards). The imposition of tort liability for third party criminal acts on a business establishment may only accomplish a shift in the venue of crime, not meaningfully reduce the level of crime, because potential defendants, not possessing police powers, can only use precaution in the form of specific deterrence. In fact, Clotfelter (29) suggests, "it is quite conceivable that this (public to private sector) substitution could even result in an increase in aggregate crime rates if private means of protection work by simply diverting crime from protected to unprotected individuals." Clotfelter (30) refers to this shifting of crime venue as the "displacement effect" of specific deterrence.

Alternatively, one might plausibly argue that by increasing the level of specific deterrence there will also be an increase in general deterrence. That would only be true, however, if all (or substantially all) of the businesses and residences in a given jurisdiction rose to the same level of specific deterrence. If not, there would still be "easier" targets, which would become magnets for criminals. It follows logically that cases such as *Isaacs* would impose liability on such a business and residence for being a magnet.

The argument also assumes that the criminals do not upgrade their criminal skills and equipment in response to specific deterrence. It is instructive to note that the people who sell "The Club" antitheft device for cars are now marketing another device whose purpose is to make it more difficult to defeat "The Club." It seems that professional car thieves are simply making four cuts in the steering wheel with high speed cutting tools, and removing "The Club." It is equally plausible that muggers and other perpetrators of

robbery and larceny can alter their technique according to circumstances.

The point is that specific deterrence, often embodied in particular devices designed to protect particular types of property, often becomes predictable to the potential criminal interested in committing a particular type of crime (e.g., auto theft, burglaries, convenience store robberies, fast food restaurant robberies). The potential criminal is then able to learn what devices are necessary, or what steps must be taken, to defeat specific protective strategies, rendering the investment in specific deterrence of little value. This, in turn, may force the retailer, or other entrepreneur, to invest in the next generation of specific deterrence devices. The newer devices, of course, soon become known, studied, and overcome. This technological "arms race" between entrepreneur and potential criminal may easily become an expensive course for the entrepreneur and an inefficient strategy for the society at large. There is limited evidence on the effectiveness of specific deterrence. Clotfelter (30) undertakes a cross sectional study of the patterns of New York City subway utilization. His findings support the hypothesis of a strong displacement effect and a relatively weak deterrence of criminal activities resulting from specific deterrence activities.

With respect to general deterrence, one might also imagine instances in which the police response to a given type of crime may be anticipated by the potential criminal. Perhaps the potential criminal may be able to take some steps to offset the effectiveness of some police efforts. Overall, however, the nature and speed of the police response to a crime, in terms of the particular resources deployed, some of the means of detection, and the scale of the police response, seem intrinsically less predictable and, thus, more difficult to counteract. Moreover, a major component of general deterrence is incarceration for those arrested and convicted. There is very little (short of a rare prison escape) that a potential criminal can do to counteract this type of deterrence.

One way for the *Isaacs* court to have converted the specific deterrence that likely would flow from their ruling into more general deterrence would have been to allow the business found liable to sue other businesses in the neighborhood for contribution. The theory underlying such a suit would be that the other businesses also attracted criminals into the area and, by having superior specific deterrence in place, focused criminal attention on the defendant and thus contributed to the unreasonable risk of harm. This might have had the effect of forcing all the neighborhood businesses into collective action to equally deter criminals at all their establishments, that is, general deterrence. In this way, the Court, indirectly, would have created new, voluntary associations to produce general deterrence, a public good. That the Court did not follow this course suggests that no such outcome was contemplated. We, therefore, are left with the supposition that the California Supreme Court believes that specific deterrence on the part of individual actors can be substituted for general deterrence. This places an enormous cost on the businesses involved, with little or no prospect of society realizing any benefit. Moreover, it is easy to see a series of secondary effects of the California Supreme Court's ruling, nearly all of which reduce the opportunity set for disadvantaged persons. This would seem to be an example of an unintended result of a well-meaning, but poorly reasoned, attempt to do justice.

There are other efficiency arguments in favor of greater emphasis on general rather than specific deterrence. General deterrence through the public sector offers the opportunity for greater community control over the conduct of crime suppression activities, such as the use of civilian review boards to monitor police operations. Because the police department jurisdiction conforms to political jurisdictions, if the community is dissatisfied with the level of police services or the manner in which these services are provided, the mayor (or similar local public executive) is politically accountable and can normally be expected to make the appropriate corrections.

Public provision of crime suppression activities also allows for the centralization of information on criminals and the tracking of criminals as potential suspects as the police attempt to detect parties guilty of criminal offenses. Moreover, there would be centralized management of police resources which allows for a more efficient mix of crime suppression services. For example, if the most extreme criteria for assessing legal liability, the totality of the circumstances rule, applies, then every possessor of land must offer a uniform level of protection against the criminal acts of third parties. This uniformity is inefficient if different communities have different needs, different budgets, and different budget priorities in fighting crime. In the public sector police department, the police executive can allocate more resources to higher crime areas or to the prevention of crimes that have been given a higher priority.

There is evidence that this greater legal pressure for uniformity in the provision of specific deterrence is already present. The trend of expenditures on private security measures, growing much faster than public security measures that began in the 1960s, continues (29). A U.S. Department of Justice study reveals that 73% more was spent in 1990 on private security in the United States than was spent on public sector police departments. The same study projects that by the year 2000, private security spending will exceed public police department spending by 136% (32). This relative expansion of private security is also consistent with Clotfelter's (30) analysis that there is a "tipping" phenomenon at work. He argues that once private security reaches a threshold level, the higher crime rates among the unprotected pressure more of this group to also purchase more private security. This puts yet further pressure on the remaining unprotected to utilize specific deterrence, *ad infinitum.* However, the relative expansion of private security is also consistent with the analysis of Friedman et al. (31), who posit that public sector police efforts may become less effective over time as urban population density increases.

Ethical Implications

Economists often state that nothing anybody wants comes without an opportunity cost. In this case, the California Supreme Court is effectively ordering the purchase of additional units of crime suppression. However, the opportunity cost of these units is not made explicit. The additional legal duties imposed by rulings such as *Isaacs* v. *Huntington Memorial Hospital* (6) impose a greater overhead cost on all businesses. The effect is disproportionately greater in those areas or neighborhoods that suffer from higher crime rates. Hence, businesses (e.g., hospitals, grocery stores, pharmacies, gas stations) in those areas, competing with other businesses in safer, lower overhead cost areas, are more likely to respond by moving, raising prices, cutting back services, going out of business, or some combination of the first three. Hence, there would be fewer places for people living in these neighborhoods to purchase essential and other services and to find suitable employment. That is, the choices and opportunities of denizens of high crime areas, often already the most economically vulnerable members of society, are reduced.

An overriding issue in this analysis may be the failure of the responsible governmental agencies to provide a sufficient level of

general deterrence through their exercise of the police power. (See, for example, *Nola M.* v. *University of Southern California* (9) and *Goldberg* v. *Housing Authority of Newark* (33).) It may be argued that this failure to allocate sufficient resources to the production of the public good of general deterrence, or to provide an institutional and procedural framework that permits the most efficient use of those resources, or both, has led to these second-best efforts of piecemeal increases in specific deterrence (e.g., towns where citizens are required to carry guns, neighborhood watch committees, the incidence of poorly trained, unprepared citizens purchasing firearms that may be central to various accidental shootings).

Another "second best" issue relates to the tendency of the courts to expand the range of conduct that gives rise to tort liability and the blurring of the willful misconduct requirement to trigger punitive damages. (See, for example, *Kentucky Fried Chicken* v. *Superior Court* (34).) In such an environment, it may even be that people will seek out behavior that increases the risk of becoming a crime victim. Or, at the least, potential victims will take less precaution to avoid becoming a victim of crime. This is the classic "moral hazard" problem. This moral hazard problem is another danger in allowing the courts to pursue the ethical urge to expand compensation of crime victims. This is particularly the case if punitive damages are permitted in cases without willful misconduct.

The thrust of this argument is that establishing the criteria and magnitudes for compensation may be better left to state legislatures, who can select from a greater variety of approaches to achieve society's desire for the ethical treatment of victims through compensation. These legislative remedies are less prone to creating perverse incentives via the moral hazard problem. The usual objection to judicial policy-making is that it lacks legitimacy because the judicial branch is the least democratic of the three branches. The objection here should be that the judiciary is less well-suited to making these policy choices because it has such a limited range of options in remedying a perceived inequity. It does not have the power to lay and collect taxes, to set up administrative bureaucracies, or to compel public spending without legislative approval.

Summary and Conclusions

This paper has considered the trend in our court system over the last several decades to expand the liability of the possessor of land in the event of harm to customers, tenants, or other invitees as a result of the criminal acts of third parties. This trend may have resulted either from a well-intentioned desire to compensate the victims of such crimes or from impatience with the public criminal justice system for failing to provide greater protection against criminal acts. The current focus in several recent decisions has not been whether this expansion of legal liability to the possessor of land has been warranted, effective, or just. Rather, the recent issue has been how broad an expansion of the duty to the possessor of land is appropriate: whether to apply the prior similar incidents rule, a further expansion to the foreseeability criteria, or a yet further expansion to the totality of the circumstances criteria. The analysis presented here suggests that the key issue should not be how far down the expansion of duty path we should travel, but that efficiency and ethical arguments suggest that we should step back from this path altogether. We argue that a greater relative emphasis on specific deterrence is likely to be more effective in shifting the venue of crime than reducing the level of crime. We suggest that the latter is better accomplished by increasing resources to the criminal justice system. It is also argued that there are ethical dilemmas implicit in the expansion of liability to increase specific deterrence. From the beneficent motive to compensate the victims of third party criminal acts (at least some of whom assumed a known risk in placing themselves in harm's way) the employment, housing, and shopping opportunities of lower income individuals are likely to be reduced. Also, the implicit movement toward a system of strict liability is likely to retard industrial innovation and diminish the living standards of future generations. This trend also reduces the imperative of personal responsibility (i.e., *autonomy*) in two ways. One, it diminishes the obligation to the potential victim to be alert and aware of proximate risks. Second, it transfers responsibility for the criminal act away from the criminal and to the otherwise law-abiding possessor of land.

Finally, if the possessor of land is to assume this legal and ethical responsibility for the physical well being of customers and tenants, what actions may or must he/she take to execute this responsibility? What of the use of metal detectors in entrance areas? Is it appropriate to exclude those whose attire or other physical characteristics coincide with the statistical profiles of criminals? Will more commercial establishments post signs such as, "No more than two minors allowed in the store at one time?" Will some establishments post signs such as, "No more than two minorities allowed in the store at one time?" For example, the *New York Times* (35) reports that Bloomington Minnesota's Mall of America has already taken a large step in this direction. As of September 20, 1996, people under 16 years old are not allowed in the mall on Friday and Saturday evenings unless accompanied by a parent or other adult over 21 years old. Although this rule was justified in terms of the allegedly rowdy and dangerous behavior of unsupervised teenagers, several observers noted that these had been the times of the week when there was the greatest inflow of African-American teenagers in the mall. Yusef Mgeni of the local chapter of the Urban Coalition stated, "This policy has been drawn up in reaction to and, in large part, because of the large number of young people of color who congregate in the mall in the evening."

Perhaps less obvious ways of making those potential customers who "fit the profile" feel unwelcome in an establishment will be utilized. What of the use of deadly force (as is permitted by those responsible for general deterrence) to suppress a crime? For example, a recent *Wall Street Journal* article (32) provides an idea of how far this greater utilization of private security services has gone. The landlord of an apartment complex in Tampa, Florida has contracted with a private security service for personnel who "patrol the premises with .357 Magnum pistols, Mace, and two-way radios." The article reports that although public sector police personnel receive between 400 and 600 h of training, private guards receive, on average, between 4 and 8 h of training. One security expert is quoted, "Far too many are underpaid, undertrained, and psychologically unqualified." If the community finds such tactics and instruments of specific deterrence ethically unacceptable, is it still ethical to mandate that the possessor of land be responsible for preventing customer or tenant injuries?

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