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Bringing the Science of Policing to Liability for Third-Party Crime at Shopping Malls

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BRINGING THE SCIENCE OF POLICING TO
LIABILITY FOR THIRD-PARTY CRIME AT
SHOPPING MALLS

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Unlike state and municipal police forces that can generally not be sued by victims of crime on the grounds that they provided inadequate policing, shopping malls are regularly the targets by crime victims in tort actions for failing to provide adequate security. Courts have struggled with the question of how to set the standard for reasonable policing. Most courts place heavy emphasis on the foreseeability by the mall management of the likelihood of criminal activity to take place on the grounds of the mall. In doing so, they rely on the testimony of security experts who intuit as to the adequacy of the staffing.

This Article challenges the case law on several grounds. First, experts fail to utilize objective data as to the workload of security officers on the mall. This Article will demonstrate that such data is available and provides an objective measure as to adequate staffing. Second, foreseeability of crime is too uncertain a measure as to the adequacy of staffing. The question of how much foreseeability is sufficient to trigger a duty of security has bedeviled the courts. Third, courts have struggled to determine whether better security would have avoided harm to a particular crime victim. Thus, even if security is found to be inadequate it is often impossible for plaintiffs to prove causation. This Article argues that once a court, based on objective data, sets the standard of reasonable care, the burden of proof that additional security would not have averted the crime to the victim should shift to the defendant management of the mall.

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* Aaron D. Twerski, Irwin and Jill Cohen Professor of Law, Brooklyn Law School. Having completed fifty years as a law professor I would like to dedicate this article to my mentors at Marquette Law School, the late Professors James Ghiardi and Ray J. Aiken. They inspired me with their brilliance and dedication to the law for which I am forever grateful. We want to acknowledge the valuable contribution of David Gelfand, Brooklyn Law School, 2018, who served as research assistant on this article.

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I. INTRODUCTION

Shopping malls and other public areas not policed by government occupy a unique position with regard to policing against crime.¹ Unlike the streets, highways, and public thoroughfares that are policed by municipalities, counties, or state agencies, general shopping malls are not under the aegis of public authorities.² Instead they are treated as purely private property with responsibility for security against the commission of crime totally in the hands of the management of the malls.³ The enormity of this undertaking can be

1. Though some shopping malls are in decline as a result of on-line shopping, other malls continue to be profitable. See Ben Eisen, *Retailer Woes Depress Mall REITS*, WALL ST. J., Mar. 27, 2017, at B10. However, malls that have lost their major tenants are now being redesigned to serve multiple purposes such as schools, senior citizen homes, fitness centers, and micro-lofts. See, e.g., Kim Peterson, *10 New Uses for Abandoned Malls*, MONEY WATCH (Nov. 13, 2014), <http://www.cbsnews.com/media/10-new-uses-for-abandoned-malls/> [<https://perma.cc/J8SX-M5B5>]; Amanda Erickson, *7 Uses for Failing Shopping Malls*, CITY LAB (Jan. 8, 2013), <http://www.citylab.com/work/2013/01/7-alternatives-failing-shopping-malls/4335> [<https://perma.cc/F5RQ-2SEM>]; see also Esther Fung, *New Way to Fill Malls: Medical Centers*, WALL ST. J., June 19, 2017, at A3; Esther Fung, *Mall of Future Will Have No Stores*, WALL ST. J., June 13, 2017, at B6. The management of these redesigned malls will still have to grapple with the issue of adequate security. Furthermore, the workload model set forth in this Article will apply to sports arenas, parking lots that serve multiple car rental establishments, and other similar areas where management is responsible for security rather than state or municipal police forces.

2. See, e.g., STEVEN W. McNALLY, *EXPLORING STRIP MALL CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN: A QUALITATIVE SINGLE CASE STUDY* 36 (2015).

3. See DAN B. DOBBS ET AL., *HORNBOOK ON TORTS* 638 (2d ed. 2016) [hereinafter DOBBS ON TORTS]; RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (AM. LAW INST. 1965). The site, design and type of each shopping center generally inform whether security is provided by the mall or through public police and how much security is needed. For example, the vast majority of strip malls in the United States do not provide security, relying instead on public police, but regional and super-regional malls either have internal security personnel or contract with outside vendors for security. Telephone Interview with Malachy Kavanagh, Senior Vice President, ICSC (Feb. 10, 2017); see also Ellen Romano, *Making Shopping Centers Safer*, 59 J. PROP. MGMT. 46, 49 (1994) (discussing environmental changes). In either case, security extends to the common areas of the malls—parking lots, parking garages, ingress and egress areas, stairwells and interconnected corridors—but ends at the lease line, where the tenant begins. *Id.* at 47. The malls do not provide security for the interior space of individual

understood by observing the huge size of the malls and the number of visitors to malls. The average size of the thirty largest malls in the United States is 2.07 million square feet of gross leasable area (GLA).⁴ The average yearly

retail stores; that is the responsibility of each tenant. *See, e.g.,* MCNALLY, *supra* note 2, at 87–89. This Article is concerned with security staffing for work emanating from common areas of malls and not with individual retail stores. The methodology can be generalized to any size or type of mall to develop an understanding about staffing needs.

4. Annual visitor data were obtained from research conducted by Travel and Leisure. *See* Joe Yogerst, *America's Most-Visited Shopping Malls*, TRAVEL & LEISURE (Dec. 2, 2011), <http://www.travelandleisure.com/slideshows/americas-most-visited-shopping-malls> [<https://perma.cc/424U-7HHQ>]. Data on annual visitors are not collected by Shoppertrak, the International Council of Shopping Centers, or the Directory of Major Malls, which are the mall industry's leading advocacy and professional groups. *See id.* As a matter of proprietary interest, most malls either do not capture or do not publish data on annual visitors. *See id.* As such, all data on visitors are estimates. *Id.* Given that the data are used for a simulated exercise, estimates are suitable.

TABLE 1: DESCRIPTIVE STATISTICS IN THE STUDY (N=30)

Variables		n	%	Mean	S.D.
Gross Leasable Area (GLA)		30	—	2,070,000.0	564,196.1
Daily Visitors		30	—	56,843.6	21,047.9
Years Operating		30	—	39.4	13.6
Overall Attendance		30	100.0	19,270,000.0	7,135,252.5
Before 1971		15	50.0	16,913,333.3	5,925,232.6
After 1971		15	50.0	21,626,666.7	7,645,303.6
Attendance by State		30	100.0	—	—
NY	Northeast	5	16.7	20,800,000.0	2,280,350.9
CA	West	3	10.0	21,866,666.7	5,801,149.3
FL	South	3	10.0	21,666,666.7	9,291,573.2
IL	Midwest	3	10.0	2,000,000.0	8,888,194.4
TX	South	3	10.0	20,333,333.3	4,041,451.9
NJ	Northeast	2	6.7	15,900,000.0	5,798,275.6
AZ	West	1	3.3	12,200,000.0	—
GA	South	1	3.3	1,500,000.0	—
MA	Northeast	1	3.3	1,700,000.0	—
MI	Midwest	1	3.3	8,400,000.0	—
MN	Midwest	1	3.3	40,000,000.0	—
NC	South	1	3.3	20,000,000.0	—
NV	West	1	3.3	1,300,000.0	—
OH	Midwest	1	3.3	810,000.0	—
PA	Northeast	1	3.3	25,000,000.0	—
VA	South	1	3.3	22,100,000.0	—
WA	West	1	3.3	9,900,000.0	—
Attendance by Region		30	100.0	—	—

attendance per mall is 19.27 million visitors.⁵ Based on being open for business an average of 6.5 days per week, each year average daily attendance is 56,844.⁶ Suffice it to say that the amount of daily human traffic in a large shopping mall is enormous—equal to that of many fairly large American cities.⁷

Comparing large shopping mall traffic with cities of like population would be of little interest were it not for a vast difference in the law governing liability to individuals who claim to have suffered personal injury as a result of inadequate policing. With very limited exceptions, government entities are not held liable to individuals against claims that the entity has not provided adequate resources to prevent crime.⁸ Courts have found no tort duty running to an individual.⁹ The very opposite is true with regard to shopping malls.¹⁰ A multitude of claimants have sued in tort for the negligence of the management of shopping malls for crimes perpetrated against individuals on their premises based on the grounds that management failed to provide adequate security.¹¹

Northeast	9	30.0	19,755,555.6	3,948,136.0
South	9	30.0	20,344,444.4	5,503,887.5
Midwest	6	20.0	19,416,666.7	12,900,607.2
West	6	20.0	16,783,333.3	6,745,788.8

5. See *id.*

6. See *id.*

7. For example, according to the 2015 Census Bureau estimate, Jupiter, Florida, had a population of 62,748. *American FactFinder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov> [<https://perma.cc/Q4VP-UUR8>] (last visited July 13, 2017). The 2016 estimates for La Mesa, California, are 59,948. *Id.* The comparison between cities and shopping malls is not directly analogous; however, shopping malls do compare well with cities in terms of calls for service, crime, staffing issues and security needs. The size of the mall (density) and the amount of time someone spends at the mall compared to a city create measurement issues. Nonetheless, the presence of over 56,000 people at a mall over a given day presents policing challenges similar to cities.

8. See DOBBS ON TORTS, *supra* note 3, at 574; Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection From Crime*, 90 A.L.R. 5th 273 (2001); see, e.g., *Taylor v. Phelan*, 9 F.3d 882, 887–88 (10th Cir. 1993) (applying Kansas Law); *Mastbergen v. City of Sheldon*, 515 N.W.2d 3, 5 (Iowa 1994); *Riss v. City of New York*, 240 N.E.2d 861 (N.Y. 1968).

9. *Taylor*, 9 F.3d at 887–88; *Riss*, 240 N.E.2d at 860–61.

10. *L.A.C. v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247, 262 (Mo. 2002) (en banc); *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 38, 40–41 (N.C. 1981).

11. See, e.g., *Young v. Prizm Asset Mgmt. Co.*, 100 A.3d 594 (Pa. Super. Ct. 2014); *Fenelon v. Jackson Metrocenter Mall Ltd.*, 11-CA-00683-COA (Miss. Ct. App. 2012) (en banc); *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9 (Tex. 2008); *American Nat'l Ins. Co. v. Hogue*, 1998-CA-01273-COA (Miss. Ct. App. 2000); *L.A.C.*, 75 S.W.3d 247; *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83 (Tenn. 2000); *Knauss v. DND Neffson Co.*, 963 P.2d 271 (Ariz. Ct. App. 1997); *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891 (Tenn. 1996); *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207

Thus, the question of how much security is enough security to protect a mall against personal injury claims based on negligence is a question of great moment. We do not mean to say that the question of adequate policing for municipal and state agencies is unimportant. A vast literature has sought to grapple with that issue.¹² At bottom, however, the resolution of that issue is political. What resources are to be directed to police, firefighters, schools and infrastructure are simply not justiciable by common law courts.¹³ For shopping malls there is no escape from the question of the adequacy of security.

This Article will examine the law governing the liability of shopping malls for negligence based on inadequate staffing. Part II will examine the four tests utilized by courts to decide liability for torts against individuals and will find them all seriously flawed. Part III will assume that negligence can be established, but will focus on the requirement that a plaintiff establish that the failure to provide adequate security was a cause-in-fact of her injury. Part IV will demonstrate that the issue of how much security is adequate is subject to objective quantification that is data-driven. Part V will argue that a plaintiff who proves that based on objective data the mall has not provided adequate security should not be required to prove a causal nexus between the inadequacy

(Cal. 1993); *Federated Dep't Stores, Inc. v. Doe*, 454 So. 2d 10 (Fla. Dist. Ct. App. 1984); *Miles v. Flor-Line Assocs.*, 442 So. 2d 584 (La. Ct. App. 1983); *Foster*, 281 S.E.2d 36.

12. See, e.g., CHARLES D. HALE, *POLICE PATROL: OPERATIONS AND MANAGEMENT* (2d ed. 1994); JON M. SHANE, *WHAT EVERY CHIEF EXECUTIVE SHOULD KNOW: USING DATA TO MEASURE POLICE PERFORMANCE* (2007); THE TRAFFIC INSTITUTE, NW. U., *POLICE ALLOCATION MANUAL: DETERMINATION OF THE NUMBER AND ALLOCATION OF PERSONNEL FOR PATROL SERVICES FOR STATE POLICE DEPARTMENTS* (1993), <https://rosap.ntl.bts.gov/view/dot/12763> [<https://perma.cc/5E76-YRSG>]; Lawrence W. Sherman & David Weisburd, *General Deterrent Effects of Police Patrol in Crime "Hot Spots": A Randomized, Controlled Trial*, 12 JUST. Q. 625 (1995); Jeremy M. Wilson & Alexander Weiss, *A Performance-Based Approach to Police Staffing and Allocation*, in *ESSENTIALS FOR LEADERS* (2012).

13. See, e.g., *Riss*, 240 N.E.2d at 860–61. For example, in *Riss v. City of New York*, the court said:

The amount of [police] protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided.

Before such extension of responsibilities should be dictated by the indirect imposition of tort liabilities, there should be a legislative determination that that should be the scope of public responsibility.

Id.

of the security and her individual injury. Rather, the burden of proof should be on the defendant to prove that even with adequate security the plaintiff would have been injured.

II. THE LIABILITY STANDARD: FOUR VERSIONS OF DUTY

Courts traditionally begin their analysis of the duty of landowners to protect against third-party crime by noting that duty is an issue of law to be decided by the court.¹⁴ In doing so they signal that they are not prepared to simply allow these cases to go to juries on a common law negligence standard.¹⁵ Instead they seek to establish rules to screen out cases before they are permitted to go to a jury.¹⁶ The four approaches to the problem are:

- (1) *Specific Imminent Harm Test*. According to this rule a landowner does not owe a duty to protect patrons from the violent acts of third parties unless he is aware of specific imminent harm about to befall them.¹⁷
- (2) *Similar Incidents Test*. In order to establish foreseeability requiring a mall to take precautions against third-party crime the plaintiff must establish a past history of similar criminal conduct on or near the premises.¹⁸
- (3) *Totality of Circumstances Test*. This test looks to a host of factors such as the nature, condition and location of the land, the level of crime in the surrounding area and any other factors that may alert the landowner to the likelihood

14. See, e.g., *Trammell*, 267 S.W.3d at 12; *L.A.C.*, 75 S.W.3d at 257; *Staples*, 15 S.W.3d at 89; *Ann M.*, 863 P.2d at 212; *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97, 101 (Cal. Ct. App. 1993); *Thai v. Stang*, 263 Cal. Rptr. 202, 205 (Cal. Ct. App. 1989).

15. See, e.g., *Trammell*, 267 S.W.3d at 12; *L.A.C.*, 75 S.W.3d at 257; *Staples*, 15 S.W.3d at 89; *Ann M.*, 863 P.2d at 212; *Nola M.*, 20 Cal. Rptr. 2d at 101; *Thai*, 263 Cal. Rptr. at 205.

16. For a summary of differing approaches, see DOBBS ON TORTS, *supra* note 3, at 638-39. *Posecai v. Wal-Mart Stores, Inc.*, 99-1222, p. 4-8 (La. 11/30/99); 752 So. 2d 762, 766-67; *McClung*, 937 S.W.2d at 899-900.

17. *Willmon v. Wal-Mart Stores, Inc.*, 957 F. Supp. 1074, 1076-77 (E.D. Ark. 1997); *MacDonald v. PKT, Inc.*, 628 N.W.2d 33, 34, 40 (Mich. 2001); *Dudas v. Glenwood Golf Club, Inc.*, 540 S.E.2d 129, 132 (Va. 2001); *Burns v. Johnson*, 458 S.E.2d 448, 450 (Va. 1995); *Bailey v. Bruno's Inc.*, 561 So. 2d 509, 510-11 (Ala. 1990); *Naegle v. Dollen*, 63 N.W.2d 165, 166-67 (Neb. 1954).

18. *Wood v. Centermark Props., Inc.*, 984 S.W.2d 517, 524 (Mo. Ct. App. 1998), *modified*, *L.A.C.*, 75 S.W.3d at 258; *Lauersdorf v. Supermarket Gen. Corp.*, 657 N.Y.S.2d 732, 733 (N.Y. App. Div. 1997); *Boren v. Worthen Nat'l Bank of Ark.*, 921 S.W.2d 934, 940-41 (Ark. 1996).

of crime.¹⁹

- (4) *The Balancing Test*. This test seeks to address the interests of both business proprietors and their customers by balancing the foreseeability of harm against the burden of imposing a duty to protect against criminal acts of third persons.²⁰

The “specific imminent” harm test has been rejected by most courts as too restrictive in limiting the duty of business owners to their invitees.²¹ The “similar incidents test” has been criticized because of the variability of the number and nature of crimes necessary to trigger a duty.²² The “totality of circumstances” test has been shunned by some courts as being too open-ended and hence imposing an overbroad duty to business establishments.²³ The “balancing test” appears not be a duty rule at all but simply an articulation of the Learned Hand risk/utility test for negligence.²⁴

Two related problems are common to each of these tests. First, they all rely heavily on foreseeability of violent crime as the grounds either for imposing a duty to adopt security measures or for deciding whether the standard they have set was breached.²⁵ However, the courts are hopelessly in disagreement as to

19. *Maguire v. Hilton Hotels Corp.*, 899 P.2d 393, 400 (Haw. 1995); *Whittaker v. Saraceno*, 635 N.E.2d 1185, 1188 (Mass. 1994); *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1335 (Kan. 1993); *Reitz v. May Co. Dept. Stores*, 583 N.E.2d 1071, 1074–75 (Ohio Ct. App. 1990).

20. Various courts have adopted a balancing test that at first glance appears not to have the hallmarks of duty rules that set firm guidelines for liability. *Bass v. Gopal, Inc.*, 716 S.E.2d 910, 915 (S.C. 2011); *Posecai*, 99-1222, p. 8–9; 752 So. 2d at 767–68; *McClung*, 937 S.W.2d at 901; *Ann M.*, 863 P.2d at 215. Nonetheless, these courts signal that they will engage in rigorous risk/utility balancing and will not routinely allow cases to go to a jury without evidence of high foreseeability of crime. See AARON D. TWERSKI ET AL., *TORTS: CASES AND MATERIALS* 475–76 (3d ed. 2012).

21. *Posecai*, 99-C-1222, p. 6; 752 So. 2d at 767.

22. *Id.* at p. 6–7; 752 So. 2d at 767.

23. *Id.* at p. 7–8; 752 So. 2d at 767.

24. It is interesting to note that the California court that first articulated the “balancing test” in *Ann M. v. Pacific Plaza Shopping Center*, concluded that it would not impose liability for failure to hire security guards unless there was a “high degree of foreseeability” of criminal activity on the premises and that degree of foreseeability “rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner’s premises.” 863 P.2d 207, 215 (Cal. 1993). The court said that “the obligation to provide patrols adequate to deter criminal conduct is not well defined. ‘No one really knows why people commit crime, hence no one really knows what is “adequate” deterrence in any given situation.’” *Id.* (quoting 7735 Hollywood Blvd. Venture v. Superior Court, 172 Cal. Rptr. 528, 530 (Cal. Ct. App. 1981)).

25. See, e.g., *L.A.C. v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247, 257–58 (Mo. 2002) (en banc); *Dickinson Arms-REO, L.P. v. Campbell*, 4 S.W.3d 333, 346 (Tex. App. 1999); *Ann M.*, 863 P.2d at 215.

how much foreseeable crime constitutes “enough foreseeability”²⁶ to trigger a duty of reasonable care or breach of the duty. Furthermore, in order to decide whether mall management breached the standard of reasonable care the courts rely on security experts to opine as to the adequacy of the security or breach measures taken.²⁷ As this Article will demonstrate, foreseeability of crime should not be solely determinative of duty or breach of the standard of reasonable care. Second, expert opinion is of little value if it does not utilize hard data based on the total calls for service (i.e., assignments distributed to security officers that require their presence to address a specific condition) that sets forth the workload of security officers at the mall.²⁸ The presence and frequency of crime will be one of many variables that will appear in records of calls for service.²⁹ Security experts that are called by the opposing parties offer little more than intuitive opinions as to the adequacy of security.³⁰ We have seen no evidence in the judicial opinions or the expert reports that workload data has been referenced. Indeed, we have examined a multitude of shopping mall security cases and expert opinions and have not found a single case where an expert has testified to workload data.³¹

In the absence of hard data, the courts’ emphasis on similar incidents or other indicia of crime are unhelpful in deciding the adequacy of security.

26. *Fenelon v. Jackson Metrocenter Mall Ltd.*, 11-CA-00683-COA (¶ 18) (Miss. Ct. App. 2012) (en banc) (stating plaintiff’s argument that an “atmosphere of violence” was sufficient to create duty of reasonable care); *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 18 (Tex. 2008) (Jefferson, J., concurring); *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602, 605 (N.C. Ct. App. 1998) (noting case law discussing how many crimes are sufficient to trigger a duty of reasonable care); *McClung v. Delta Square Ltd. P’ship*, 937 S.W.2d 891, 899 (Tenn. 1996) (“[C]ourts do not universally agree on the meaning of ‘foreseeability.’”).

27. *See, e.g., Fenelon*, 11-CA-00683-COA (¶ 7).

28. *See Wright v. R.M. Smith Invs., L.P.*, 15-CA-00199-COA (¶¶ 8, 9, 11) (Miss. Ct. App. 2016).

29. Jon M. Shane, *Activity-Based Budgeting: Creating a Nexus Between Workload and Costs*, 74 FBI L. ENFORCEMENT BULL. 11, 15 (2005).

30. *See Wright*, 15-CA-00199-COA (¶¶ 8, 11).

31. *See id.* Because judicial decisions do not reflect workload data in deciding whether a mall acted reasonably to secure the premises from third party criminal acts, we sought out expert reports and affidavits to see whether expert reports made reference to workload data. After studying the reports, we found not a single expert report that made reference to such data. We located these documents by searching the Westlaw Database: Expert Reports and Affidavits, using the following query: “Security/p park! or shop! And mall or center or retail and “premise! Liability.” The search retrieved 386 results, which were filtered to display only those reports and affidavits from Law Enforcement & Private Security Experts. The final result list contained 96 documents. The search was last run on March 2, 2017, to determine whether the experts in their opinions utilized such data. Experts that do not rely on workload data, or cannot articulate the methods or standards they relied upon to arrive at their decision may be barred in some jurisdictions from testifying at trial. *Id.*

Security officers deal not only with violent crime such as robbery, carjacking and rape, but also a host of other activities in a mall such as auto accidents, noise complaints, unruly juveniles, disorderly conduct, etc.³² Security officers whose attention is diverted to a myriad of non-violent activities are not present to adequately patrol and deter violent crime. Thus any test that a court adopts to establish a duty to police against crime will fail unless the totality of service calls for a mall is established. Admittedly, deployment of security forces, the adequacy of their training, and whether they have adequate equipment will factor into whether the mall's security was reasonable, but the starting point has to be adequacy of staffing. In the ensuing sections, we shall demonstrate that such hard data on staffing is available but has never been used in shopping mall injury cases.³³

III. THE ILLUSIVE ISSUE OF ACTUAL OR BUT-FOR CAUSATION

Even where courts are able to make a finding of inadequate security, plaintiffs are faced with an impossible causation burden to overcome. To make out but-for causation, plaintiffs must establish that, had there been adequate security, the crime would not have transpired.³⁴ For reasons that will be developed, plaintiffs either cannot meet the burden³⁵ or the courts send the issue to juries for resolution knowing that they can do nothing but speculate as to whether causation has been established.³⁶

For better or worse, the "but-for" test for causation is the overwhelming majority rule as an essential element in making out a prima facie case of negligence,³⁷ and it has been formally recognized in the Third Restatement of Torts.³⁸ Though courts allow juries considerable latitude in deciding but-for

32. See *infra* Part IV.

33. See *infra* Part IV.

34. *Fenelon v. Jackson Metrocenter Mall Ltd.*, 11-CA-00683-COA (¶18) (Miss. Ct. App. 2012); *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602, 606 (N.C. Ct. App. 1998).

35. See, e.g., *Fenelon*, 11-CA-00683-COA (¶¶18, 24, 25) (Irving, J., dissenting); *Saelzler v. Advanced Grp.* 400, 23 P.3d 1143, 1152 (Cal. 2001); *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785, 791 (Cal. Ct. App. 1996); *Liller*, 507 S.E. 2d at 606.

36. See *Stewart v. Federated Dept. Stores, Inc.*, 662 A.2d 753, 759 (Conn. 1995) (approving general charge on causation without explicit reference to cause-in-fact).

37. DOBBS ON TORTS, *supra* note 3, at 317.

38. RESTATEMENT (THIRD) OF TORTS § 26 (AM. LAW INST. 2010).

causation³⁹ there are limitations.⁴⁰ Pure speculation on causation is beyond the pale. In landowner security cases, many courts have justifiably granted defendants summary judgment or directed verdicts because the evidence on causation was too thin.⁴¹ One might draw an analogy to the heeding presumption that has been adopted by many courts in products liability failure to warn cases⁴² to aid the plaintiff in mall security cases to establish causation. When a plaintiff establishes that a product was sold with inadequate warnings and that she suffered an injury that could have been averted had the warning been given, the question arises whether plaintiff would have read or heeded the warning had it been given.⁴³ Courts are keenly aware that placing the burden on the plaintiff may often result in no recovery.⁴⁴ To aid the plaintiff in

39. See, e.g., *Zuchowicz v. United States*, 140 F.3d 381, 389–90 (2d Cir. 1998); *Reynolds v. Tex. & Pac. Ry. Co.*, 37 La. Ann. 694 (La. 1885). The classic article on this topic is *Wex S. Malone, Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956); see also PROSSER AND KEETON ON THE LAW OF TORTS 270 (W. Page Keeton et al. eds., 5th ed. 1984).

40. See, e.g., *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 121 (2d Cir. 2006); *Perkins v. Tex. & New Orleans R.R. Co.*, 147 So. 2d 646 (La. 1962).

41. See, e.g., *Tucker v. KFC Nat'l Mgmt. Co.*, 689 F. Supp. 560 (D. Md. 1988); *Fenelon v. Jackson Metrocenter Mall Ltd.*, 11-CA-00683-COA (¶18) (Miss. Ct. App. 2012); *Burris v. Eddie's Liquor Store*, No. B153671, 2002 WL 31521538 (Cal. Ct. App. Nov. 14, 2002); *Saelzler v. Advanced Grp.* 400, 23 P.3d 1143, 1155 (Cal. 2001); *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602 (N.C. Ct. App. 1998); *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785 (Cal. Ct. App. 1996); *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97 (Cal. Ct. App. 1993); *Thai v. Stang*, 263 Cal. Rptr. 202 (Cal. Ct. App. 1989); *Noble v. L.A. Dodgers, Inc.*, 214 Cal. Rptr. 395 (Cal. Ct. App. 1985).

42. See *Tech. Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972).

43. See, e.g., *id.* The earliest case confronting this issue was *Technical Chemical Company v. Jacobs*, where the court said:

It has been suggested that the law should supply the presumption that an adequate warning would have been read. "Where warning is given, the seller may reasonably assume that it will be read and heeded." Such a presumption works in favor of the manufacturer when an adequate warning is present. Where there is no warning, as in this case, however, the presumption that the user would have read an adequate warning works in favor of the plaintiff user. In other words, the presumption is that Jacobs would have read an adequate warning. The presumption, may, however, be rebutted if the manufacturer comes forward with contrary evidence that the presumed fact did not exist. Depending upon the individual facts, this may be accomplished by the manufacturer's producing evidence that the user was blind, illiterate, intoxicated at the time of the use, irresponsible or lax in judgment or by some other circumstance tending to show that the improper use was or would have been made regardless of the warning.

Id. (citations omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (AM. LAW INST. 1965)).

44. See *Pavlik v. Lane Ltd./Tobacco Exporters Int'l*, 135 F.3d 876, 883 (3d Cir. 1998); *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 826 (Ind. Ct. App. 1975), *rev'd on other grounds*, 358 N.E.2d 974 (Ind. 1976); *James A. Henderson, Jr. & Aaron D. Twerski, Doctrinal*

establishing a prima facie case in products liability, a substantial number of courts have created a rebuttable presumption that shifts the burden of production to the defendant that the plaintiff would not have either read or heeded the presumption.⁴⁵ Similarly, where plaintiff has established that security was inadequate one might suggest that a presumption of causation inure to the plaintiff, thus shifting the burden of production to the defendant that additional security would not have averted the crime.⁴⁶

The analogy to product liability cases is not apt. In product failure-to-warn cases, defendants seek to rebut the presumption by introducing evidence of the plaintiff's behavior that suggests that the plaintiff would not have heeded the warning.⁴⁷ Plaintiffs are then in a position to argue that the specific behavior is not indicative that they would not have heeded a warning if given.⁴⁸ The issue is almost always one of fact subject to jury determination.⁴⁹ In the mall security cases, defendants will routinely present some evidence suggesting that additional security would not have averted the particular crime.⁵⁰ They will have done enough to meet their burden of production. Plaintiffs, who retain the burden of persuasion on causation, have no way of carrying their burden.⁵¹ It is extremely difficult to prove that additional security guards would have averted a criminal attack by a third party.⁵²

Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. REV. 265, 278-79 (1990).

45. See, e.g., *Tenbarge v. Ames Taping Tool Sys., Inc.*, 190 F.3d 862, 866 (8th Cir. 1999); *Nissen Trampoline Co.*, 332 N.E.2d 820, 826-27, *rev'd on other grounds*, 358 N.E.2d 974 (Ind. 1976); *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1281 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1382 (Okla. 1974). In 1998, the Third Circuit predicted that Pennsylvania would adopt a heeding presumption in failure-to-warn cases. *Pavlik*, 135 F.3d at 883. Although Pennsylvania's high court has not yet decided this issue, the lower courts have adopted a heeding presumption with increasing consistency. See, e.g., *Maya v. Johnson & Johnson*, 97 A.3d 1203, 1219 (Pa. Super. Ct. 2014) (deciding that the trial court did not err in failing to instruct the jury on the heeding presumption in a case involving Children's Motrin). For an extensive discussion of the heeding presumption, also see *Henderson & Twerski*, *supra* note 44, at 278-80; Aaron D. Twerski & Neil B. Cohen, *Resolving the Dilemma of Nonjusticiable Causation in Failure-to-Warn Litigation*, 84 S. CAL. L. REV. 125, 136-43 (2010).

46. See *Pavlik*, 135 F.3d at 884.

47. See, e.g., *Waterhouse v. R.J. Reynolds Tobacco Co.*, 162 F. App'x 231, 235 (4th Cir. 2006); *Golonka v. Gen. Motors Corp.*, 65 P.3d 956, 966 (Ariz. Ct. App. 2003).

48. See *Bryant v. BGHA, Inc.*, 9 F. Supp. 3d 1374, 1395-96 (M.D. Ga. 2014).

49. *Golonka*, 65 P.3d at 966.

50. See, e.g., *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602, 606 (N.C. Ct. App. 1998); *Thai v. Stang*, 263 Cal. Rptr. 202, 207 (Cal. Ct. App. 1989).

51. See *Saelzler v. Advanced Grp.* 400, 23 P.3d 1143, 1153 (Cal. 2001).

52. See *id.* Some courts have switched the burden of proof on causation from the plaintiff to the defendant when plaintiff faces an impossible burden of proof that the defendant's negligence was the

In the concluding section of this Article, we shall argue that the plaintiff not be burdened with proving causation, but the burden of proof on causation should shift to the defendant. We will be comfortable in doing so because we will establish a data-driven standard for adequate security. Unlike the current situation where the standard for what constitutes adequate security has no objective parameters, causation has to serve as a break against wholly illusory standards of liability.⁵³ However, once a court can conclude with confidence that objective data support a finding of inadequate security, there is every reason to allow a plaintiff to recover without asking her to prove the impossible. The burden of proof should shift to the defendants to prove that even with adequate security the plaintiff would have suffered injury.

IV. STAFFING MODEL FOR SHOPPING CENTER SECURITY PERSONNEL

The need for security personnel at shopping centers is evident, but the provocative question is this: How many security personnel are deemed adequate or how much security is reasonable? To answer this question, it is crucial to determine the actual and anticipated workload that shopping center security personnel are likely to encounter based on calls for service. This requirement for the shopping center can be anticipated; it is measurable. For shopping center security, as with the public policing, the demand for services shifts with priorities as well as the routine patterns and fluctuations of reactive work that presents itself through calls for service.

A shopping center is akin to a city with all of the associated variation in patrons (adults, juveniles, elderly) and temporal use patterns (day and time of week, seasonality, holidays, special events, heavy-volume periods of vehicles and pedestrians).⁵⁴ In their decisions, courts often speak in generalized terms when describing a shopping center's level of security such as (in)adequate staffing, (in)adequate security, (in)adequate safety measures, (un)reasonable security, and (in)sufficient security.⁵⁵ As noted, the parties rely on experts to help determine what adequate staffing levels should have been at the time of

cause-in-fact of her injury. See, e.g., *Haft v. Lone Palm Hotel*, 478 P.2d 465, 475 (Cal. 1970); *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948); see also RESTATEMENT (THIRD) OF TORTS § 28(b) (AM. LAW INST. 2010); RESTATEMENT (SECOND) OF TORTS § 433B (AM. LAW INST. 1965). But see, David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1783 (1997) (noting that *Haft* fails to "offer much guidance as to when burden shifting is appropriate").

53. See *Nola M. v. Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97, 109 (Cal. Ct. App. 1993); *Noble v. L.A. Dodgers, Inc.*, 214 Cal. Rptr. 395, 398–99 (Cal. Ct. App. 1985).

54. See MCNALLY, *supra* note 2, at 2.

55. See *Monk v. Temple George Assocs., L.L.C.*, 869 A.2d 179, 183, 187 (Conn. 2005); *Noble*, 214 Cal. Rptr. at 398.

the crime.⁵⁶ Experts will often review crime statistics for the area surrounding the mall, review the parking lot configuration, and review existing lighting, but these conditions do not necessarily imply the need for a specific number of security staff, particularly how many more personnel are needed to establish “adequacy.”⁵⁷ Moreover, these factors are not measured against any industry standard that imply a need for additional security staff.⁵⁸ Indeed, any standard appears to be the personal estimate of the individual security experts who inevitably disagree.⁵⁹ At best, experts can only speculate about adequate security levels when they are not informed by data; at worst, their estimates are completely inaccurate about the number of personnel needed to provide adequate security. While regional, corporate, and consumer preferences must be accounted for when determining the appropriate level of security for a given shopping center, there is a standardized method to establish a baseline measure for adequate staffing using empirical data.⁶⁰

A. Workload Data Evaluation

Shopping center security personnel typically engage in patrol activities including emergency response, visitor management, patron assistance, escorts, bank deposits, and traffic assistance.⁶¹ One of the most consistent activities across different sized malls and regions is patrol and response.⁶² Determining adequate patrol and response requires that the expert evaluate the reactive

56. *Fenelon v. Jackson Metrocenter Mall Ltd.*, 11-CA-00683-COA (¶ 7) (Miss. Ct. App. 2012); *Noble*, 214 Cal. Rptr. at 398.

57. *Monk*, 869 A.2d at 183; *Noble*, 214 Cal. Rptr. at 398.

58. *See generally Noble*, 214 Cal. Rptr. at 397–99.

59. *Id.* at 398.

60. *See generally* Shane, *supra* note 29 (explaining the full model and technical specifications of how the model is conceptualized). Based on Shane’s personal and consultative experience in policing since 1985 across the United States and abroad, capturing the workload data shown in Table 2 is a fundamental aspect of police management. *See infra* Table 2. Workload analysis is so basic to policing that the Commission on Accreditation for Law Enforcement Agencies (CALEA) recognizes workload assessments as a standard that must be adopted for accreditation. *See* COMM’N ON ACCREDITATION FOR LAW ENF’T AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES 16-2 (5th ed. 2006) (“The agency allocates personnel to, and distributes them within, all organizational components in accordance with documented workload assessments conducted at least once every three years.”). The Lee County, Florida, Sheriff’s Office has adopted Shane’s staffing model at the recommendation of CALEA. Telephone Interview with Ronald Curtis, Captain, Florida Sheriff’s Office (Mar. 9, 2017).

61. Romano, *supra* note 3, at 46–52; Margaret Hunter, *Who’s Minding the Mall*, 32 SEC. MGMT. 54, 54–56 (1988).

62. *See, e.g.,* Romano, *supra* note 3, at 46–47; Hunter, *supra* note 61, at 54.

workload presented to the security department (i.e., calls for service).⁶³ Workload data are objective.⁶⁴ They present telltale signs of problems and the locations where those problems are likely to emerge.⁶⁵ The nexus between workload and cost provides mall executives and managers the ability to exercise control in several ways: (1) assign personnel based upon a demonstrated need; (2) expand or contract personnel proportionately as the need changes; (3) uncover waste and hidden costs; (4) view which activities are most and least expensive, thus subjecting them to review; (5) assess the full efficiency of the security program; (6) identify places to cut spending; (7) establish a cost baseline that may be influenced through process or technology changes that reduce effort requirements for the activity, and (8) argue from an informed, objective position in favor of the security program's budget.⁶⁶

B. A Simulated Workload Analysis and Staffing Model for a Shopping Center

Collecting the Data. Security staffing based on empirical data is the most reasonable and easiest to justify; in fact, "[t]he only logical and defensible means of determining how many persons should be assigned to patrol duty is through a careful and systematic analysis of the duties performed by patrol officers."⁶⁷ The best indicator of crime and disorder conditions, as well as assigned duties, is analyzing actual calls for service of past demands.⁶⁸ These calls include crimes (violent and property); public disorder (noise, fighting, groups congregating and loitering) and suspicious circumstances (persons, vehicles and items) that belie security problems; as well as service needs such

63. Shane, *supra* note 29, at 15.

64. *Id.* at 13.

65. Generally, the focus on mall security is to assist and prevent crimes against patrons. However, crimes against employees provide telltale signs of a wider or emerging crime problem that may not yet have reached patrons. Crimes involving employees such as assault, robbery, car theft, and theft from cars should be viewed as indicators of a wider or emerging crime problem that should be addressed.

66. Shane, *supra* note 29, at 12.

67. CHARLES D. HALE, POLICE PATROL: OPERATIONS AND MANAGEMENT 162 (1981).

68. Richard C. Lumb, *Community Attitudes Regarding Police Responsibility for Crime Control*, 69 POLICE J. 319, 319-26 (1996) (discussing staffing indicators that are derived from demands for service); see Shane, *supra* note 29, at 15 (describing the accuracy of calls for service data). Calls for service data must not be confused with demographic data as a driver for security measures. Demographic data are variables such as age, sex, race, employment status, poverty level, income level, education level, and population characteristics. These are not crime data; they are data that reflect the composition of the population collected by the U.S. Census Bureau. Demographic data do not implicate site-specific conditions, actual crime rate or workload volume at a given property address and should not be relied upon to infer crime and disorder conditions.

as medical calls, hazardous conditions, traffic control, and patron assistance.⁶⁹ Determining adequate staffing begins with a workload analysis, which is “the process of collecting and analyzing data on patrol activities for the purpose of more efficient scheduling and deployment of manpower.”⁷⁰ Calls for service represent the reactive portion of the workload.⁷¹ Undertaking this process is required to determine how well the mall security program is implemented.⁷² To say that staffing is adequate based on intuition without hard data is not a rational process. Rational in this sense is aimed at measuring aspects of the mall’s business process to determining whether management acted reasonably.⁷³ It is important to have at least one full year’s worth of data in order to account for seasonal fluctuations or other random anomalies that might occur (e.g., spike or sudden decrease in calls for service).⁷⁴ A better data set is three to five years that also accounts for personnel trends such as fluctuations in staffing levels or significant emergencies that may adversely impact how calls for service are handled including the amount of time required to handle individual calls.⁷⁵ A larger data set is also crucial to ensure a sufficient number of calls can be examined for their regularity (frequency and location) and similarity (type and

69. See *infra* Table 2 and accompanying text.

70. HALE, *supra* note 67, at 163. Other staffing methods such as the per capita, minimum staffing and the authorized level approaches exist, but all are severely limited and do not account for workload volume. The workload approach is much more comprehensive in determining appropriate staffing levels and is endorsed by the Commission for the Accreditation for Law Enforcement Agencies. COMM’N, *supra* note 60, at 16-2; see ERIC J. FRITSCH ET AL., POLICE PATROL ALLOCATION AND DEPLOYMENT 32-45 (2009) (describing “early” and “modern” police allocation strategies); see also JEREMY M. WILSON & ALEXANDER WEISS, A PERFORMANCE-BASED APPROACH TO POLICE STAFFING AND ALLOCATION 21-50 (2012), http://a-capp.msu.edu/sites/default/files/files/041218461_Performance_Based_Approach_Police_Staffing_FINAL100112.pdf [<https://perma.cc/M88C-6Y76>] (last visited Sept. 14, 2016).

71. WILSON & WEISS, *supra* note 70, at 36.

72. It is possible that workload data may be manipulated to show lesser need for security. However, mall management needs this data to self-monitor and it is not likely that workload data will be falsified.

73. SECURITY SUPERVISION & MANAGEMENT 428 (Sandi J. Davies & Christopher A. Hertig eds., 3d ed. 2008) (documenting calls for service as “factual evidence of what is transpiring at the site . . . as opposed to what people ‘think’ is happening”). See generally PETER M. BLAU & RICHARD A. SCHOENHERR, THE STRUCTURE OF ORGANIZATIONS (1971); JAMES D. THOMPSON, ORGANIZATIONS IN ACTION (1967).

74. Shane, *supra* note 29, at 15.

75. See *id.* (“A better data set would encompass 2 years of information to clarify these same variables and also to illuminate personnel trends.”).

severity), which helps identify patterns and trends for planning purposes⁷⁶ and may explain how offenders find suitable targets.⁷⁷

The workload analysis begins with defining the principle modalities (Table 2)⁷⁸ and must include: (1) type of call; (2) average number of hours spent handling the call;⁷⁹ (3) number of calls of each type; (4) number of personnel required to handle the call; and (5) total employee hours per modality (Table 3).⁸⁰ The hours per unit is the average amount of time spent handling a single call for service of that type (e.g., handling a single assault will take 1 hour).⁸¹ The units per year is the total number of calls for service for that type (e.g., there were twenty-five assaults for the year).⁸² The officers required is the number of officers assigned to handle each call.⁸³ The total employee hours per modality is the product of hours per unit \times units per year \times officers required.⁸⁴ This presents the baseline volume of service demands and hours that security personnel will encounter as a matter of reactive work.⁸⁵ This type of data is routinely captured by mall security either through pen and paper records, or electronically through computer-aided dispatch calls for service.⁸⁶

Although Table 2 is based on a yearly workload, this information can be retrieved by the month, week, or day in the calendar year.

76. *Id.* Calls for service data—which include date, time, location, duration, and nature—will put mall management on notice about people, places, and things that are prone to victimization. Premises liability litigation may focus on a specific location within the property (such as a particular area of the parking lot, or a common area inside the mall) and may allege inadequate security based on a design flaw, a mechanical defect in a security device, or inadequate security staffing, which is why date, time, location, duration, and nature are vitally important variables to capture; these data alert mall management to emerging problems. Calls for service may also fluctuate based on temporal distribution such as time of day, day of week, month of year and season (e.g., Christmas or holiday shopping). See HALE, *supra* note 12, at 231. In general, private security will often know about specific incidents and the wider patterns that develop from those incidents that occur on their property before the public police. This is why it behooves mall management to frequently analyze workload data and to adjust existing personnel as necessary or hire additional personnel. See MCNALLY, *supra* note 2, at 36.

77. See generally Patricia L. Brantingham & Paul J. Brantingham, *Environment, Routine, and Situation: Toward a Pattern Theory of Crime*, in 5 ROUTINE ACTIVITY AND RATIONAL CHOICE: ADVANCES IN CRIMINOLOGICAL THEORY (Ronald V. Clarke & Marcus Felson eds., 1993).

78. "Modalities" are the attributes (i.e., major activities) that are being examined. In this example, the attributes are the types of calls for service mall security is likely to handle.

79. Any portion of an hour is calculated as such. For example, 20 minutes is captured as .33 hours; 47 minutes is captured as .783 hours.

80. Shane, *supra* note 29, at 15–16.

81. *Id.* at 16.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 15.

TABLE 2: PRINCIPLE MODALITIES (MAJOR ACTIVITIES)

Service Demands	Acuity				Total				Percentage Allocation
	Hours Per Unit	Units Per Year	% of Total	Officers Required	Employee Hours Per Modality	Total Modality	Percentage Allocation		
Assault	1	25	0.47%	2	50	50	0.62%		
Animal Complaint	0.5	42	0.79%	1	21	21	0.26%		
Detention (pending police arrival)	1.5	104	1.96%	2	312	312	3.85%		
Assist Other Agency (police, EMS, fire, public works)	0.5	125	2.35%	2	125	125	1.54%		
Bomb Threat	1	3	0.06%	3	9	9	0.11%		
Burglar Alarm	0.416	750	14.11%	2	624	624	7.71%		
Burglary	1	12	0.23%	2	24	24	0.30%		
Carjacking	1	1	0.02%	2	2	2	0.02%		
Court Appearances	3	90	1.69%	2	540	540	6.67%		
Criminal Mischief/Vandalism	0.75	105	1.97%	1	79	79	0.97%		
Directed Patrols	0.25	1,095	20.59%	2	548	548	6.76%		
Disorderly Conduct (fights, crowds)	0.75	122	2.29%	2	183	183	2.26%		
Domestic Violence	1.5	15	0.28%	2	45	45	0.56%		
Fire (car, trash, structure)	1.5	10	0.19%	2	30	30	0.37%		
HazMat Condition/Dangerous Circumstances	1	2	0.04%	2	4	4	0.05%		
Juvenile Condition (curfew, truancy, and all others)	0.75	201	3.78%	2	302	302	3.72%		
Kidnapping	3	1	0.02%	4	12	12	0.15%		
Motor Vehicle Accident (with or without injuries)	1.5	300	5.64%	2	900	900	11.11%		
Noise Complaint	0.33	21	0.39%	1	7	7	0.09%		
Open Door Condition	0.75	110	2.07%	2	165	165	2.04%		
Parking Complaint	0.33	841	15.82%	1	278	278	3.43%		
Person with a Weapon	0.42	3	0.06%	4	5	5	0.06%		
Public Intoxication/Public Consumption	1	50	0.94%	2	100	100	1.23%		
Sexual Assault	2	1	0.02%	3	6	6	0.07%		
Robbery	1.5	41	0.77%	3	185	185	2.28%		
Sick/Injured Person	0.75	302	5.68%	2	453	453	5.59%		

TABLE 2: PRINCIPLE MODALITIES (MAJOR ACTIVITIES)

Service Demands	Acuity			Total			Percentage Allocation
	Hours Per Unit	Units Per Year	% of Total	Officers Required	Employee Hours Per Modality		
Stolen Vehicle Report	0.75	15	0.28%	1	11	0.14%	
Suicide	2	1	0.02%	2	4	0.05%	
Suspicious Circumstances (unattended items, person, vehicle)	0.5	154	2.90%	2	154	1.90%	
Theft	0.75	55	1.03%	1	41	0.51%	
Traffic Control	2	720	13.54%	2	2,880	35.57%	
Total		5,317	100%		8,097	100%	

Distributing Officers' Time Across Management Categories. After the baseline calculations are determined for the reactive workload it is necessary to distribute the time across three primary categories: (1) service demands; (2) administrative activities; and (3) proactive activities⁸⁷ (Table 3). The first category (service demands) is critical since the other categories receive their allotted time based on what is allotted in this category. The first priority for mall security is to answer calls for service from patrons and tenants.⁸⁸ The sum of employee hours per modality represents 100% of the reactive workload (8,097 hours in this simulation, Table 1).⁸⁹ However, there are other activities security personnel must do besides respond to calls for service, such as administrative tasks (e.g., submitting reports, attending meetings, meeting with supervisors) and proactive activities.⁹⁰ It is not realistic to formulate a staffing model around 100% of the total employee hours per modality without accounting for a security officer's other responsibilities. This is where decisions about corporate priorities must be made regarding how much of the officers' time mall management is willing to distribute across these three categories. Administrative time and proactive time are discretionary but must be derived from a rational process. Administrative time allocation (e.g., meeting with supervisors, submitting reports, attending meetings) should be based on meeting or supervisor logs.

Proactive time is the most important discretionary area of mall management decision-making. It includes decisions as to how many stationary guards should be assigned at fixed places (entrances, exits, bridges); how many CCTV cameras should be installed and the number of personnel to monitor them; and the number of roving patrol cars or foot patrol persons to be assigned.⁹¹ These decisions are informed in part by the reactive workload that provides information as to potential areas where trouble may be expected.⁹² However, deterrence is integral to effective policing and visible security is as important to mall security as it is to policing in municipalities, highways, and other public

87. *Id.* at 17. Proactive activities consist of self-initiated work (e.g., stop & question, traffic stops, parking enforcement, meeting with business owners, assisting patrons, surveillance) aimed at deterring crime and disorder through a visible show of security presence and engaging patrons to learn their concerns, thereby preventing crime from occurring. *See id.* This is contrasted against reactive activities such as responding to calls for service after something has occurred. *Id.*

88. *See id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *See id.* at 16.

areas.⁹³ Proactive patrol is also used for observing suspicious circumstances, disrupting emerging disorder conditions (congregating juveniles), assisting patrons, addressing traffic conditions, and checking vulnerable locations (e.g., places where non-violent crime such as burglary, theft, and vandalism may occur).⁹⁴ Consumer attitudes toward safety should also be taken into account.⁹⁵ The fact that this is a discretionary area of decision-making does not mean that it is without rigor. Just as police document their decisions as to the deployment of resources, mall security managers must be able to explain the processes they utilized for deciding both the number of security personnel and their deployment.

In the following simulation, to handle 23,135 hours of work, where 35% of time is allocated to service demands, 10% is allocated for administrative activities, and 55% is allocated to proactive activities, the effective strength is eleven security officers (Table 3).⁹⁶

TABLE 3: DISTRIBUTION OF TIME

Activity	%	Hours/year
Service Demands	35.00%	8,097
Administrative	10.00%	2,314
Proactive	55.00%	12,724
Total	100.00%	23,135
Scheduled Hours		2,086
Effective Strength		11.09

The relief factor (Table 4), also known as nonproductive FTE, accounts for officers' time off for various reasons (e.g., vacation, bereavement leave, personal day off, sick leave, training) and is used as a multiplier to determine coverage needs. Once the relief factor is calculated, the actual personnel strength can be calculated, which is the actual number of security personnel required to handle the workload based on the distribution of time. To provide

93. See Romano, *supra* note 3, at 46–47; see also Marcus Felson, *Those Who Discourage Crime*, in 4 CRIME AND PLACE: CRIME PREVENTION STUDIES 62 (John E. Eck & David Weisburd eds., 1995).

94. See generally Romano, *supra* note 3.

95. The International Council of Shopping Centers (ICSC) conducts an annual customer survey on behalf of shopping centers to document consumers' preferences, perceptions, and satisfaction, including security features, so that mall tenants and security directors can adjust their practices. Telephone Interview with Malachy Kavanagh, Senior Vice President, ICSC (Feb. 10, 2017).

96. By way of example using this same data, if service demands are allocated at 65%, administrative activities at 10%, and proactive activities at 25%, total hours of work is reduced to 12,457 (–46.1% reduction) with an effective strength of six security personnel instead of eleven.

adequate coverage, 1.34 security officers are required for every position subject to relief (Table 4).

TABLE 4: NONPRODUCTIVE FTE (RELIEF FACTOR)

Time Off in Hours	
Time Off	Security Officer
Vacation	200
Compensatory	40
Sick Leave	120
Personal	24
Training	64
Bereavement	80
Total Time Off	528
Work Year Personnel	2,086
Availability	1,558
Relief Factor	1.34

Management and Support Staff Positions. In addition to the workload analysis, other positions must be accounted for, including supervisors, management, support staff and fixed-posts to get the full picture of security staffing needs (Table 5).

TABLE 5: MANAGEMENT AND SUPPORT STAFF

Supervisory Staff		Position	
By ratio: 1 supervisor per 7 security officers	Supervisor	1.58	effective strength
By ratio: 1 mid-level manager per 5 supervisors	Mid-level manager	0.42	effective strength
Total		1.90	FTE Supervisory Staff
Management Staff			
Not by ratio (fixed position): 1 security manager	Manager	1.000	effective strength
Not by ratio (fixed position): 1 assistant manager	Asst. Manager	1.000	effective strength
Total		2.000	FTE Command Staff (managers)
Support Staff for Management			
By ratio: 2 support staff members per manager	Support staff	4.000	effective strength
Total		4.000	FTE Support Staff
Fixed Post Positions			
Not by ratio (fixed position): 1 CCTV operator	Security officer	1.000	effective strength
Not by ratio (fixed position): 2 parking lot posts	Security officer	2.000	effective strength
Total		3.000	FTE Support Staff

Actual Staffing Strength. In this simulation, 42 actual security officers are required to handle 23,135 hours of work that is spread across sixteen hours per day, seven days per week, for an entire year with an average attendance of 56,844 visitors (Table 6). Those personnel are supported by 6 supervisors, 3 CCTV operators and 3 parking lot attendants for a total of 54 officers. With 55% of the security officers' time devoted to proactive activities, visible presence is greatly heightened, which creates feelings of safety for patrons and promotes more opportunities for officers to observe and report suspicious circumstances, or engage with suspicious people.⁹⁷

97. Observing and reporting suspicious circumstances are part of the "See Something, Say Something" campaign of the U.S. Department of Homeland Security and the "Nationwide Suspicious Activity Reporting Initiative" of the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and state, local, tribal, and territorial law enforcement partners. U.S. DEPARTMENT OF HOMELAND SECURITY, *If You See Something, Say Something*, <https://www.dhs.gov/see-something-say-something> [<https://perma.cc/63HZ-7GZH>] (last visited Jan. 28, 2018); NATIONWIDE SAR INITIATIVE, <https://nsi.ncirc.gov/default.aspx> [<https://perma.cc/C6EW-HLF7>] (last visited Jan. 28, 2018); see also ROBERT C. DAVIS ET AL., AN ASSESSMENT OF THE PREPAREDNESS OF LARGE RETAIL MALLS TO PREVENT AND RESPOND TO TERRORIST ATTACK (2006). In this study of mall preparedness, 14.7% of mall security directors surveyed indicated that increasing the visibility of security officers

TABLE 6: ACTUAL STRENGTH FOR SECURITY STAFFING

Position	Effective Strength	Coverage	Relief Factor	Actual Strength
Security Administration				
Security Manager	1.00	9–5 M–F	No	1
Assistant Security Manager	1.00	9–5 M–F	No	1
Mid-level Security Manager	1.00	9–5 M–F	No	1
Subtotal FTE				3
Field Operations				
Security Supervisor	1.58	16/7 days	3.75	6
Security Officers	11.09	16/7 days	3.75	42
1 CCTV Operator (fixed post)	1.00	12/7 days	2.81	3
2 Parking Lot Posts (fixed post)	2.00	10/7 days	1.67	3
Subtotal FTE				54
Support Staff				
Administrative Personnel	4.00	9–5 M–F	No	4
Subtotal FTE				4
Total Security FTE's				61

C. The Importance of Workload Analysis to Security Litigation

In litigating a case where the issue is the adequacy of security, a workload analysis is a crucial component in deciding whether the mall management was negligent. First, it sets a baseline for how many security officers should have been on duty to handle reactive calls based on past history. A mall that is understaffed based on historical demands is presumably negligent.⁹⁸ If the mall has a reduced security presence it must be able to explain why it has not provided adequate security to respond to expected calls for service. Second, if the mall has not allocated resources for administrative personnel or for relief time, it will either be poorly managed or understaffed, or both. Third, a workload analysis informs the mall management as to hot spots to which they

was a measure that malls could take to become better prepared for a terrorist attack, *id.* at 10, and 63% of security directors said that the most frequent security change following the September 11, 2001, terrorist attacks was “to increase the visibility of security officers, instruct officers to be alert for suspicious individuals, and pay more attention to cars and delivery trucks coming into the mall.” *Id.* at 18; *see id.* at 19 (illustrating the survey results). The study suggests that mall directors do focus on visible patrols to deter crime and terror attacks. *See id.* at 27–28, 30.

98. *See, e.g.,* L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247 (Mo. 2002) (en banc); *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 40 (N.C. 1981).

should deploy security officers. Fourth, and most important, no policy or security force can operate effectively without personnel devoted to a pro-active presence to act as a deterrent against crime. If all that a mall covers is reactive calls for service, it has not provided for roaming patrol cars, stationary officers at fixed points in the mall, officers to monitor ingress and egress, or officers to monitor surveillance cameras. We do not suggest that a workload analysis will provide a definite answer as to the adequacy of security, but by setting forth a baseline tied to calls for service it provides a firm starting point to begin the analysis. Mall operators must then be able to defend how they account for administrative needs and proactive policing.

Earlier we noted that foreseeability of crime has been the most important factor relied on by the courts to establish a duty to provide security to protect against third-party crime or the breach of that duty.⁹⁹ Having set forth the need for workload data to determine adequate staffing, we conclude that courts simply have it wrong. The presence or absence of crime is reflected in calls for service that in turn sets the basis for adequate security. When courts turn to foreseeability to account for possible crime because a mall is located in a high-crime area, the premise is that crime in malls is more likely to occur because of the proximity of criminals to the mall,¹⁰⁰ but that premise fails to take into account that malls may be structured in a manner to discourage third-party crime. An entire science devoted to building malls and other structures to minimize crime belies the emphasis on the location of malls as an important determinant of the frequency of crime.¹⁰¹ Crime statistics of the surrounding

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

100. See, e.g., *Burris v. Eddie's Liquor Store*, No. B153671, 2002 WL 31521538 (Cal. Ct. App. Nov. 14, 2002); *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 904 (Tenn. 1996); *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 123–24 (Cal. 1999); *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 13 (Tex. 2008); *Young v. Prizm Asset Mgmt. Co.*, 100 A.3d 594, 600 (Pa. Super. Ct. 2014); *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 657 (Tex. 1999); *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1339 (Kan. 1993); *Holland v. Liedel*, 494 N.W.2d 772, 775 (Mich. Ct. App. 1992).

101. See generally Patricia L. Brantingham & Paul J. Brantingham, *Notes on the Geometry of Crime*, in ENVIRONMENTAL CRIMINOLOGY (Paul J. Brantingham & Patricia L. Brantingham eds., 1981). Environmental criminology is the study of crime, criminality, and victimization as each relates to specific places and the way people and places shape activities in time and space to create or discourage opportunities. See *id.* at 27–54; see also Patricia Brantingham & Paul Brantingham, *Criminality of Place: Crime Generators and Crime Attractors*, 3 EUR. J. ON CRIM. POL'Y & RES. 5–8 (1995); Felson, *supra* note 93; Richard Wortley & Lorraine Mazerolle, *Environmental Criminology and Crime Analysis: Situating the Theory, Analytic Approach and Application*, in ENVIRONMENTAL CRIMINOLOGY AND CRIME ANALYSIS 1–3 (Richard Wortley & Lorraine Mazerolle eds., 2008). Environmental criminology has its roots in urban planning and crime prevention; the theory suggests that the physical environment, particularly its physical characteristics, building layout, and site plan function to allow people to become key agents of security to defend the space. See generally OSCAR

area do not necessarily imply that a crime is foreseeable on the shopping center's grounds. To accept this as a viable method of forecasting crime at the shopping center is to deny virtually all of the environmental crime prevention literature. Crime prevention through environment design, the concept of defensible space and situational crime prevention exist so that facilities can be made safer despite crime in surrounding areas.¹⁰² This is why facilities that are designed with crime prevention in mind can be placed into risky neighborhoods with reasonable assurance that crimes occurring outside the facility will not necessarily occur inside the facility or on the facility's grounds.¹⁰³ It is an either/or proposition. If over a significant period of time calls for service do not reflect crime, then staffing may be adequate; if it does not then the great likelihood is that the mall was constructed environmentally to discourage crime.¹⁰⁴

V. SHIFTING THE BURDEN OF PROOF IN MALL SECURITY CASES TO THE DEFENDANT

In an earlier section, we set forth the argument that in the context of data-driven standards for reasonable staffing, the failure to meet that standard is good reason to shift the burden of proof to the defendant.¹⁰⁵ Now that we have set forth the model for deciding adequate staffing we need to revisit the argument. In some cases, it is clear that the negligence of the mall to provide adequate staffing will not be the cause of the plaintiff's harm. If a patron of the mall utilizes a hidden handgun to randomly shoot ten people in a minute's time it is likely that plaintiff will not be able to establish but-for causation or proximate

NEWMAN, DEFENSIBLE SPACE: PEOPLE AND DESIGN IN THE VIOLENT CITY (1972); Douglas D. Perkins et al., *The Physical Environment of Street Crime: Defensible Space, Territoriality and Incivilities*, 13 J. ENVTL. PSYCHOL. 29 (1993). An integral part of environmental criminology is crime prevention through environmental design (CPTED), which emphasizes a collection of design principles for the "built" environment, both indoors and outdoors. C. RAY JEFFERY, CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN 224 (1977); McNALLY, *supra* note 2, at 1, 3; Corey L. Gordon & William Brill, *The Expanding Role of Crime Prevention Through Environmental Design in Premises Liability*, NAT'L INST. JUST. (1996) (discussing the evolution of the legal basis for premises liability cases and their connection to CPTED features). These principles encourage users of the physical environment to feel safe in their surroundings while concurrently discouraging motivated offenders from engaging in crime and anti-social behavior. See Hunter, *supra* note 61, at 55-57; Romano, *supra* note 3, at 46-51.

102. See Perkins, *supra* note 101, at 30.

103. *Id.*; Gordon & Brill, *supra* note 101, at 6; McNALLY, *supra* note 2, at 1.

104. See Perkins, *supra* note 101, at 30-31.

105. See *supra* notes 34-46 and accompanying text.

cause.¹⁰⁶ There is no necessity in such a case to shift the burden of proof. Plaintiff will simply not be able to establish a prima facie case.

The more difficult cases for causation arise from mugging, carjacking, kidnapping and various forms of sexual assault. One has sympathy for courts that have struggled with the causation issue and their willingness to grant the defendants summary judgment or directed verdicts.¹⁰⁷ After all, how are we to know that additional guards would have made a difference? As the California Court of Appeal said in *Nola M. v. University of Southern California* in discussing the causation issue, “[W]here do we draw the line? How many guards are enough? Ten? Twenty? Two Hundred?”¹⁰⁸ Lying beneath the surface is the frustration courts have in determining the standard for adequate security. If the standard of care rests on shaky foundations based almost entirely on an unquantifiable foreseeability analysis and intuitive expert opinion, it is understandable that courts would be reluctant to allow a plaintiff to make a case based on both questionable negligence and equally questionable causation.¹⁰⁹

However, if the plaintiff can establish that mall security was inadequate based on calls for service data, then placing the burden of proof of causation on defendants is fair. A jury can determine with some confidence how much security was necessary. The defendant should justly bear the burden of proving that had that level of security been in place, the injury to the plaintiff would have taken place in any event. The argument in favor of switching the burden of proof on causation to the defendant in cases where the plaintiff proves breach of the duty to provide adequate security was propounded by an intermediate court of appeals in *Saelzler v. Advanced Group 400*.¹¹⁰ On appeal, the California Supreme Court rejected this position and found that the plaintiff had not proved causation by a preponderance of the evidence.¹¹¹ In finding the lack of causation as a matter of law, the court relied on a line of cases that insisted

106. See, e.g., *Lopez v. McDonald's*, 238 Cal. Rptr. 436 (Cal. Ct. App. 1987).

107. See cases cited *supra* note 41.

108. 20 Cal. Rptr. 2d 97, 108 (Cal. Ct. App. 1993).

109. See *Wright v. R.M. Smith Invs., L.P.*, 15-CA-00199-COA (¶¶8, 9, 11) (Miss. Ct. App. 2016) (explaining the relationship between the strength of the violation and the standard of care and cause-in-fact). In *Williams v. Utica College of Syracuse University*, Judge Calabresi found that a standard of care that just passes the threshold to avoid summary judgment will require more demanding proof for cause-in-fact. 453 F.3d 112, 121 (2d Cir. 2006).

110. 92 Cal. Rptr. 2d 103, 112 (Cal. Ct. App. 1999). For a lengthy article supporting this position see Dennis T. Yokoyama, *The Law of Causation in Actions Involving Third-Party Assaults When the Landowner Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler v. Advanced Group 400*, 40 CAL.W. L. REV. 79 (2003).

111. *Saelzler v. Advanced Grp. 400*, 23 P.3d 1143, 1155 (Cal. 2001).

that in security cases plaintiff must provide sufficient evidence to make out cause-in-fact.¹¹² In our view, the reason why the court has taken a strong position on the causation issue is clear. Where the standards for establishing how much security would be reasonable security are tenuous, the courts will not allow a burden shift to the defendants.¹¹³ Those who advocate a burden shift to the defendants are willing to do so based on a simple breach of the standard of care, i.e., there should have been more security guards.¹¹⁴ Since they cannot quantify how many, they invite the courts to take the position that they will not speculate on causation and thus deny recovery by refusing to let the case go to juries.¹¹⁵

VI. CONCLUSION

The case law dealing with the liability of malls for third-party crime committed on their premises has focused almost exclusively on the foreseeability that crime may occur.¹¹⁶ The number of crimes that have occurred in the past determine whether there is a duty or the breach of the standard of care.¹¹⁷ Courts cannot agree as to the number or the severity of the crimes necessary to trigger a duty of care or the breach.¹¹⁸ Experts for the opposing parties regularly opine as to whether the staffing was adequate and whether adequate staffing would have averted the crime to the plaintiff.¹¹⁹

This Article challenges the existing case law on two grounds. First, adequate staffing of a mall cannot be determined by looking merely at past criminal conduct. To determine adequate or reasonable staffing, it is absolutely necessary to examine workload data to determine calls for service at the mall. Second, the opinions of experts who opine as to adequate staffing without undertaking a workload analysis are simply unprofessional. A workload analysis is fundamental to all policing and is so recognized by the agency that accredits police forces. Once a workload analysis is performed that identifies the reactive work of the mall security force, it is necessary for the mall management to decide the nature and the amount of proactive resources that it

112. *Id.* at 1149–51.

113. *See id.* at 1151–55.

114. *See id.* at 1154–55.

115. *See id.*

116. *See, e.g.,* L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W. 3d 247, 258 (Mo. 2002) (en banc); Dickinson Arms-REO, L.P. v. Campbell, 4 S.W.3d 333, 345–46 (Tex. App. 1999); Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207 (Cal. 1993).

117. *See* Liller v. Quick Stop Food Mart, Inc., 507 S.E.2d 602, 605 (N.C. Ct. App. 1998).

118. *See* McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 899 (Tenn. 1996).

119. *See* Wright v. R.M. Smith Invs., L.P., 15-CA-00199-COA (¶¶8, 9, 11) (Miss. Ct. App. 2016); Noble v. L.A. Dodgers, Inc., 214 Cal. Rptr. 395, 398 (Cal. Ct. App. 1985).

needs to deploy for adequate security. Mall safety is too important to leave to the untutored opinion of experts who have not done their basic homework. It is high time that the science of policing be reflected in the judicial decisions that decide cases based on mall injuries resulting from third-party crime.

Once the standard for adequate or reasonable policing of malls is established, courts should shift the burden of proof to the defendant that the lack of adequate policing was not causal. Plaintiff cannot prove by a preponderance of the evidence that additional security would have prevented a particular crime. If courts allow the causation question to go juries based on expert testimony by plaintiffs that additional security would have prevented a crime, they make a mockery of the causation issue. Plaintiffs cannot reasonably carry their burden of proof. It may be difficult for defendants to prove that additional security would not have made a difference, but if an error is to be made it should be made against the defendants who failed, based on objective criteria, to provide adequate security.