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COMMENTS

LANDLORD LIABILITY FOR CRIMES COMMITTED BY THIRD PARTIES AGAINST TENANTS

"The landlord is no insurer of his tenants' safety, but he certainly is no bystander."¹

A landlord's potential liability for crimes committed by third parties against tenants has been a dynamic and expanding area of the law since 1970. While several jurisdictions have been reluctant to expand the landlord's liability to his tenant,² other courts have found the landlord liable for criminal acts based upon tort and contract principles.³

This comment examines the traditional basis of landlord immunity and the viability of such a position today. It focuses on the various theories upon which courts have predicated landlord liability in recent years. Finally, this comment advocates establishing a tort standard, rather than a traditional or contractual standard, for determining a landlord's liability to his tenants.

I. THE LANDLORD-TENANT RELATIONSHIP: A HISTORICAL PERSPECTIVE

At early common law, a lease of land was not an estate; if anything, the lease was a covenant.⁴ The lessee had no interest in the land which the law would protect against third parties. If the landlord wrongly evicted the lessee, the sole remedy was for breach of the covenant.⁵

Around the middle of the thirteenth century, the lessee secured the right to recover leased land against all wrongdoers, including the landlord, by writ of *ejectionae firmae*.⁶ Gradually, the tenant's interest became a recognizable property right in the land itself,⁷ rather than a mere

1. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970).

2. See *infra* notes 20-33 and accompanying text.

3. See *infra* notes 55-114 and accompanying text.

4. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 195 (2d ed. 1975). Rent was seen as "issuing out of the land;" thus little, if any, significance was attached to the buildings on the land. *Id.*

5. W. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* 111 (3d ed. 1965).

6. H. TIFFANY, *THE LAW OF REAL PROPERTY AND OTHER INTEREST IN LAND* § 68 (3d ed. 1970).

7. J. CRIBBET, *supra* note 4, at 195-96. The interest acquired by the tenant was as good as the interest acquired by the owner of any other estate in land. Some commentators have

contractual right arising from the covenant of the lessor.⁸

Since a lease was considered to be a conveyance of an interest in land, the tenant was afforded exclusive possession of the property in consideration of rent.⁹ This exclusive possession effectively brought the landlord's liability for the premises to an end. Since the landlord had no control over the premises, liability could not be imposed.¹⁰

This immunity of the landlord became a serious problem with the growth of cities and towns. As more city dwellers began to rent premises for shelter instead of for pecuniary gain, landlords and tenants began using covenants in leases to protect their respective rights.¹¹ At the same time, lawmakers began taking steps to regulate leased land and structures. The laws governing agrarian land use simply were inappropriate for leased premises in larger cities and towns.¹²

Courts also recognized the problems of renting in an urban society and therefore began to reevaluate the landlord's responsibility.¹³ Gradually,

suggested that the lessee's position may have been superior since his remedy in an ejectment action was superior to the remedies available in real actions. Regardless, the lessee's interest continued to be labeled as personal property. 1 AMERICAN LAW OF PROPERTY § 3.1, at 175-76 (J. Casner ed. 1952).

8. 2 R. POWELL, THE LAW OF REAL PROPERTY § 221[1], at 179 (rev. ed. 1986).

9. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 125-27 (2d ed. 1968).

The tenant's rights were virtually limitless as long as he paid the rent. However, one important limitation to these rights was an obligation not to commit waste. Therefore, the tenant was required to treat the premises in a manner causing no injury to the property for the continuance of the lease. This rule made the tenant liable for negligent use of the property. 1 E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 67 (London 1832 & reproduced in facsimile 1979).

10. English courts decided that the conveyance to the tenant was made subject to the doctrine of caveat emptor. Thus, the tenant took the property as he found it, absent any agreement to the contrary. This rule was based on the idea that the tenant had ample opportunity to inspect the property and was capable of repairing any defect that existed or manifested itself. RESTATEMENT (SECOND) OF PROPERTY § 5.1 comment b (1977).

11. 1 AMERICAN LAW OF PROPERTY, *supra* note 7, § 3.11, at 202. These covenants included the promises to pay rent, provisions relating to repairs, taxes, insurance, and use of the premises. The use of covenants to deal with these problems reintroduced a contractual flavor to the interpretation of leases. 2 R. POWELL, *supra* note 8, § 221[1], at 180-81.

12. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 269 (3d ed. 1923).

13. See *e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The *Javins* court noted the particular problems facing modern urban tenants:

Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before.

Id. at 1078.

exceptions to the traditional rule of immunity developed. The exceptions most commonly recognized were: (1) physical defects in that part of the premises over which the landlord retained control;¹⁴ (2) failure to disclose latent defects known to the landlord but unknown to the tenant;¹⁵ (3) breach of a covenant to repair;¹⁶ (4) negligent repair of the premises;¹⁷ (5) injuries occurring on premises leased for public use;¹⁸ and (6) failure to

14. *See, e.g.*, *Hester v. Guarino*, 251 So. 2d 563 (Fla. Dist. Ct. App. 1971), *cert. denied*, 259 So. 2d 715 (Fla. 1972); *Hinthorn v. Benfer*, 90 Kan. 731, 136 P. 247 (1913); *Geesing v. Pendergrass*, 417 P.2d 322 (Okla. 1966); *Lawton v. Vadenais*, 84 R.I. 116, 122 A.2d 138 (1956). The classic example occurs when the landlord leases separate portions of a building to various tenants, retaining control of the common areas used by all tenants. In such an instance, the landlord is under a duty of reasonable care to keep the common areas free from physical defects. J. CRIBBET, *supra* note 4, at 199; *see* RESTATEMENT (SECOND) OF PROPERTY § 17.3 comment c (1977).

15. *See, e.g.*, *Miner, Read & Garrette v. McNamara*, 81 Conn. 690, 72 A. 138 (1909); *Borggard v. Gale*, 205 Ill. 511, 68 N.E. 1063 (1903); *Baird v. Ellsworth Realty Co.*, 265 S.W.2d 770 (Mo. Ct. App. 1954). This basic exception to the caveat emptor rule depends upon the tenant's ability to show: (1) that the landlord had actual knowledge of the defect; (2) the defect was such that the tenant could not be expected to discover it even upon reasonable inspection of the premises; and (3) the landlord did not disclose his knowledge of the defect. J. CRIBBET, *supra* note 4, at 205. *See generally* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 Wis. L. Rev. 19, 50-52 (discussing extent of landlord's liability for latent defects).

16. *See, e.g.*, *Bauer v. Cedar Lane Holding Co.*, 24 N.J. 139, 130 A.2d 833 (1957); *Ashmun v. Nichols*, 92 Or. 223, 178 P. 234 (1919).

Landlords are allowed to make extensive covenants to repair. These covenants usually divide the burden of repair between the landlord and the tenant. Typically, the duty to make inside repairs is on the lessee and the duty to make outside repairs is on the lessor. *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 7, § 3.79, at 351; *cf.* *Berwick Corp. v. Klein-ginna Inv. Corp.*, 143 So. 2d 684 (Fla. Dist. Ct. App. 1962) (lessor liable for failure to repair roof).

While the modern trend is toward a view that a breach of a covenant to repair subjects the landlord to tort liability, many cases adhere to the older common law view that such a breach gives rise only to contractual liability. Such an interpretation limits the tenant's measure of recovery to the cost of repair or the loss of rental value of the property. *See, e.g.*, *Jordan v. Miller*, 179 N.C. 73, 101 S.E. 550 (1919); *Cooper v. Roose*, 151 Ohio St. 316, 85 N.E.2d 545 (1949).

17. *See, e.g.*, *Worrell v. Hodrick*, 258 Ala. 10, 61 So. 2d 67 (1952); *Marks v. Nambil Realty Co.*, 245 N.Y. 256, 157 N.E. 129 (1929); *Schedler v. Wagner*, 37 Wash. 2d 612, 225 P.2d 213 (1950), *aff'd on rehearing*, 37 Wash. 2d 612, 230 P.2d 600 (1951). Tort liability is imposed for negligent repair which:

[m]akes the leased property more dangerous for use irrespective of whether the added danger is due to the fact that the physical condition of the leased property is changed for the worse by the repairs or to the fact that the making of the repairs gives it a deceptive appearance of safety and so leads the tenant or others with his consent to use the leased property in a way which but for the repairs they would recognize to be dangerous.

RESTATEMENT (SECOND) OF PROPERTY § 17.7 comment b (1977).

18. *See, e.g.*, *Hayes v. Richfield Oil Corp.* 38 Cal. 2d 375, 240 P.2d 580 (1952). The landlord owes a duty to the public that cannot be shifted to the tenant where the landlord has reason to believe the tenant will admit the public on the premises before the leased property can be put in a safe condition. Duty is upon the landlord to inspect and repair the premises

deliver habitable quarters.¹⁹ These exceptions, however, still did not provide any basis for liability of a landlord for the criminal acts of third parties against tenants.

II. A LANDLORD'S LIABILITY FOR THE CRIMINAL ACTS OF THIRD PARTIES

A. *The Traditional View of Landlord Immunity*

Although the courts' recognition of a landlord's potential liability has increased in the United States,²⁰ traditional obstacles have continued to bar a tenant from recovering from the landlord for crimes committed by third parties on leased premises. Characterization of the lease as a conveyance of an interest in the land meant that the landlord had no contractual obligation to make the leased premises safe from criminal attack.²¹ The only recognized obligation was to keep the premises "safe and habitable." "Safe and habitable" was defined by common law or statute to mean free from physical defects, not safe from criminal acts of third parties.²²

Moreover, tenants were prevented from recovering under negligence principles of tort law. Courts were reluctant to recognize a duty of affirmative action, i.e., a duty of one person to take steps to protect another from the criminal acts of a third party.²³ Most decisions involving a landlord's liability for the criminal acts of third parties were based upon traditional notions of foreseeability. Generally, courts held that criminal activity was unforeseeable as a matter of law, thus there could be no legal

prior to turning possession of the property over to the tenant. R. SCHOSKINSKI, *AMERICAN LAW LANDLORD AND TENANT* 198 (1980).

19. See, e.g., *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971). The most commonly cited reasons for imposing an obligation upon the landlord to deliver habitable quarters are: inadequate amount of suitable low cost housing in many urban areas; the widespread enactment of housing codes interpreted as a legislative policy to realize the obligations of repair and maintenance; the expectations and demands of the contemporary landlord-tenant relationship; and the unequal bargaining power of landlords and tenants. See *Javins*, 428 F.2d 1071; *Green v. Superior Ct. of San Francisco*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). But see *Blackwell v. Del Bosco*, 35 Colo. App. 399, —, 536 P.2d 838, 840 (1975) (stating that "landlord does not impliedly warrant that his residential rental premises are fit for human habitation . . . [or] that such premises are in compliance with applicable housing codes"), *aff'd*, 191 Colo. 344, 558 P.2d 563 (1977).

20. See *supra* notes 14-19 and accompanying text.

21. *Trice v. Chicago Housing Auth.* 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973); *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 186 A.2d 291 (1962); *New York City Hous. Auth. v. Medlin*, 57 Misc. 2d 145, 291 N.Y.S.2d 672 (N.Y. Civ. Ct. 1968).

22. See generally Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153 (1970-1971) (discussing the landlord's lack of obligation at common law).

23. RESTATEMENT (SECOND) OF TORTS § 314 comment c (1977).

duty on the part of the landlord to take precautionary measures.²⁴

Duty was imposed on a party to guard against the criminal acts of third parties in cases where a special relationship existed between the parties.²⁵ The existence of such a special relationship has been recognized where the parties are in the position of carrier and passenger,²⁶ innkeeper and guest,²⁷ employer and employee,²⁸ and possessor of land and invitee.²⁹

24. See *Goldberg*, 38 N.J. at —, 186 A.2d at 293. The *Goldberg* court considered determination of a duty as the central issue in imposing liability upon a landlord. In ruling that a municipal housing authority had no duty to provide police protection at a housing project to protect persons legally on the premises, the court said:

The question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it. Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.

Id. at —, 186 A.2d at 293; see also *DeKoven v. 780 West End Realty*, 48 Misc. 2d 951, 266 N.Y.S.2d 463 (1965); *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 207 S.E.2d 841 (1974).

25. RESTATEMENT (SECOND) OF TORTS § 302B comment b (1977).

26. See, e.g., *Matsumoto v. Chicago & N.W. Ry.*, 168 F.2d 496, 500 (7th Cir.), cert. denied, 335 U.S. 826 (1948); *Harvin v. Kenan*, 157 Fla. 603, 26 So. 2d 668 (1946).

27. See, e.g., *Highland Ins. Co. v. Gilday*, 398 So. 2d 834 (Fla. Dist. Ct. App. 1981). Although an innkeeper is not required to provide a warranty of personal safety, a duty of due care to protect guests from third party misconduct under all circumstances is required. See *Kveragas v. Scottish Inns*, 733 F.2d 409 (6th Cir. 1984).

Kveragas made clear that under Tennessee law an innkeeper need not have actual notice of a threatened specific act by a specific person before liability can attach to the innkeeper. Though the common law duty of absolute care has lessened, a special relationship still exists. The court specified seven factors to be considered in determining whether an innkeeper has taken reasonable security measures. These factors include: (1) whether the motel advertises itself as offering superior facilities; (2) whether the location is convenient to criminals; (3) whether prior criminal acts have occurred on the premises; (4) compliance with the industry standard for safety measures; (5) compliance with internal safety measures; (6) ability of the guests to protect themselves; and (7) the cost of protective measures weighed against the benefits of such measures. *Id.* at 414. For an excellent discussion of an innkeeper's duty to his guests, see Annotation, *Liability of Innkeeper, Restaurateur, or Tavern Keeper for Injury Occurring on or About Premises to Guest or Patron By Person Other than Proprietor or his Servant*, 70 A.L.R.2d 628 (1960).

28. Employers have a duty of providing employees with a safe place to work. This duty may be extended to include an obligation to protect against criminal acts by third parties. *Lillie v. Thompson*, 332 U.S. 459 (1947) (per curiam); *Atlantic Coast Line R.R. v. Godard*, 211 Ga. 373, 86 S.E.2d 311 (1955). See generally Annotation, *Comment Note—Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 A.L.R.3d 619 (1966) (discussing limits of an employer's duty to protect employees).

29. See, e.g., *Morgan v. Bucks Assoc.*, 428 F. Supp. 546 (E.D. Pa. 1977); *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981). These courts have extended a proprietor's duty of reasonable care to include a duty to keep parking lots adjacent to their businesses safe from criminal attack.

The proprietor also may have a duty to protect invitees even if the type of harm to be anticipated is not the same type of criminal acts that have occurred in the past. *Morgan*, 428 F. Supp. at 550 (holding an invitee assaulted in defendant's parking lot entitled to recovery for damages even though only crimes previously committed were auto thefts). *But*

This duty was based on the notion that one of the parties to the relationship had in some way limited his ability to protect himself by his submission to the control of the other party.³⁰ Traditionally, the landlord-tenant relationship had not been considered a special relationship that warranted the imposition of liability. Courts found that the tenant had not submitted to any measure of control exercised by the landlord sufficient to impose a duty on the landlord to protect against the criminal acts of third parties.³¹

Another obstacle that barred recovery by a tenant in a tort action was the lack of proximate causation. Landlords simply raised the defense that the acts of an independent third party were intervening causes which relieved the landlord from any liability.³² The courts which accepted such an argument often found the intervening acts of a third party sufficient to protect even a negligent landlord.³³

see Henley v. Pizitz Realty Co., 456 So. 2d 272 (Ala. 1984) (stating invitee denied recovery for injuries resulting from abduction in defendant's parking lot where only previous crimes were auto thefts); *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975) (owner of shopping center parking lot could only be liable for invitee's injuries where some mode of operation or condition upon the premises lures, aids or abets the special danger).

A California decision has held the protection afforded an invitee will not be extended to a licensee. In *Totten v. More Oakland Residential Hous., Inc.*, 63 Cal. App. 3d 538, 134 Cal. Rptr. 20 (1976), recovery was denied for an attack where the victim was visiting a tenant in the landlord's building. The court pointed out that the landlord had no duty to protect the victim from a sudden criminal attack in a laundry room on premises where the victim was a licensee who entered the premises upon the invitation of a tenant. *Id.* at —, 134 Cal. Rptr. at 33.

30. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 483 (D.C. Cir. 1970).

31. *See Pippin v. Chicago Hous. Auth.*, 78 Ill. 2d 204, 399 N.E.2d 596 (1979); *Gulf Reston*, 215 Va. 155, 207 S.E.2d 841.

32. "Foreseeability of the criminal activity is a decisive factor in determining causation, as it is in determining duty." *Graham v. M & J Corp.*, 424 A.2d 103, 107 (D.C. 1980). Several courts have looked to the RESTATEMENT (SECOND) OF TORTS for guidance in ascertaining the landlord's liability.

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. RESTATEMENT (SECOND) OF TORTS § 448 (1977); *see also Spar v. Obwoya*, 369 A.2d 173 (D.C. 1977) (citing the RESTATEMENT (SECOND) OF TORTS and holding landlord liable for a tenant's injuries for a failure to secure a front door lock); *Johnston v. Harris*, 387 Mich. 369, 198 N.W.2d 409 (1972) (citing the RESTATEMENT (SECOND) OF TORTS and holding landlord liable for creating conditions conducive to criminal assaults).

33. The *Goldberg* court aptly characterized the problem of foreseeability and recognition of a duty to be imposed upon a landlord to protect tenants:

Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide "police" protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have

Thus, before 1970, courts consistently found that landlords were not liable to tenants for the criminal acts of third parties.³⁴ Regardless of whether the landlords' immunity had been based on a lack of contractual obligation, absence of a special relationship, intervening causes, or other grounds,³⁵ tenant victims of crime generally were unsuccessful in suits against their landlords.

B. Modern Landlord Liability: Kline v. 1500 Massachusetts Avenue Apartment Corp.³⁶

Since 1970, courts have been more receptive to theories which hold landlords liable to tenants for the criminal acts of third parties.³⁷ In

to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.

Goldberg, 38 N.J. at —, 186 A.2d at 293; see also *Tirado v. Lubarsky*, 49 Misc. 2d 543, 268 N.Y.S.2d 54 (N.Y. Civ. Ct.), *aff'd mem.*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (N.Y. App. Term. 1966) (plaintiff not allowed recovery from loss of property from burglary by third person because the burglary was not the natural and continuous sequence of an act initiated by the landlord's negligence in failing to replace the front door lock).

34. Certain circumstances did warrant imposition of liability. If the injuring party was an employee or an agent of the landlord, acting within some capacity of employment, the landlord could be liable for the employee's criminal acts against tenants. See *Sayer v. Boyles*, 280 Ala. 153, 190 So. 2d 707 (1966); *Hall v. Smathers*, 240 N.Y. 486, 148 N.E. 654 (1925).

Liability also could be imposed for negligent hiring, if the landlord knew at the time an employee was hired that the employee was a dangerous person or if the landlord retained such an employee in his service after he has learned or should have learned of the employee's dangerous tendencies. *Svacek v. Shelley*, 359 P.2d 127 (Alaska 1961); see also *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980), *appeal denied*, 392 So. 2d 1374 (Fla. 1981) (developer who permitted an employee to have access to tenant's townhouses was chargeable with such information concerning the employee's background as could be discerned from reasonable inquiry).

35. Several other grounds have been noted as reasons for landlords nonliability:

[J]udicial reluctance to tamper with the traditional common law concept of the landlord tenant relationship; . . . the vagueness of the standard which the landlord must meet; the economic consequences of the imposition of the duty; and conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.

Kline, 439 F.2d at 481.

36. 439 F.2d 477 (D.C. Cir. 1970).

37. Though *Kline* is cited as the landmark case in imposing a duty of protection on the landlord, the groundwork had been laid earlier. In *Ramsay v. Morrissette*, 252 A.2d 509 (D.C. 1969), a tenant was injured in an assault by an intruder who forced his way into the tenant's apartment. The tenant-plaintiff alleged the landlord was negligent on four relevant grounds: failure to replace a deceased full-time manager who had taken care of problems in the building; failure to apprise police of the dangerous conditions in the building; failure to install a lock on the front door; and failure to keep intruders and strangers from using the hallways as urinals and places to sleep. *Id.* at 512.

Reversing the trial court's summary judgment, the court said that the landlord was under a duty to use reasonable care concerning those portions of the building over which the land-

Kline, a tenant brought suit against her landlord for injuries sustained when she was assaulted in the common hallway of her apartment house. Ms. Kline established that there had been a significant decline in security measures during the seven years since the original lease between the landlord and herself was executed.³⁸

The court found that the landlord owed a duty to the tenant for three reasons. First, the "logic of the situation itself" indicated that the landlord owed the tenant some duty of protection. The court reasoned that between a landlord and a tenant, the landlord was in a far superior position to reduce the risks to tenants of third party criminal acts.³⁹ Since the landlord had or should have had knowledge of the dangerous conditions existing in the building, it was only fair to hold him responsible for minimizing the opportunities for crime.⁴⁰

lord retained control. *Id.* at 511. Though the court stopped short of imposing a duty on the landlord to actually protect his tenants, the landlord's actions were to be judged by "what is reasonable in all circumstances." *Id.* at 513. In dicta, the court indicated that "in these changing times of modern urban living circumstances exist which may require that the landlord's duty of reasonable care encompass steps to deter or prevent criminal acts against his tenant." *Id.* Though no specific duty or standard of care was imposed, the court did potentially extend a landlord's liability for criminal acts of third parties against his tenants.

To a lesser degree, *Kline* also relied upon *Kendall v. Gore Properties*, 236 F.2d 673 (D.C. Cir. 1956), as a basis for extending the landlord's liability. In *Kendall*, a negligent hiring case, the focus was on the landlord's duty to perform sufficient investigation of an employee's background before allowing him access to tenants' apartments. *Id.* at 680. However, *Kline* interpreted the *Kendall* case as creating an obligation on the landlord's behalf to protect tenants against the criminal acts of third parties, whether the criminal act was perpetrated by an employee or not. *Kline*, 439 F.2d at 484.

38. When Kline first signed the lease a doorman was on duty twenty-four hours a day. At all times, an employee in the lobby was capable of observing everyone using the building's elevators. There were attendants stationed at the dual entranceway of the building's garage. One of these attendants was always in position to observe persons entering the apartment building or garage. *Kline*, 439 F.2d at 479.

Seven years later, the doorman at the main entrance was gone. The desk in the lobby was left unattended a great deal of the time and the number of garage personnel had decreased. Moreover, an entrance from the building onto the street was regularly left unlocked. The decline in security coincided with an alarming increase in the number of personal and property crimes committed against the tenants in and from the common hallways of the building. The landlord had notice of these crimes, and Kline had personally urged the landlord to secure the building. *Id.* The assault upon Kline occurred only two months after another female tenant had been similarly attacked. *Id.* at 480.

39. Common law traditionally has implied an obligation upon the landlord to protect tenants from harm caused by physical defects in areas over which the landlord has retained control. See *supra* note 18 and accompanying text. *Kline* expanded this duty by requiring the landlord to keep the common areas free from more than physical defects. *Kline*, 439 F.2d at 481.

40. *Kline*, 439 F.2d at 484. Further, the court reasoned that the landlord is better situated even than the police to take the necessary protective measures. The police do not have the ability or authority to thoroughly patrol private multiple unit dwellings. The landlord alone, acting upon his knowledge of the predictable risk, was in a position to prevent the injuries suffered by the tenant. *Id.*

Second, the court found an implied contractual obligation of the landlord to provide protective measures within his reasonable capacity.⁴¹ Since Ms. Kline had continued to pay the same amount of rent, she had the right to expect the premises to remain in their original condition for the duration of the lease. Any decline in the level of security from that level which had existed at the time of the execution of the original contract was a breach of a contractual duty.⁴²

Finally, the court found that a duty existed on the part of the landlord by virtue of the "special relationship" theory.⁴³ The court reasoned that a landlord and a modern urban apartment house dweller had a relationship that was more analogous to that of innkeeper and guest than to that of the traditional landlord and tenant.⁴⁴ Therefore, the modern landlord, similar in many aspects to an innkeeper,⁴⁵ has a duty to exercise reasonable care to protect tenants from the foreseeable criminal acts of third parties.⁴⁶

The *Kline* decision established the standard of care applicable to the duty of protection that a landlord owes his tenant. The standard articulated by the court was reasonable care in all the circumstances.⁴⁷ The

41. *Id.*

42. *Id.* (quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970)). However, Judge MacKinnon's dissent reveals a serious flaw in this argument. The declining state of security was evident to Ms. Kline, since she observed the decline each day she lived there. Thus, she could not have believed the level of security would remain the same. More importantly, Kline was on a month to month tenancy, as her original lease had terminated five years earlier. MacKinnon noted that "whatever contract existed was created at the beginning of the month and since there was no evidence of any alteration in the security precautions during the current month, there is no basis for any damage claim based on contract." *Kline*, 439 F.2d. at 492 (MacKinnon, J., dissenting).

MacKinnon also noted that the trial court had found no duty on the part of the landlord to use due care to protect tenants. Facts proving liability were never reached because no duty was ever established. However, the majority's decision found not only a duty, but additionally held the landlord liable as a matter of law. MacKinnon believed such a "*de novo* consideration of the facts" was unsubstantiated. *Id.* at 488 (MacKinnon, J., dissenting).

The judge also attacked the majority's rationale of foreseeability. "[O]ne solitary instance of an assault and robbery is an insufficient base to support a finding that assaults and robberies are a 'predictable' risk from which the landlord would have 'every reason to expect like crimes to happen again.'" *Id.* at 489 (MacKinnon, J., dissenting). MacKinnon believed the majority was concluding too much from too little. *See id.*

43. *See id.* at 485.

44. *Id.*

45. *Kline* implied that the innkeeper-guest and landlord-tenant relationships are similar because of the supervision and care or control of the premises exercised by both the innkeeper and the landlord. *Id.* at 482. Both tenant and guest relinquished a great deal of control to the landowner to provide for their protection. *Id.* at 483.

46. *Id.* Particular distinction was made between "foreseeable" and "possible" criminal acts. The landlord has a duty to guard against foreseeable criminal acts in the sense the acts are "probable and predictable," not simply "possible." *Id.*

47. *See id.* at 485. Having defined the standard to be applied, the court called attention

court noted that it was not requiring the landlord to become an insurer of the safety of his tenants, but was requiring the landlord "to take those measures of protection which are within his power and capacity to take, and which can reasonably be expected to mitigate the risk."⁴⁸ In *Kline*, the landlord failed to meet this standard when he allowed the security within the building to fall below the standard existing when the lease was made.⁴⁹

By recognizing a duty of protection owed to tenants by landlords and by defining the applicable standard of care, *Kline* placed the traditional immunity of the landlord in jeopardy. *Kline* also left many questions under the contract and tort theories of recovery unanswered.⁵⁰ The importance which the *Kline* opinion attached to the decrease in security measures during the term of the lease opens up the possibility that other courts could interpret the holding as limited to situations in which a landlord undertakes to provide protection and does so negligently,⁵¹ a not-unfamiliar principle in landlord-tenant cases.⁵² By implying from the lease itself a duty to provide reasonable safety, *Kline* clearly stands for the proposition that a landlord may be liable for nonfeasance with regard to foreseeable risks of criminal activity.⁵³

to the fact that the specific measures required to meet this burden vary with the individual circumstances. Evidence of customs among similarly situated landlords "may play a significant role in determining if the standard has been met." *Id.* at 486.

48. *Id.* at 487.

49. The court stated that although the landlord was not required to maintain the exact same security measures throughout the term of the lease, he was required to maintain the same relative degree of security. *See id.* at 486.

50. Since the landlord is under a contractual obligation to the tenant to maintain security measures for the duration of the lease comparable to those in existence when the lease began, would the landlord be under a different obligation to each tenant moving into the building at different times if security increases or decreases? Which level of security would a tenant moving out of the building and subsequently moving back in be entitled to expect—those measures in effect when the original lease was signed or those in effect when the new lease was executed? Is the landlord bound to forever provide the same degree of protection found when the original lease was made?

The tort theory of recovery also raised serious unanswered questions. What exactly is the extent of the landlord's duty? A landlord may understand that he is required to repair a dilapidated stairway, but how will he know how much protection is reasonable "under all circumstances?" How fair is it that the only time the question of adequacy of protection will be raised will be during a trial after an injury has occurred? How much must a landlord foresee? Because there are no easy answers, there is a wide range of rationales on the extent of a landlord's liability.

51. *See Note, Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489, 503 (1971).

52. *Williams v. William J. Davis, Inc.*, 275 A.2d 231 (D.C. 1971); *see also Hall v. Fraknoi*, 330 N.Y.S.2d 637 (N.Y. Civ. Ct. 1972).

53. *See Note, supra* note 22, at 1174-77.

C. *Landlord Liability Since Kline*

1. Tort

The theories of recovery established in *Kline* began a dispute as to the extent of a landlord's liability for criminal acts of third parties. Some courts are willing to predicate landlord liability upon the *Kline* rationale, thereby overturning common law precedent.⁵⁴ In so doing, these courts overcome formerly insurmountable hurdles in the negligence analysis by imposing a duty of protection on a landlord and by refusing to recognize the criminal acts of third parties as superseding, intervening causes. Several courts adopted the position that a special relationship between the landlord and the tenant gives rise to a duty of the landlord to protect the tenant.⁵⁵

a. The Special Relationship

The Michigan Supreme Court, in *Samson v. Saginaw Professional Building, Inc.*,⁵⁶ recognized a duty of protection based upon the landlord-tenant relationship.⁵⁷ A female employee of a commercial tenant brought suit against the landlord. She had sustained injuries when she was attacked in an elevator by a mental patient undergoing treatment at a clinic which also leased space in the building. The court held that the landlord had a duty to protect tenants and invitees from an unreasonable risk of physical harm.⁵⁸ Although the attack was the first such incident on the premises, the tenants had previously conveyed to the landlord their uneasiness over the presence of mental patients in the elevators and stairwells. The court held that the landlord had a duty to investigate the tenants' complaints and to take reasonable preventive measures. The landlord had breached his duty by failing to act after he perceived or should have perceived an unreasonable risk of harm to another.⁵⁹

The California courts also have considered this special relationship the-

54. See *infra* notes 56-91 and accompanying text.

55. See *supra* notes 25-31 and accompanying text.

56. 393 Mich. 393, 224 N.W.2d 843 (1975).

57. *Samson* also is the leading case establishing that a landlord should have some responsibility to his tenants for the criminal conduct of other tenants. The landlord's liability should depend on whether the criminal act was foreseeable and whether the landlord's conduct was reasonable under the circumstances. *Id.* at ___, 224 N.W.2d at 849. The imposition of such a duty raises complex questions beyond the scope of this comment concerning how closely a landlord must assess the criminal propensities of a tenant and his invitees. For a discussion of a landlord's potential liability for the criminal acts of other tenants, see Recent Developments, *Samson v. Saginaw Professional Building, Inc.: The Landlord's Duty to Protect Against Crimes by Tenants and Their Invitees*, 62 VA. L. REV. 383 (1976).

58. See *Samson*, 393 Mich. at ___, 224 N.W.2d at 845.

59. See *id.*, at ___, 224 N.W.2d at 849.

ory. In *O'Hara v. Western Seven Trees Corp. Intercoast Management*,⁶⁰ a female tenant brought suit against her landlord seeking damages as a result of injuries she sustained when she was raped in her apartment.⁶¹ The court noted that no California decision had ever held a landlord liable for failing to protect his tenants against third party criminal conduct.⁶² Nevertheless, the *O'Hara* court recognized a special relationship between the landlord and the tenant. The court found that this particular criminal act was foreseeable because the landlord was aware of other rapes that had occurred in the area and even had composite drawings of the suspect involved. Since the landlord had failed to protect the tenant from this foreseeable attack, he was held liable.⁶³

A large number of courts have declined to impose a duty based upon the mere existence of a landlord-tenant relationship.⁶⁴ Since the special

60. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). The court relied upon the RESTATEMENT (SECOND) OF TORTS:

Special Relations Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

RESTATEMENT (SECOND) OF TORTS § 314A (1965), cited in *Samson*, 393 Mich. at ___, 224 N.J.2d at 849.

61. *O'Hara*, 75 Cal. App. 3d at 802, 142 Cal. Rptr. at 489.

62. See *id.* at 803, 142 Cal. Rptr. at 490.

63. See *id.*; see also *Olar v. Schroit*, 155 Cal. App. 3d 860, 202 Cal. Rptr. 457 (1984) (affirming the existence of a special landlord-tenant relationship which imposes on the landlord an obligation to protect the tenant); *Spar v. Obwoya*, 369 A.2d 173 (D.C. 1977) (affirming *Kline v. 1500 Massachusetts Ave. Apartment Corp.* and holding a landlord liable for tenant's injuries sustained during a robbery in a hallway of the apartment building); *Feld v. Merriam*, 314 Pa. Super. 414, 461 A.2d 225 (1983) (landlord liable for injuries sustained by tenant during an assault, because the landlord breached his duty to provide adequate protection from foreseeable criminal acts of third parties), *rev'd*, 506 Pa. 383, 485 A.2d 742 (1984).

64. See, e.g., *Flood v. Wisconsin Real Estate Inv. Trust, Inc.*, 497 F. Supp. 320 (D. Kan. 1980); *Whelan v. Dacoma Enters.*, 394 So. 2d 506 (Fla. Dist. Ct. App. 1981); *King v. Ilikai Properties, Inc.*, 2 Haw. App. 359, 632 P.2d 657 (1981); *Pippin v. Chicago Hous. Auth.*, 78 Ill. 2d 204, 399 N.E.2d 596 (1979); *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976); *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 207 S.E.2d 841 (1974).

The United States Court of Appeals for the Fourth Circuit, applying Virginia law, recently reaffirmed the traditional standard of limited liability for a landlord. In *Deem v. Charles E. Smith Management, Inc.*, No. 85-1996 (4th Cir. Sept. 8, 1986), the court relied on *Gulf Reston, Inc.*, 215 Va. 155, 207 S.E.2d 841, and determined that the landlord-tenant relationship created no special duty for a landlord to protect a tenant from an intentional criminal attack committed by an unknown third person. *Deem* had been sexually attacked

relationship theory of liability considers no external factors, such as the circumstances under which the particular incident occurred, rejection of the special relationship approach may be justified. Indeed, a duty to protect tenants based solely upon this special relationship moves the landlord dangerously close to becoming an insurer of his tenants' safety.⁶⁵ A landlord could be liable for criminal acts even though he has no knowledge of the dangerous condition of the premises. Similarly, the criminal assault upon the tenant may have been the first violent act on the landlord's property. In such instances, imposition of a duty seems harsh because of the obvious lack of foreseeability of the criminal acts.⁶⁶

b. Common Areas

Other courts, while unwilling to impose a general duty of protection on the landlord, nevertheless have found the landlord obligated to the tenants to keep the common areas of leased premises reasonably safe.⁶⁷ *Scott v. Watson*⁶⁸ is the leading case for the safe common areas proposition. In *Scott*, the personal representative of the estate of a tenant who was killed in an apartment complex's garage brought suit against the landlord. The court declined to impose upon the landlord a general duty to protect tenants from criminal activity. The court stated that the landlord's mere ownership of the property did not render him liable for such

in the parking lot of the apartment complex where she resided. She sued Charles E. Smith Management, Inc., alleging that the landlord had breached duties owed to her as a tenant for failing to adequately light the parking lot. She argued that this breach of duty had led, in part, to her injuries.

The Fourth Circuit declined to adopt Deem's contention that "safe conditions" or "safety," as used in the Virginia Residential Landlord and Tenant Act, meant that the landlord had to protect tenants from criminal attacks. See VA. CODE ANN. § 55-248.13 (Repl. Vol. 1986); see also *infra* note 105. Instead, the court found that those terms refer to the protection of the tenant from injuries caused by failures of the building. The court also noted that any change in the state of the law had to come from the Virginia General Assembly.

65. The New Jersey Supreme Court may be close to imposing a duty of protection upon the landlord based upon a special relationship. In *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436 (1980), the court concluded that the time was ripe to reconsider the general principle that the landlord-tenant relationship imposes no duty on the landlord to safeguard the tenant from crime. See *id.* at —, 412 A.2d at 441; see also *Scott*, 278 Md. at —, 359 A.2d at 553.

66. *Flood*, 497 F. Supp. at 322. Georgia courts have held a landlord liable to his tenants for failure to take steps to alleviate a known dangerous condition. See *Smith v. General Apartment Co.*, 133 Ga. App. 927, 213 S.E.2d 74 (1975); *Warner v. Arnold*, 133 Ga. App. 174, 210 S.E.2d 350 (1974). Though both decisions present a well reasoned evaluation of the proximate cause element of the negligence action, neither concisely defines the underlying basis of the landlord's duty.

67. See, e.g., *Secretary of HUD v. Layfield*, 88 Cal. App. 3d 28, 152 Cal. Rptr. 342 (1978); *Spar v. Obwoya*, 369 A.2d 173 (D.C. 1977); *Escobar v. Brent Gen. Hosp.*, 106 Mich. App. 828, 308 N.W.2d 691 (1981); *Sheppard v. Drucker & Falk*, 63 N.C. App. 667, 306 S.E.2d 199 (1983).

68. 278 Md. 160, 359 A.2d 548 (1976).

injuries sustained by the tenants.⁶⁹ The traditional obligation included only a duty to repair or maintain rather than a duty to protect.⁷⁰ However, *Scott* extended the landlord's duty to include any situation where portions of the leased premises were under the landlord's direct control. In those circumstances, the landlord was required to take reasonable measures to eliminate any condition which contributed to criminal acts. The court imposed a duty upon the landlord to take reasonable and ordinary care to keep leased premises safe and to prevent injuries to tenants caused by criminal acts of third parties. The general level of crime in the individual neighborhood would be considered in determining whether or not the landlord had breached his duty. Liability could be imposed whenever the landlord's breach enhanced the likelihood of the particular crime that actually occurred.⁷¹

Arguably, extension of the landlord's duty with respect to the common areas is preferable to imposition of a duty based on a landlord-tenant special relationship. The common areas theory is appealing because the duty of a landlord would be that which a reasonably prudent landlord should expect to satisfy anyway—the duty to take reasonable and ordinary care to keep the common areas of leased premises safe. Additionally, because of the landlord's well-defined areas of responsibility, the factual determination of whether the landlord had met his duty would be simplified. Establishing a rebuttable presumption of landlord negligence for criminal acts occurring inside a tenant's apartment would insure that liability would not be artificially avoided merely because the criminal act did not occur in a common area.⁷²

c. Assumption of Duty

Several courts that have rejected the common areas and special relationship rationales have based landlord liability upon the voluntary assumption of a duty that is negligently performed. This rationale is analo-

69. *See id.* at ___, 359 A.2d at 552.

70. *Id.*; cf. RESTATEMENT (SECOND) OF PROPERTY § 17.3 comment *l* (1977) (addressing the common law duty imposed upon the landlord to keep the premises free from physical defects and criminal intrusions).

71. *See Trice v. Chicago Hous. Auth.*, 14 Ill. App. 3d 97, ___, 302 N.E.2d 207, 209 (1973). For a discussion of the landlord's obligations arising from his exclusive control of certain parts of the premises, see W. PROSSER, PROSSER AND KEETON ON TORTS § 63 (5th ed. 1985).

72. It is arguable that a failure to raise the rebuttable presumption would allow a landlord to escape liability if the attacker entered through an unsafe common area, yet assaulted the tenant within the tenant's apartment. Further, the focus simply on the location of the attack would be an artificial means of cutting off recovery. Cf. *O'Hara v. Western Seven Trees Corp. Intercoast Management*, 75 Cal. App. 3d 798, 803, 142 Cal. Repr. 487, 490 (1977) (landlord will not be relieved of liability simply because an attack occurs within the tenant's apartment if the attacker gained entrance through an unsafe common entranceway).

gous to the common law doctrine of negligent repair.⁷³ Duties voluntarily assumed by the landlord must neither increase the risk of harm to the tenant nor cause the tenant injury because of reliance on the landlord's undertaking.⁷⁴

In *Pippin v. Chicago Housing Authority*,⁷⁵ the mother of a decedent brought a wrongful death action against a landlord. Her son, the guest of a tenant, was stabbed to death by that tenant in the lobby of the building. Security guards employed by the landlord were present but failed to prevent the attack.⁷⁶ The trial court granted summary judgment to the defendants, and the Supreme Court of Illinois affirmed the appellate court's decision to reverse and remand the case.⁷⁷ The court agreed with the defendants that a "special relationship" which would create a duty of protection on the part of the landlord did not exist in this case.⁷⁸ Rather, the court held that the established principle that liability can arise from the negligent performance of a voluntary undertaking applied in this case.⁷⁹ The court explained that the duty arising was limited by the extent of the undertaking. Thus, the landlord could not be held liable for the negligent performance of the guard services, but could be held liable for the negligent hiring of the security services.⁸⁰ The court held that the trier of fact must determine whether or not the defendants had breached their duty.⁸¹

73. See *supra* note 17.

74. An affirmative manifestation to the tenant of ongoing security efforts may be considered a voluntary assumption of duty. In *Olar v. Schroit*, 155 Cal. App. 3d 861, 202 Cal. Rptr. 457 (1984), the landlord made various false and fraudulent representations to the tenant concerning the security of the complex. Subsequently, the tenant was robbed and raped when an intruder gained entrance through a defective security gate. *Id.* at ___, 202 Cal. Rptr. at 459. The court held that the landlord's blatant advertisement of various security measures constituted "a voluntary undertaking compounding their ordinary duty. Defendants thus were obligated to exercise a heightened degree of due care in the performance of their advertised undertaking." *Id.* at ___, 202 Cal. Rptr. at 464; see *Ten Assocs. v. McCutchen*, 398 So. 2d 860 (Fla. Dist. Ct. App. 1981); *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 (1983); *Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134, 365 N.Y.S.2d 239 (1975). See generally RESTATEMENT (SECOND) OF TORTS § 323 (1965) (discussing liability of a party who fails to exercise reasonable care in an undertaking to render services).

75. 78 Ill. 2d 204, 399 N.E.2d 596 (1979).

76. The tenant had approached the two security guards in the lobby and asked them to remove Pippin from her apartment. They told her they could not become involved in a "domestic problem" and suggested she call the police. She left the lobby but returned a few minutes later, along with Pippin. The tenant and Pippin then became involved in an altercation and upon separating them, the security guards saw that the tenant had a knife, and Pippin had been stabbed. *Id.* at ___, 399 N.E.2d at 597-98.

77. *Id.* at ___, 399 N.E.2d at 596.

78. *Id.* at ___, 399 N.E.2d at 598.

79. *Id.* at ___, 399 N.E.2d at 599.

80. If the landlord had employed a security service without proper investigation of the qualifications of the service, then the landlord would be liable for injuries to his tenants caused by the service's inadequacies. *Id.*

81. *Id.* at ___, 399 N.E.2d at 600.

Pippin is illustrative of the inherent limitations in an assumption of duty case. Only the landlord who endeavors to provide extra security measures would risk increasing his potential liability.⁸² While the ordinary citizen may be afforded some protection by the "good samaritan" laws for the voluntary assumption of duty, landlords enjoy no such protection.⁸³ Therefore, under the assumption of duty rationale, the landlord operating without statutory or judicial compulsion may be discouraged from providing any security at all, lest he be found liable for its inadequacy.

d. Foreseeability

The New Jersey Supreme Court has taken a somewhat unique approach to imposing a protective duty on the landlord. In *Braitman v. Overlook Terrace Corp.*,⁸⁴ a tenant brought an action against his landlord to recover for property stolen when his apartment was burglarized.⁸⁵ The thieves apparently gained access to the apartment because of the landlord's failure to repair a defective deadbolt lock on the door of the apartment.⁸⁶

The court approved the appellate division's observation that a land-

82. Provision of commonplace security measures, i.e., doors, door locks, windows and outside lighting, probably would not be considered a voluntary assumption of duty. See *Riley v. Marcus*, 125 Cal. App. 3d 103, 177 Cal. Rptr. 827, 831 (1981); *Gant v. Flint-Goodridge Hosp.*, 359 So.2d 279 (La. Ct. App. 1978).

83. Some jurisdictions have adopted "good samaritan" laws encouraging parties to act where there is otherwise no legal obligation. For example, the Virginia statute reads in pertinent part:

Any person who, in good faith, renders emergency care or assistance, without compensation, to any injured person at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital, medical clinic or doctor's office, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance.

VA. CODE ANN. § 8.01-225 (Repl. Vol. 1984); see also CAL. HEALTH & SAFETY CODE § 1799.102 (West Cum. Supp. 1986); IND. CODE ANN. § 34-4-12-1 (Burns 1973). Unfortunately, no such laws exist in the landlord-tenant context.

84. 68 N.J. 368, 346 A.2d 76 (1975).

85. *Id.* at ___, 346 A.2d at 78.

86. *Id.* at ___, 346 A.2d at 77-78. The RESTATEMENT (SECOND) OF PROPERTY § 17.3 (1977) states that a landlord is subject to liability to his tenant for physical harm caused by a dangerous condition on the property retained in the landlord's control. Door locks on the entrance to the tenant's apartment are considered property retained within the landlord's control. In *Braitman*, the deadbolt lock on the plaintiff's apartment had been broken for more than a week, during which time the plaintiffs had complained repeatedly to the landlord and had been told that the matter would be "taken care of." *Braitman*, 68 N.J. at ___, 346 A.2d at 77-78. Thus the court in *Braitman* could have imposed liability based on RESTATEMENT (SECOND) OF PROPERTY § 17.3.

lord-tenant relationship alone does not impose a duty of protection upon the landlord. However, the court also recognized the "recent judicial trend toward expanding the scope of duty on the part of landlords with respect to tenant security."⁸⁷ The court used a unique foreseeability theory to impose liability on the landlord. The key question under this theory was the foreseeability of a theft resulting from the landlord's failure to fix a defective lock. In view of the prior break-ins in the vicinity of the defendant's building, the trial court could reasonably find that the burglary was foreseeable.⁸⁸

The use of this foreseeability theory is troublesome. It is generally understood that foreseeability alone does not justify the imposition of a duty;⁸⁹ rather, foreseeability defines and limits the scope of a preexisting duty based upon the relationship of the parties.⁹⁰ The court's foreseeability analysis takes no account of the relationship between the parties. Instead, the focus is entirely on whether the event itself was foreseeable. The requisite balancing of interests by consideration of factors such as the parties' relationship and the nature of the risk is therefore eliminated.⁹¹

87. *Braitman*, 68 N.J. at ___, 346 A.2d at 79.

88. *See id.* at ___, 346 A.2d at 83. The court also used this foreseeability theory to overcome the traditional proximate causation problem. There was sufficient causal connection between the landlord's negligence and the tenant's loss to hold the landlord responsible since "a reasonable man would have recognized the possibility of the enhanced risk that a defective lock would create." *Id.* at ___, 346 A.2d at 84. Therefore, the landlord was not allowed to exculpate himself on the theory of an intervening third party action. *Id.*

89. Most courts have held that a landlord has no duty to act until the foreseeable criminal event poses some sort of immediate risk of injury to another on the landlord's property. *See, e.g., Cross v. Chicago Hous. Auth.*, 74 Ill. App. 3d 921, 393 N.E.2d 580 (1979), *aff'd*, 82 Ill. 2d 313, 412 N.E.2d 472 (1980); *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 224 N.W.2d 843 (1975).

90. The court in *Wytupeck v. Camden*, 25 N.J. 450, 136 A.2d 887 (1957), aptly summarized:

Duty arises out of a relation between the particular parties that in right reason and essential justice enjoins the protection of the one by the other against what the law by common consent deems an unreasonable risk of harm, such as is reasonably foreseeable Duty is largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men

Mayer v. Housing Auth., 84 N.J. Super. 411, 420-21, 202 A.2d 439, 444 (N.J. Super. Ct. App. Div. 1964) (quoting *Wytupeck*, 25 N.J. at ___, 136 A.2d at 893).

91. The *Braitman* ruling greatly weakens any precedential value of *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 186 A.2d 291 (1962). The *Goldberg* court clearly said "[w]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." *Id.* at ___, 186 A.2d at 293. According to *Goldberg*, "[t]he question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it." *Id.*

2. Contract

a. Express Warranty of Security

An express warranty of security can be a basis for imposing a duty upon a landlord to provide safe premises for his tenants. In *Flood v. Wisconsin Real Estate Investment Trust*,⁹² a tenant brought an action against her landlord to recover damages sustained when she was raped in her apartment.⁹³ The tenant introduced evidence showing that she had moved into the complex because of the various security measures actively promoted by the landlord. Indeed, the landlord expressly had advertised the safety of the complex.⁹⁴

The court concluded that the landlord had breached an express warranty of security by failing to maintain the premises in the condition advertised. The lease was interpreted as a contract containing reciprocal rights and obligations for both the landlord and the tenant beyond the traditional common law warranty of safe and habitable premises.⁹⁵ Since the advertisement included representations of express security measures, inducing reliance on the tenant's behalf, there were sufficient grounds to impose liability if the security measures were not maintained.⁹⁶

Similarly, in *Ten Associates v. McCutchen*,⁹⁷ the court found the landlord liable to a tenant who had been raped in her apartment. The court based the landlord's duty to the tenant on the warranties of security which were expressly stated in the tenant's lease.⁹⁸ The landlord also had verbally assured the tenant of the security of the building before she moved in. The court found these statements also created an additional express warranty of security.⁹⁹ These express warranties furnished the basis of the landlord's duty to provide the promised security.¹⁰⁰

Imposing liability which is based exclusively upon an express warranty of security greatly limits the landlord's scope of responsibility. Such an approach examines only the express terms charged between the landlord and the tenant. Thus, this theory limits the usefulness of each case to its own facts because the express terms will differ with each tenant. There-

92. 503 F. Supp. 1157 (D. Kan. 1980).

93. *Id.* at 1159.

94. *Id.* at 1160.

95. *Id.*

96. *See supra* note 94 and accompanying text.

97. 398 So. 2d 860 (Fla. Dist. Ct. App. 1981).

98. *Id.* at 862. The lease contained an express promise for the provision of twenty-four hour security guard service. *Id.* at 861.

99. *See id.* at 862 n.2.

100. In the court's opinion, the advertisements stating that the apartment complex provided twenty-four hour security services also created an implied warranty of security. *Id.* at 861; *see* *Holley v. Mount Zion Terrace Apartments*, 382 So. 2d 98 (Fla. Dist. Ct. App. 1980). *But see* *Gant v. Flint-Goodridge Hosp.*, 359 So.2d 279 (La. Ct. App. 1978).

fore, the protection afforded tenants is greatly limited.¹⁰¹

b. Implied Warranty of Habitability

The concept that a landlord implicitly warrants the habitability of residential premises has found broad acceptance in the courts in the United States.¹⁰² Jurisdictions adopting the implied warranty concept have abrogated the common law rules of *caveat emptor* and no-repair. Thus, the landlord has a duty to deliver habitable quarters at the inception of the tenancy and the responsibility to maintain habitable premises throughout the term of the lease.¹⁰³ However, before the New Jersey Supreme Court decision in *Trentacost v. Brussel*,¹⁰⁴ no court had recognized the implied warranty of habitability as an independent basis of landlord liability for

101. The contract approach may lead to inequitable results. Suppose two tenants move into an apartment building at different times. One tenant receives express guarantees of security. The other tenant does not receive such guarantees. The landlord thus would be held accountable only to one tenant.

Some landlords have tried to limit their potential liability with the use of exculpatory clauses. These clauses typically relieve the landlord of liability for personal injury or property damage to the tenant. At common law these clauses were enforceable. *College Mobile Home Park & Sales, Inc. v. Hoffmann*, 72 Wis. 2d 514, 516, 241 N.W.2d 174, 176 (1976) (citing *Queens Ins. Co. v. Kaiser*, 27 Wis. 2d 571, 13 N.W.2d 247 (1965)). Today, many states have statutes voiding exculpatory clauses as against public policy. *See, e.g.*, HAW. REV. STAT. § 521-33 (1976); MD. REAL PROP. CODE ANN. § 8-105 (1974). Thus, such exculpatory provisions are generally ineffective in relieving a landlord from potential liability to his tenants for the foreseeable criminal acts of third parties. *See Smith v. General Apartment Co.*, 133 Ga. App. 927, 213 S.E.2d 74 (1975); *Vermes v. American Dist. Tel. Co.*, 312 Minn. 33, 251 N.W.2d 101 (1977); *Cardona v. Eden Realty Co.*, 118 N.J. Super. 381, 288 A.2d 34 (N.J. Super. Ct. App. Div. 1972).

102. *See Knight v. Hallsthammar*, 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981); *Hsu v. Thomas*, 387 A.2d 588 (D.C. 1978); *Lau v. Bautista*, 61 Haw. 144, 598 P.2d 161 (1979) (*per curiam*); *Pole Realty Co. v. Sorrells*, 84 Ill. 2d 178, 417 N.E.2d 1297 (1981).

The courts in Alabama, Florida, Idaho and Kentucky have refused to imply a warranty of habitability in residential leases. *See Martin v. Springdale Stores, Inc.*, 354 So. 2d 1144 (Ala. Civ. App.), *cert. denied*, 354 So. 2d 1146 (Ala. 1978); *Alvarez v. DeAquirre*, 395 So. 2d 213 (Fla. Dist. Ct. App. 1981); *Worden v. Ordway*, 105 Idaho 719, 672 P.2d 1049 (1983); *Miles v. Shauntee*, 664 S.W.2d 512 (Ky. 1983). The warranty has not been extended to the rental of a used single family dwelling in Indiana. *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982).

A majority of states recognize the implied warranty of habitability by statute. *See, e.g.*, ARIZ. REV. STAT. ANN §§ 33-1324 to -1364 (1974 & Cum. Supp. 1985); CAL. CIV. CODE §§ 1941, 1941.1, 1941.2, 1942 (West 1985 & Cum. Supp. 1986); DEL. CODE ANN. tit. 25, § 5303 (1975 & Cum. Supp. 1984); KY. REV. STAT. & R. SERV. 383.595, .625, .635, .640, .645, .655 (Baldwin Cum. Supp. 1986); MICH. COMP. LAWS ANN. § 554.139 (West Cum. Supp. 1986); N.Y. REAL PROP. LAW § 235b (McKinney 1968 & Cum. Supp. 1986); VA. CODE ANN. §§ 55-248.13, -248.23, -248.25 (Repl. Vol. 1986).

103. *See Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978); *Hilder v. Saint Peter*, 144 Vt. 150, 478 A.2d 202 (1984).

104. 82 N.J. 214, 412 A.2d 436 (1980).

crimes committed against tenants by third parties.¹⁰⁵

105. A few courts had imposed liability upon the landlord for third party criminal acts where the landlord failed to perform a statutorily imposed obligation. In *Brownstein v. Edison*, 103 Misc. 2d 316, 425 N.Y.S.2d 773 (Sup. Ct. 1980), decedent's plaintiff brought suit against the landlord for wrongful death. The plaintiff alleged that the death was caused by a failure on the landlord's behalf to repair or replace defective locks on the front door of the building. *Id.* at ___, 425 N.Y.S.2d at 774. The court concluded that building security was encompassed within the purview of § 235b of the N. Y. REAL PROP. LAW. *Brownstein*, 103 Misc. 2d at ___, 425 N.Y.S.2d at 777-75.

A statutory warranty of habitability imposing an obligation upon the landlord to protect his tenants arguably does not exist in Virginia. Generally, Virginia courts have not held a landlord liable for the criminal acts of third parties based upon the lack of foreseeability rationale of *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 207 S.E.2d 841 (1974); *see supra* note 64. However, a recent Norfolk Circuit Court decision challenged this rule.

In *Kane v. Dabu*, No. L-83-2151 (Norfolk Cir. Ct. Feb. 4, 1985) (unpublished opinion), the tenant sought damages for injuries sustained when she was raped inside her apartment. The tenant had asked the landlord repeatedly to repair the deadbolt mechanism on the front door of her apartment. After at least four such requests, the landlord replaced the lock, assuring the tenant of its suitability. That same evening, an intruder entered the apartment through the front door and raped the tenant. Evidence was introduced at trial that showed the lock to be completely ineffective and capable of being opened with the slightest push.

At trial, counsel for the plaintiff, William Breit, argued that the criminal attack by the third party was foreseeable in light of the inadequacy of the lock. Counsel relied on § 55-248.13 of the Code of Virginia, which states that the landlord shall:

- (1) Comply with the requirements of applicable building and housing codes materially affecting *health and safety*;
 - (2) Make all repairs and do whatever is necessary to put and keep the premises in a *fit and habitable condition*;
 - (3) Keep all common areas shared by two or more dwelling units of the premises in a clean and *safe* condition;
 - (4) Maintain in good and *safe* working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators, supplied or required to be supplied by him;
 - (5) Provide and maintain appropriate receptacles and conveniences, in common areas, for the collection, storage, and removal of ashes, garbage, rubbish and other waste incidental to the occupancy of two or more dwelling units and arrange for the removal of same; and
 - (6) Supply running water and reasonable amounts of hot water at all times and reasonable heat in season except where the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant or supplied by a direct public utility connection.
- (b) If the duty imposed by paragraph (1) of subsection (a) is greater than any duty imposed by any other paragraph of that subsection, the landlord's duty shall be determined by reference to paragraph (1).
- (c) The landlord and tenant may agree in writing that the tenant perform the landlord's duties specified in paragraphs (3), (5) or (6) of subsection (a) and also specified repairs, maintenance tasks, alterations and remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord, and if the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

VA. CODE ANN. § 55-248.13 (Repl. Vol. 1986) (emphasis added).

The court heard arguments that this section of the code superseded the rule in *Gulf Reston*, 215 Va. 155, 207 S.E.2d 841. Plaintiff contended "safe" in this context meant "fit

Trentacost is radical because it represents the merging of two different areas of landlord-tenant law: the traditional warranty of habitability, and the duty of the landlord to protect his tenants from foreseeable criminal acts. This case involved a sixty-one year old female who was injured when she was attacked and robbed in the common hallway of the building.¹⁰⁶ The entire court agreed that the landlord was liable for failing to guard against a foreseeable crime.¹⁰⁷ The decision could have been based entirely on such a holding.

Instead, a plurality of the court went beyond the negligence principles established in *Braitman v. Overlook Terrace Corp.*¹⁰⁸ While the court in *Braitman* based the landlord's liability upon the foreseeability of the particular criminal activity, three justices in *Trentacost* concluded that an alternative theory of recovery was the warranty of habitability implied in the lease.¹⁰⁹ The landlord's breach of this warranty made him "liable to the tenants for injuries attributable to that breach."¹¹⁰ Thus, foreseeability was discarded as a limiting factor on the landlord's duty.¹¹¹ The court reasoned that "since the landlord's implied undertaking to provide adequate security exists independently of his knowledge of the risks, there is no need to prove notice of such a defective condition to establish the landlord's contractual duty."¹¹² In effect, the court's recognition of an implied warranty of habitability as a basis for liability meant the landlord would be liable absolutely for any contractual breach.¹¹³

and habitable, free from foreseeable criminal attacks." Therefore, the breach of the landlord's duty to provide an adequate lock was negligence per se. A tenant's rights should then include not only a privilege to terminate the lease, but a right to seek damages for an injury sustained as a result of the statutory breach.

The court agreed with plaintiff that the statutory provisions overruled *Gulf Reston*. Thus, the plaintiff's cause of action was recognized. A jury award of \$7,000.00 was immediately appealed to the Supreme Court of Virginia. The only issue raised on appeal was negligent repair, not the new found cause of action. The court denied the landlord's petition for certiorari. Telephone interview with William Breit, Attorney at Law, Norfolk, Virginia (Sept. 19, 1985).

106. *Trentacost*, 82 N.J. at ___, 412 A.2d at 438.

107. *Id.* at 412 A.2d at 445.

108. 68 N.J. 368, 346 A.2d 76 (1975). The *Braitman* court had considered but declined to resolve whether the implied warranty of habitability was "flexible enough to encompass appropriate security devices." *Id.* at ___, 346 A.2d at 87.

109. *Trentacost*, 82 N.J. at ___, 412 A.2d at 442-43. Writing for the majority, Justice Pashman concluded that because of increasingly unsafe urban conditions, the landlord's control over the common areas, the tenant's inability to secure the common areas, and the landlord's superior bargaining position, the "landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises." *Id.* at ___, 412 A.2d at 443.

110. *Id.*

111. See *supra* notes 90-92 and accompanying text.

112. *Trentacost*, 82 N.J. at ___, 412 A.2d at 443.

113. The dissent adamantly opposed such an application of the implied warranty of habitability. Justice Clifford characterized the decision as an "unwarranted and ill-advised"

Arguably, the *Trentacost* standard is too broad because liability could be imposed upon the landlord for conditions that arise beyond his control. In effect, the landlord becomes the insurer of the tenant's safety. Adherence to this standard would force the landlord to adopt expensive security measures to protect his tenants and yet be liable for any injury to tenants that happened to occur. These costs then would be passed on to the tenant in the form of higher rent.¹¹⁴

III. CONCLUSION

Courts may base a landlord's duty to protect his tenants from crimes committed by third parties on tort or contract principles. If the duty is based on an express contract theory, the tenant's protection is limited to the terms of the individual contract. No consideration is made of societal policy factors. Further, each case turns on the particular facts involved. Reliance on an implied warranty of habitability practically imposes strict liability on the landlord. Without the requirement of notice, not only must a landlord be prepared to foresee the criminal actions of third parties and take steps to prevent such acts, he also must continually inspect the leased premises for defects. Arguably, this standard is far too burdensome.

The tort standard is the most efficient ground upon which to determine the question of landlord liability for third party crimes. The various theories balance the competing interests of providing protection for a tenant against requirements of foreseeability and proximate causation. Creation of a duty in tort ensures the tenant's safety. The landlord likewise is protected from extensive liability because his duty is limited to foreseeable crimes. The tort standard does not rely upon outmoded or changing property law notions, but is premised upon well-settled negligence principles.

Accordingly, courts should adopt the safe common areas theory of negligence as a basis for determining a landlord's liability. Such a theory would encourage the landlord to secure those areas used by all tenants. A failure on the landlord's part to comply with this duty would be easily discernible by a trier of fact.

An attack occurring in a tenant's apartment should subject the land-

predication of liability upon the landlord based upon the landlord-tenant relationship and loose notions of foreseeability. *Id.* at ___, 412 A.2d at 446 (Clifford, J., dissenting in part). Justice Clifford said the imposition of liability "must involve a fair balancing of the relative interests of the parties, the nature of the risk, and the public interest in the proposed solution." *Id.* at ___, 412 A.2d at 447 (Clifford, J., dissenting in part) (citing *Goldberg v. Housing Auth.*, 38 N.J. 578, 583, 186 A.2d 291, 296 (1962)).

114. Since the danger is greatest in those crime-ridden areas where the poor live, they alone will be singled out to pay for their own police protection in the form of increased rents. Arguably, the entire community should shoulder the burden, not those least able to afford it.

lord to liability if the assailant gained entrance because of poorly maintained common areas. To hold otherwise creates an arbitrary line unfairly relieving the landlord of liability.

C. Stephen Setliff

