"Am I My Brother's Keeper?": Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity

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I. INTRODUCTION

Property ownership begets responsibility. Not surprisingly, in recent years landowners, landlords, business owners, and other land possessors have, at times, been held responsible for injuries caused by the criminal acts of third persons that occur on their premises. While quite a bit of case law has developed over recent years as to a landowner's liability for criminal acts that have occurred on the premises, a landowner's liability for failing to disclose potential harm from criminal activity to prospective tenants or property buyers has not been established. It has also not been established whether a landlord has the duty to screen prospective tenants to protect other tenants from criminal behavior or a duty to warn other tenants of known criminal propensities of an existing tenant.

Finally, it is not clear whether a landlord or landowner may refuse to rent or sell to a particular individual or disclose concerns about the criminal propensity of certain individuals to other tenants or property

2. However, some courts have held a landlord liable for criminal acts committed against tenants who had not been warned of physical defects that made the premises susceptible to crime. See Tracy A. Bateman & Susan Thomas, Annotation, Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person, 43 A.L.R.5th 207 § 10a (1996).

3. See id. at § 37 (discussing liability of landlord for failure to protect from or warn of another tenant). This Article does not address the situation where a shopkeeper is asked to comply with a robber's demands in order to avoid injury to customers held as hostages. See Ky. Fried Chicken of Cal., Inc. v. Superior Court, 927 P.2d 1260, 1270 (Cal. 1997) (holding that shopkeeper does not have a duty to comply with criminal demands in order to protect customers); Vicki Lawrence MacDougall, Premises Liability After the KFC Case: Potential Liability of a Commercial Establishment to a Customer Injured By Provocation of an Armed Robber, 50 CONSUMER F'ING. L.Q. REP. 397, 398 (1996) (discussing whether scope of premises liability should be expanded to include "the duty to not provoke an armed robber, or to comply with the demands of an armed robber, to avoid unreasonably increasing the potential risk of harm to the customer").
owners without being subject to tort liability or violations of fair housing act statutes. A recent judicial decision in Texas requiring convicted child molesters to post disclosure signs on their residences and cars has also engendered controversy over the constitutional and privacy rights of these individuals.4

This Article will explore the landowner liability issues of whether to disclose or warn others about future criminal activity that might occur on the premises in the future. The duty to warn others about criminal activity is based on the tort concept of premises liability, while the duty to disclose the presence of criminals in the area is a recent departure from the common law rules of caveat emptor5 and caveat lessee. Part II will describe the historical development in tort law of premises liability for the criminal acts of others.6 This part will also discuss recent trends in premises liability law, including how premises liability theories impact issues of workplace violence, school violence, Internet site liability, terrorist activity, and insurance coverage.

While Part II focuses on the landowner’s potential duty to protect against criminal acts of third parties, Part III will address the issue of whether landowners have a duty to disclose or warn of premises susceptibility to criminal acts. Megan’s Law legislation, dealing with community notification about the presence of convicted sex offenders, raises a particularly troublesome disclosure issue.

Part IV examines landowner liability for refusing to rent or sell to individuals with criminal backgrounds or for disclosing to others the criminal propensity of a third party.7 Some jurisdictions have pro-

6. This Article will not address the issue of whether a landowner can be held liable for third party criminal attacks on adjacent premises. See, e.g., Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429, 430 (7th Cir. 1978) (presenting, in a diversity case, legal question of “whether the owner or occupier of land has a duty of reasonably guarding an invitee against criminal attacks that take place beyond the boundaries of his premises and on a public thoroughfare”); Kuzmic v. Ivy Hill Park Apartments, Inc., 688 A.2d 1018, 1021-22 (N.J. 1997) (holding that landlord did not owe a duty to tenant to protect him from known criminal danger on neighboring property).
7. In particular, the community notification laws under Megan’s Law have been challenged as violating common law privacy rights and constitutional rights such as due process and equal protection. Sex offenders have also claimed that these
ected landowners and their agents from liability for failing to disclose the presence of sex offenders in the neighborhood by legislating that such facts are not material to the transaction. This nondisclosure protection has been incorporated into existing psychological taint or stigma legislation which shields landowners from disclosing facts such as a previous death occurring on the property or that a previous occupant had been infected with AIDS. The Article concludes by suggesting that landowners who are aware of reasonably foreseeable criminal activity against occupiers of their premises should have a duty to disclose this information to either prospective or existing occupiers, particularly when there is a potential danger of harm to children.

II. PREMISES LIABILITY FOR CRIMINAL ACTS OF OTHERS

A. Historical Development Under Tort Law

To understand the dilemma courts and legislatures face in deciding whether or not to require landowners to disclose the potential for criminal activity on the premises, it is important to understand the development and current contours of premises liability for the criminal acts of others. Historically, courts held that there was no duty to protect others from third party criminal acts. Instead, the criminal act has been found to be the proximate cause of any injury and public policy dictated that the owner or occupier of property not be an insurer against third-party criminal behavior occurring on their premises. Nevertheless, courts are increasingly assigning liability where the criminal act is sufficiently foreseeable. Courts have created exceptions to the "no-duty-to-protect-others" rule based on either statutory obligation or the existence of a special relationship between the owner or occupier of the property and the crime victim.


10. Id. § 11.2, at 292 (describing the relationships of innkeeper and guest, school and pupil, and hospital and patient as examples of exceptions to the no-duty rule).
premises conditions contributing to criminal activity. The critical issue is whether or not a duty on the part of the landowner has been created, despite the historical "no-duty" to protect against the criminal acts of others. Once a duty is established, which is a question of law, the plaintiff must show a breach of that duty (a question of fact) and that the injury was proximately caused by the landowner's breach.

1. Creation of a Duty

a. Special Relationship Between Business Possessors or Landowners and Invitees

Business possessors or landowners have been held liable in tort for the criminal acts of third persons based on the assignment of a duty to warn or protect invitees under certain circumstances. Under the Restatement Second of Torts, section 344, a possessor of land held out to the public for business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment f clarifies the landowners' business possessor's duties explaining that:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Therefore, before a business possessor, who may or may not be the landowner, is charged with a duty, the business possessor must have

11. See Toscano Lopez v. McDonald's, 238 Cal. Rptr. 436, 510 (Ct. App. 1987) (holding that as a matter of law, the mass murder of 21 people in a San Ysidro McDonald's was "so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct").

12. See id. at 448 (determining that causation is typically a question of fact "but, where reasonable men will not challenge the absence of causality, the court may treat the question as one of law and take the decision from the jury").


14. Id. § 344 cmt. f.
knowledge from past experience that criminal activity is likely to occur or the nature of the possessor’s business must be such that criminal activity of third persons can reasonably be anticipated.\textsuperscript{15}

The issue of whether the possessor has a reason to know that criminal acts might occur is framed in the tort language of foreseeability. Foreseeability may be based on either the knowledge of prior similar criminal acts or the totality of the circumstances and may be considered a question of law in this context of determining duty.\textsuperscript{16} Some jurisdictions require that the foreseeability be in regards to a risk of \textit{imminent harm} to an invitee. For example, in \textit{MacDonald v. PKT, Inc.},\textsuperscript{17} the Michigan Supreme Court concluded that “merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees” but that they do not have a duty to anticipate third party criminal acts or provide security against such activity.\textsuperscript{18} The Virginia Supreme Court reiterated a similar rule in \textit{Thompson v. Skate America, Inc.}, holding that “despite the existence of that special relationship, the business owner does not owe a duty of care to protect its invitee unless it knows that criminal assaults against persons are occurring, or are about to occur, on the premises which indicate an imminent probability of harm to [its] invitees.”\textsuperscript{19} The court held that this duty does not arise until there is “notice of a specific danger just prior to the assault.”\textsuperscript{20}

When the court uses prior criminal activity to determine foreseeability and, hence, liability, one of the major issues is whether or not the prior crimes resembled closely enough the criminal activity generating the claimed injury. In \textit{Hendrickson v. Georgia Power Co.},\textsuperscript{21} the court applied the test of foreseeability as stated by the Georgia Supreme Court in \textit{Sturbridge Partners, Ltd. v. Walker},\textsuperscript{22} which requires the court to:

\begin{quote}
inquire into the location, nature and extent of prior criminal activities and their likeness, proximity or other relationship to the crime in question . . . .
While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical . . . . [What] is required is that the prior [incident] be sufficient to attract the [landlord’s] attention to the dangerous condition which resulted in the litigated [incident].\textsuperscript{23}
\end{quote}

Finding that the plaintiff had failed to prove a specific number of criminal incidents occurred on the defendant’s property before the

\begin{footnotes}
\footnotenumbers
\footnotetext[15]{WEISSENBERGER & McFARLAND, supra note 8, § 11.3, at 294-95.}
\footnotetext[17]{628 N.W.2d 33 (Mich. 2001).}
\footnotetext[18]{Id. at 44.}
\footnotetext[19]{540 S.E.2d 123 (Va. 2001).}
\footnotetext[20]{Id. at 127 (quoting Wright v. Webb, 362 S.E.2d 919, 922 (Va. 1987)).}
\footnotetext[21]{80 F. Supp. 2d 1374 (M.D. Ga. 2000).}
\footnotetext[22]{482 S.E.2d 339 (Ga. 1997).}
\footnotetext[23]{Hendrickson, 80 F. Supp. 2d at 1381 (quoting Sturbridge, 482 S.E.2d at 341).}
\end{footnotes}
murder, the court also found that even if the incidents could be shown, there was no evidence that they occurred in the same vicinity as the murder and "the nature of the previous criminal activity was vastly different than the incident that occurred here" because it "involved domestic disputes or rowdy behavior," not murder.

In fact, "[the most probative evidence on the question of whether a criminal act was foreseeable is evidence of prior criminal activity committed." However, the court in Connelly v. Family Inns of America, Inc., explained that factors such as where the prior crimes occurred, what type of crimes were committed, and the amount of criminal activity must be considered. Thus, the court held that the defendant motel owner should have been aware of criminal incidents occurring near the motel and should have taken reasonable steps to protect its guests from third party criminal acts.

The totality of the circumstances approach is where the court looks at whether the overall criminal activity in the area is at a level requiring the landowner to take reasonable action to provide safety to invitees, guests, or tenants. For example, in Isaacs v. Huntington Memorial Hospital the California Supreme Court accepted this test in lieu of relying only on the existence of prior similar acts to establish foreseeability and determined that a hospital failed to provide adequate security, resulting in a doctor being shot in the parking lot. The court found that the overall criminal activity in the area established foreseeability even though prior similar shootings had not occurred.

The California Supreme Court "refined" this rule in Ann M. v. Pacific Plaza Shopping Center by imposing a higher degree of foreseeability based on proof that there had been similar violent crimes on the premises or surrounding areas before a duty was imposed on a landowner. The Tennessee Supreme Court in McClung v. Delta Square Ltd. Partnership adopted what they called the "balancing

24. Hendrickson, 80 F. Supp. 2d at 1382.
25. Id.
27. Id. at 41.
28. Id.
29. Id. at 43.
30. See, e.g., Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999) (holding that the "totality of the circumstances" test should be applied to determine whether a landowner owes a duty to protect an invitee from third party criminal acts).
32. Id. at 659.
33. Id.
34. 863 P.2d 207 (Cal. 1993).
35. Id. at 215.
36. 937 S.W.2d 891 (Tenn. 1996).
approach" used in the Ann M. decision to balance the costs of imposing a duty on owners and occupiers of business premises to protect customers from the criminal acts of others against the foreseeability and gravity of harm from such third-party crimes.\textsuperscript{37}

The totality of the circumstances test was adopted by the South Dakota Supreme Court in Small v. McKennan Hospital.\textsuperscript{38} Citing the Isaacs decision, the court reversed a summary judgment for the defendant hospital to give the plaintiff an opportunity to show that foreseeability of the rape and murder of a hospital invitee after being abducted from the hospital parking area was not necessarily based on previous similar criminal acts, but rather on the surrounding facts and circumstances.\textsuperscript{39} Texas has also adopted a totality of circumstances test to determine whether or not the criminal act on the landowner's premises was foreseeable.\textsuperscript{40} The Texas Supreme Court in Timberwalk Apartment Inc. v. Cain\textsuperscript{41} concluded that:

[In determining whether the occurrence of certain criminal conduct on a landowner's property should have been foreseen, courts should consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them.\textsuperscript{42}]

Similarly, Massachusetts courts require that juries consider the totality of the circumstances to decide whether a criminal act was foreseeable. In Mullins v. Pine Manor College,\textsuperscript{43} the Massachusetts Supreme Court held that the plaintiff's failure to show prior criminal acts on campus was not a bar to the college's liability for the campus rape of a female student and that, instead, the totality of the circumstances should be used to determine whether the criminal act was foreseeable.\textsuperscript{44}

In some jurisdictions, neither the existence of prior similar acts nor an examination of the totality of the circumstances may be necessary in certain situations. Parking garages and other parking facilities

\textsuperscript{37} See id. at 901-02. See also Loren Singer, Tennessee Expands Merchants' and Property Owners' Duty to Protect Customers from Criminal Attacks, West's Legal News 11665, Nov. 1, 1996, available at 1996 WL 628668.

\textsuperscript{38} 403 N.W.2d 410 (S.D. 1987).

\textsuperscript{39} Id. at 413-15.

\textsuperscript{40} See George C. Hanks, Jr., When Sticks and Stones May Break Your Bones: An Overview of Texas Premises Liability Law for Business Owners, 60 Tex. B.J. 1010, 1014 (Nov. 1997).

\textsuperscript{41} 972 S.W.2d 749 (Tex. 1998).

\textsuperscript{42} Id. at 757. The court wrote: "[t]hese factors—proximity, recency, frequency, similarity, and publicity—must be considered together in determining whether criminal conduct was foreseeable. Thus, the frequency of previous crimes necessary to show foreseeability lessens as the similarity of the previous crimes to the incident at issue increases." Id. at 759.

\textsuperscript{43} 449 N.E.2d 331 (Mass. 1983).

\textsuperscript{44} Id. at 337.
have been considered inherently dangerous, such that the plaintiff need not show either prior criminal acts or meet the totality of the circumstances test in order to prove foreseeability.\textsuperscript{45} A business possessor may also be held liable for criminal acts resulting from a risk created by the business itself.\textsuperscript{46} In \textit{Osborne v. Stages Music Hall, Inc.},\textsuperscript{47} a bar customer was allowed to sue the bar owner for injuries she received on the public sidewalk outside the club during an assault by two men who had previously been ejected from the club.\textsuperscript{48} Although the injuries did not occur on the bar owner's premises, the court found that the club bouncers, who had ejected the men, had merely "exported the club's problems to the sidewalk and then ignored the troublemakers while allowing two female patrons to leave through locked doors into the path of potentially dangerous men."\textsuperscript{49} Therefore, the court held that the attack could be considered reasonably foreseeable, thus creating a duty by the club to guard against such an attack.\textsuperscript{50}

Finally, a business possessor or landowner can be held liable for negligently performing the voluntary undertaking of security measures to protect invitees.\textsuperscript{51} In \textit{Martin v. McDonald's Corp.},\textsuperscript{52} McDonald's was held liable for a franchise restaurant employee's death, which occurred during a robbery, because the corporation had voluntarily assumed a duty to protect the franchisee's employees by employing a regional security manager to act as a security supervisor for the franchisee.\textsuperscript{53}

\begin{quotation}

46. See, e.g., Merchs. Nat'l Bank v. Simrell's Sports Bar & Grill, Inc., 741 N.E.2d 383, 386 (Ind. Ct. App. 2000) (recognizing "the duty of a tavern owner, engaged in the sale of intoxicating beverages, to exercise 'reasonable care to protect guests and patrons from injury at the hands of irresponsible persons whom they knowingly permit to be in and about the premises'" (quoting Ember v. BFD, Inc., 490 N.E.2d 764, 769 (Ind. Ct. App. 1986) (citations omitted))); Jeffords v. Lesesne, 541 S.E.2d 847, 851 (S.C. Ct. App. 2000) (concluding that "the place and the character of the activity [a bar serving alcohol] was such as to raise a factual issue concerning the reasonable foreseeability of such conduct and the necessity of taking reasonable precautions, such as providing security").


48. Id. at 734.

49. Id.

50. Id.

51. See Merchs. Nat'l Bank, 741 N.E.2d at 388 (observing that "[t]he assumption of a duty creates a special relationship between the parties and a corresponding duty to act in the manner of a reasonably prudent person"); see also Andrew K. Miller, \textit{Understanding Premises Liability for Third Party Crimes}, 80 ILL. B.J. 311 (June 1992).


53. \textit{Id.} at 1078.
\end{quotation}
b. Special Relationship Between Innkeeper and Guest, Landlord and Tenant

Other special relationships have generated a duty to warn or protect others against third party criminal activity. Courts have recognized that a special relationship exists between innkeepers and guests such that the innkeeper has a duty to protect against reasonably foreseeable criminal acts against its guests. Using the analogy of the special relationship between the innkeeper and guest, the court in the landmark case of Kline v. 1500 Massachusetts Avenue Apartment Corp. held that an apartment landlord had a duty to protect tenants against foreseeable risks of crime. Since the Kline decision, the landlord-tenant relationship has been a broad source of potential landlord liability for third party crimes committed on rented premises.

Foreseeability for purposes of landlord liability is treated similarly to the concept of foreseeability for business possessors. For example, in Samson v. Saginaw Professional Building, Inc., the Michigan Supreme Court found that it was foreseeable to the landlord that a criminally insane patient from a state mental clinic renting space in the building could attack other building tenants in the common areas, such as the elevator. This foreseeability was based upon the magnitude of the risk and the fact that this concern had already been brought to the landlord's attention by other tenants in the building. However, in Gill v. New York City Housing Authority, the court refused to hold a landlord responsible for determining whether or not a mentally ill tenant would be dangerous to co-tenants and informing other tenants of such an evaluation.

The source of a landlord's duty is not restricted to a tort duty based on the special landlord/tenant relationship. In fact, some courts have

56. Id. at 484; see also Funchess v. Cecil Newman Corp., 615 N.W.2d 397, 401 (Minn. Ct. App. 2000) (noting that the special relationship between landlord and tenant is created "as the logical extrapolation of the existing common law governing the special-relationship between innkeeper and guest" when the tenant signed the lease and released to the landlord the exclusive control over security).
57. See Weissenberger & McFarland, supra note 8, § 11.15, at 309.
59. Id. at 849.
60. Id.
62. Id. at 370 ("[A] landlord is not competent to assess the dangerous propensities of his mentally ill tenants, nor does he have the resources, or control over his tenants necessary to avert the sort of tragedy presented by this case.").
held "that a landlord-tenant relationship is not a special relationship engendering a duty on the part of the landlord to protect tenants from criminal attack."63 The Virginia Supreme Court, in a trio of landowner premises liability cases decided on January 12, 2001,64 stated in Yuzefovsky v. St. John's Wood Apartments65 that "we have consistently rejected the contention that the relationship of landlord and tenant, without more, constitutes a special relationship such that a duty of care may arise with regard to the conduct of a third party."66 However, there are other exceptions which do create a landlord's duty such as where "an especial temptation and opportunity for criminal misconduct brought about by the defendant will call upon him to take precautions against it,"67 where an overriding foreseeability exists;68 or where a landlord voluntarily assumes a duty to provide security.69 Therefore, the landlord may have a duty to provide security in common areas to prevent foreseeable criminal activity, or a landlord who voluntarily undertakes to provide security may be held liable if this voluntary duty is performed negligently.70

Some jurisdictions have held condominium associations liable for injuries sustained in criminal attacks occurring on the premises based

64. See Dudas v. Glenwood Golf Club, Inc., 540 S.E.2d 129, 133 (Va. 2001) (holding that a business owner has no duty to warn or protect invitees from third party criminal acts unless business owner has knowledge of an imminent probability of harm); Thompson ex. rel. Thompson v. Skate Am., Inc., 540 S.E.2d 123, 130 (Va. 2001) (holding evidence showing that Skate America knew of perpetrator's propensity to assault other invitees sufficient to show that there was an imminent probability of harm generating a duty of care to protect its invitee); Yuzefovsky v. St. John’s Wood Apartments, 540 S.E.2d 134, 141 (Va. 2001) (holding that a special relationship between landlord and tenant generating a duty of care to protect a tenant is not established unless landlord knows "that criminal assaults against persons were occurring, or were about to occur, on the premises that would indicate an imminent probability of harm to [the tenant]").
66. Id. at 140.
67. Walls, 633 A.2d at 106 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 38, at 201 (5th ed. 1984)).
68. See id.
69. See id. (noting that a voluntary assumption of duty implies a duty to act with reasonable care).
70. See B.A. Glesner, Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises, 42 Case W. Res. L. Rev. 679, 695-702 (1992) (discussing how some courts have assessed liability against the landlord when the landlord has chosen to provide some security measures but has failed to exercise reasonable care in the performance of the undertaking); see also Bateman & Thomas, supra note 2, at 315 (discussing cases where courts have held that a landlord has a duty to protect tenants from criminal acts based upon express or implied contract principles).
on a tort theory parallel to the landlord's duty of care to tenants.\textsuperscript{71} If the association conducts itself in a way similar to a landlord by providing security, maintaining common areas, etc., a court will likely hold the association to a landlord's duty of care standard. In \textit{Frances T. v. Village Green Owners Ass'n},\textsuperscript{72} the California Supreme Court held that a condominium association could "be held to a landlord's standard of care as to the common areas under its control."\textsuperscript{73} Therefore, the court concluded that the victim, a condominium owner who was molested, raped, and robbed in her unit, had alleged facts sufficient to show that the association had a duty of care, which was breached when it failed to supply additional lighting. The court determined that this type of harm was foreseeable even though the foreseeability was based on prior crimes in the complex that were not identical to the crimes perpetrated against the victim.\textsuperscript{74}

Common law exceptions to the concept of caveat lessee,\textsuperscript{75} such as the duty to maintain common areas in a reasonably safe manner\textsuperscript{76} or the duty to perform tasks voluntarily undertaken without negligence, can be used to create a duty to provide safe premises.\textsuperscript{77} A duty may also arise from contractual concepts such as the implied warranty of habitability,\textsuperscript{78} the duty of good faith and fair dealing found in a lease, or a contractual promise to repair.\textsuperscript{79} In fact, some courts find landlord liability for foreseeable criminal acts of third persons "only where the act was based on a physical defect of the premises."\textsuperscript{80} Finally, landlords may have a statutory duty to provide and maintain security of


\textsuperscript{72} 723 P.2d 573 (Cal. 1986) (en banc).

\textsuperscript{73} Id. at 577.

\textsuperscript{74} Id. at 579.

\textsuperscript{75} See \textit{The Law of Property} § 6.46, at 350 (William B. Stoeckel \& Dale A. Whiteman eds., 3d. ed. 2000) (discussing the "general common-law rule that the landlord has no duty to repair leased premises").

\textsuperscript{76} But see Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 216 (Cal. 1993) (concluding that landlord did not have a duty to provide security guards in the common areas because rape of tenant's employee was not foreseeable).

\textsuperscript{77} See Glesner, supra note 70, at 685-86 (describing the exceptions from general rule that landlords have no legal duty of protection, which include injuries caused by defects in the common premises, failure to disclose a latent defect in the premises causing injury, and injuries resulting from negligence in undertaking promised repairs).

\textsuperscript{78} See Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980); see also Merrill, supra note 54, at 442-43.

\textsuperscript{79} See \textit{The Law of Property}, supra note 75, § 6.47, at 349.

\textsuperscript{80} Bateman \& Thomas, supra note 2, at 349; see also Walls v. Oxford Mgmt. Co., 633 A.2d 103, 107 (N.H. 1993) (rejecting "liability based solely on the landlord-tenant relationship or on a doctrine of overriding foreseeability" and refusing to find a duty where "a landlord has made no affirmative attempt to provide security, and is not responsible for a physical defect that enhances the risk of crime").
the premises for their tenants. However, the leading theory in landlord liability is based on the tort law of negligence where "the landlord is liable if, having a duty to provide security, he fails unreasonably to perform that particular duty, thereby facilitating the commission of the crime that injures the tenant or others on the leased premises or on common areas."82

c. Other Special Relationships

The special nature of certain other relationships has also justified a landowner/possessor's duty to protect or warn against criminal acts on the premises. An institution of higher education may be held liable for third party criminal activity as a landowner or as a landlord if the institution has knowledge of prior similar criminal acts on its premises.83 The Massachusetts Supreme Court in *Mullins v. Pine Manor College*84 found that a college had a duty to protect students against third party criminal acts because of the nature of the college situation, which presented an opportunity for criminal acts against resident students, particularly young women.85 Both parents and students had a reasonable expectation that the college would exercise reasonable care to protect resident students from foreseeable harm.86

The relationship between students and higher education institutions has not always supported premises liability claims. In *Tanja H. v. Regents of University of California*,87 the court held that such a special relationship did not exist and that the university did not have a duty to protect female dormitory residents from sexual assault by other dormitory residents, although the fact that the dorm stairway was unlighted may have been considered relevant if the assault had been perpetrated by a third-party intruder.88 Nevertheless, whether based on the school-student relationship under tort and property law or a negligence standard for failing to warn or protect its invitees, universities and college campuses may be found liable for student injuries resulting from criminal activity on their premises.89


84. 449 N.E.2d 331 (Mass. 1983).

85. See *id. at 335.

86. See *id. at 336.

87. 278 Cal. Rptr. 918 (Ct. App. 1991).

88. See *id. at 920-21.

89. See Bhirdo, supra note 83, at 134-35 (recommending that school administrators implement crime prevention measures).
In addition to the special relationship between school and student, other relationships indicating the existence of a duty are the hospital/patient relationship, the common carrier/passenger relationship, and "any other relationship in which someone surrenders himself or herself to the care of another." Yet, some courts refuse to find a special relationship, even when there is some degree of expectation that the landowner or possessor should have a duty. For example, in H.B. v. Whittemore, the Minnesota Supreme Court refused to hold a trailer-park manager liable for failing to protect children from a resident who had a prior conviction for child molestation of which the manager was aware. This relationship seems very close to the innkeeper/guest relationship, but the court refused to find that a special relationship existed.

No special relationship was found in Metropolitan Dade County v. Dubon, where the court held that a non-profit shelter for the homeless did not have a duty to protect its homeless residents against the criminal attack of another resident. Although this relationship also seems quite similar to the innkeeper/guest relationship, the court determined that because both the victim and the attacker "were absolutely free to come and go as they chose" there was no special relationship because the shelter did not "have either the right or ability to control the assailant third party's behavior." In Part II B.1., below, the development of new types of special relationships is discussed.

2. Breach of Duty

Once a plaintiff has established the existence of a duty, it must be shown that the landowner failed to exercise reasonable care to protect against the foreseeable criminal acts. Determining breach is a question of fact and will likely depend on "(1) whether the owner took reasonable steps to ascertain the extent of the potential harm; (2) whether the owner provided sufficient warning to the customer to avoid the harm; and (3) whether the owner furnished reasonable measures to protect the customer from harm."

A duty existed, but no breach of that duty was found in Washington v. United States Department of Housing and Urban Develop-

91. 552 N.W.2d 705 (Minn. 1996).
92. See id. at 709.
94. See id. at 330.
95. Id. at 329-30.
96. See Hanks, supra note 40, at 1014.
where the owner of an apartment building owed a duty to the tenants to discover whether criminal acts were occurring on the property and to warn tenants and visitors about such harms. The court found that the property owner did not breach this duty to discover and warn tenants because there was not sufficient evidence to show that the property owner knew or should have known that such harm would occur. Further, the tenant was already aware of particular criminal acts that had occurred in the complex and chose to continue residing on the property despite the dangerous conditions.

Thus, while the landlord had a duty to protect its tenants, the duty was not breached by the landlord's failure to protect or warn because the landlord had no knowledge, either actual or constructive, of the potential for criminal activity in the complex. Nevertheless, while breach of a duty is required for tort liability, such breach will typically be evident if the duty to protect or warn is based upon the foreseeability of the criminal activity and the landlord fails to take action to protect tenants against such potential harm.

3. Causation

In order to hold a landowner liable for injury, the plaintiff must prove that the landowner's conduct or omission to act caused or contributed to the injury. Courts have refused to hold land possessors liable for the criminal acts of third parties, even if the crime was reasonably foreseeable, based on the plaintiff's failure to prove causation. In Burgos v. Aqueduct Realty Corp., the court held that the victim tenant did not establish the necessary causal link between the victim's injuries from a criminal attack in the building and the landlord's failure to provide proper security because she did not show that the attacker entered the building through a negligently maintained entrance. Similarly, in Price ex rel. Price v. New York City Housing Authority, the court held that the victim tenant must establish proximate cause for her injuries by proving that the attacker was an

98. See id. at 773.
99. See id. at 774.
100. See, e.g., Toscano Lopez v. McDonald's, 238 Cal. Rptr. 436, 447 (Ct. App. 1987) (finding no causal connection between mass murder in San Ysidro McDonald's and McDonald's failure to provide security).
101. See, e.g., Tucker v. KFC Nat'l Mgmt. Co., 689 F. Supp. 560, 564 (D. Md. 1988) (finding that "the absence of private security guard service was not the proximate cause of plaintiff's injuries" which occurred during an altercation between two customers standing in line at the restaurant).
103. See id. at 1166.
intruder who gained access by entering through a negligently maintained entrance.105

Lack of causation recently precluded a plaintiff from claiming damages from an assault which occurred in an apartment complex in Saellzer v. Advanced Group 400.106 The California Supreme Court concluded that a Federal Express employee, who was assaulted by three men inside an apartment complex while attempting to deliver a package to a resident, could not show that the apartment owners' "failure to provide increased daytime security at each entrance gate or functioning locked gates was a substantial factor in causing her injuries."107 The plaintiff was unable to identify her assailants and, therefore, it was possible that they could have been either unauthorized trespassers or tenants of the apartment complex. If the assailants were tenants of the complex, who would have been authorized to enter the premises, any increase in the security would not have prevented the attack.108

B. Recent Trends in Premises Liability

Recent trends in premises liability are also instructive when determining whether or not landowners should be liable for failing to disclose the danger from foreseeable criminal acts of third parties. Commentators have remarked that there is a trend to hold property owners liable for third party criminal acts in both commercial and residential settings because of a jury's desire to compensate crime victims when the only defendant may be the property owner or where the fault can be apportioned between the perpetrator and the property owner.109 However, recent decisions in Michigan and Virginia have limited landowner liability by using a narrower foreseeability standard, which requires that a business invitor "knows that criminal assaults against persons are occurring, or are about to occur, on the premises which indicate an imminent probability of harm to its invitee" before it is liable for third party criminal acts.110

105. See id. at 1169; see also Leslie G. v. Perry & Assocs., 50 Cal. Rptr. 2d 785, 791 (Ct. App. 1996) (finding tenant raped in a parking garage did not prove that landlord's negligence in maintaining a garage gate caused the injury because there was no evidence that the rapist entered or exited through this gate).
106. 23 P.3d 1143 (Cal. 2001).
107. Id. at 1152.
108. See id.
109. See Joseph B. Rizzo, Negligent Premises Security Law: The Foot is Still in the Liability Door, 70 N.Y. St. B.J. 38, 41 (1998) (discussing a recent case where the jury apportioned fault at 51% to the property owner and 49% to the perpetrator, who raped an 81-year old plaintiff after entering through a first story window with a broken lock, which the landowner had not repaired).
This trend toward limiting premises liability to imminent harm situations is evident in the 2001 decision by the Virginia Supreme Court in *Dudas v. Glenwood Golf Club, Inc.* The court held that the golf club had no duty to protect a customer against a criminal assault by an unknown third party because the facts did not establish that there was an imminent probability of harm and the burden of providing security against such an assault would be unduly burdensome. Similarly, the golf course had no duty to warn the golfer of the potential danger of such attacks because such a warning could potentially harm the golf course business and result in a loss of trade.

Landowner liability has also been expressly limited by statute when public policy issues outweigh the victim's right to sue the landowner for injury. Nevertheless, the trend is to hold landowners liable for third party criminal activity and essentially treat it as a "new" tort framed as "you must take reasonable precautions with respect to your property to protect victims from foreseeable wrongdoing by third parties." Some have viewed this as the courts' attempt to assist crime-fighting efforts "by enlisting property owners in the battle through the threat of tort liability."

1. New Types of Special Relationships

As previously discussed, many jurisdictions have held landlords liable for injury to their tenants from third party criminal acts based upon a special relationship derived from an innkeeper's duty to provide security for guests. Other types of special relationships, such as school/student, tavern/customer, hospital/patient, and common carrier/passenger have also generated a duty to protect or warn against third party criminal activity if the appropriate foreseeability exists. In addition, several new relationships, including employer/employee and bank/ATM customer, and new situations, such as the potential for terrorist acts, have generated premises liability for third party crimes

111. 540 S.E.2d 129 (Va. 2001).
112. See id. at 133.
113. See id. at 133-34.
114. See, e.g., Anderson v. Atlanta Comm. for the Olympic Games, Inc., 537 S.E.2d 345, 347 (Ga. 2000) (observing that Georgia's Recreational Property Act limits landowner liability where the owner "has made property available without charge to the public for recreational purposes" such that the Olympic games committee, as lessee of park property, was not liable for injuries caused by the park bombing during the 1996 Olympic Games).
116. Id. at 459.
as exceptions to the historical common law rule of "no duty to aid" others against intervening criminal acts.\textsuperscript{117}

The employer/employee relationship has been especially compelling where employees are injured by a co-worker or former co-worker on business premises. In \textit{Wright v. St. Louis Produce Market, Inc.},\textsuperscript{118} a food processing plant employee was murdered by a co-worker at a food processing plant and the victim's mother sued the company for wrongful death alleging that the company did not make its premises reasonably safe and did not protect the employee against the criminal acts of her co-worker.\textsuperscript{119} The court noted that a duty to protect another person from third party criminal activity may arise based upon either a special relationship or "special facts and circumstances."\textsuperscript{120}

The "special facts and circumstances" theory as explained by the \textit{Wright} court, appears to deal with foreseeability issues such as whether the third person is known and identifiable, whether there have been frequent and recent violent criminal acts on the premises by unknown attackers, and whether a landlord creates a danger or risk of tenant harm above the risk of crime expected generally.\textsuperscript{121} The court did not use the special relationship theory\textsuperscript{122} and it found that the plaintiff did not present sufficient evidence under the "special facts and circumstances" theory that: the employer knew of the attacker's violent propensities; it had sufficient time to prevent the attack; prior crimes were sufficiently similar to put the employer on notice that employee safety was at risk; or the food company's actions created a risk greater than the general crime risk in the area.\textsuperscript{123} Nevertheless, the court did find that the company may have breached its duty to provide a safe work environment, but noted that workers' compensation provides the sole remedy in such circumstances.\textsuperscript{124}

Although the court in \textit{Wright} did not use the special relationships theory, jurisdictions finding a special relationship between employer and employee could use the theory to create a duty to protect or warn employees about the dangerous propensities of a co-worker. This duty to protect or warn would be particularly appropriate in situations where a co-worker has been disciplined or terminated and has expressed anger with the employer or has directly threatened violence.

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\item[118] 43 S.W.3d 404 (Mo. Ct. App. 2001).
\item[119] See id. at 408.
\item[120] Id. at 410.
\item[121] See id. at 410.
\item[122] See id. at 410 n.4 (observing that "[s]pecial relationships are not at issue in this appeal").
\item[123] See id. at 411-13.
\item[124] See id. at 415.
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In *Rosh v. Cave Imaging Systems, Inc.*, the recently terminated employee returned to the business premises and shot and severely injured the manager who had terminated him. The injured employee sued the security company, whose guards failed to deny the disgruntled ex-employee access to the facilities, even though they had been informed several times of the terminated employee's unauthorized presence. The jury awarded the manager damages in excess of five million dollars for the severe injuries which were found to be the foreseeable result of the defendant's negligent failure to provide adequate security at the company. Although the defendant here was an independent security company, not the landowner or possessor, if security had been provided by the landowner or possessor, premises liability might have been the theory used and the injury would have been foreseeable.

Sometimes, workplace violence is an extension of domestic violence and employees may be injured by an angry spouse or ex-spouse seeking revenge against a co-worker in the workplace. Employers may be held liable for injury to employee victims of such violence if they fail to provide a safe work environment or ignore domestic violence issues that spillover into the workplace. Unlike the *Wright* case, discussed above, where the plaintiff was limited to a remedy under workers' compensation, an employer may be held directly liable for injuries in the workplace resulting from domestic violence if the employer knew or should have known of the potential violence and did not take appropriate action to prevent the resulting injury.

An employer may be liable for a third party injury to an employee where the employer has assumed a contractual duty to protect the employee from harm. Foreseeability that the criminal activity might occur in the workplace, based either on prior similar acts or a totality of the circumstances test, may also create a duty by the employer to protect employees. Finally, an employer may be held liable for a co-worker's violence on the job based upon theories of negligent hiring, negligent supervision, and negligent retention. However, these

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125. 32 Cal. Rptr. 2d 136 (Ct. App. 1994).
126. *Id.* at 138-39.
127. *Id.* at 139.
128. *Id.* at 137.
130. See *id.* at 148.
131. See *id.* at 150-53 (discussing cases where the employer promised to protect an employee in the workplace).
132. See *id.* at 153-54 (discussing foreseeability in establishing employer duty).
133. See *id.* at 159.
theories are only applicable in a situation when the employer has control over the employee-perpetrator and are not relevant where a third party criminal invades the workplace and injures employees. Therefore, employer liability for criminal acts by non-employees against employees must be based on premises liability, emphasizing the special nature of the relationship between employer/employee and establishing foreseeability of the violence.

Another potential special relationship involves a bank and its ATM customers based on the increasing concern for customer safety, especially at night. The bank, as a business possessor, has a greater duty of care because of its special relationship with its customers as invitees. However, the victim of a third party ATM crime must prove foreseeability before the bank is required to provide protection.134

In Boren v. Worthen National Bank of Arkansas,135 customer Stephanie Boren was shot and robbed by two men hiding in the bushes as she drove up to a drive-through ATM to withdraw cash.136 The Arkansas Supreme Court held that the bank was not liable for the attack because "two incidents of robbery at Worthen ATMs in the nearly eight years prior to the attack on Boren [were] not sufficient to impose a duty"137 based on the foreseeability of the attack. While banks have not been held liable for third party ATM crime under premises liability theories,138 several states have attempted to regulate ATM security by requiring minimum lighting, restricting the height of landscaping near ATMs, and requiring the use of reflective mirrors.139 Therefore, if a bank undertakes to provide security as required by statute, future cases involving negligent security may result in bank liability.

Premises liability issues may eventually emerge in cyberspace as property and tort concepts are applied to Internet sites. It is conceivable that a user who is attacked by a computer virus while visiting a particular web site will attempt to hold the web site owner liable for any injury caused by the third party criminal act.140 Online chat rooms facilitating Internet relationships may also be subject to liabil-

135. 921 S.W.2d 934 (Ark. 1996).
137. Boren, 921 S.W.2d at 942.
138. See DeYoung, supra note 134, at 102 ("Courts deciding ATM cases have been reluctant to hold banks liable for third party crimes.").
139. See id. at 111-16.
140. See Robin A. Brooks, Deterring the Spread of Viruses Online: Can Tort Law Tighten the 'Net?, 17 REV. LITLG. 343, 346 (1998) (describing how a computer might be subject to virus attacks while surfing the Internet and visiting specific sites).
ity for criminal acts involving minors and criminals such as pedophiles. If the chat room host is aware that its invitees may be subject to online criminal attacks, there may be a duty to warn or protect the invitees, particularly minors, from foreseeable harm.

Terrorist activity may also generate premises liability in those instances when a landowner knows that the property is particularly attractive or susceptible to attack and fails to take appropriate security precautions or warn tenants or occupants of the danger. After the World Trade Center was bombed in 1993, suits were filed against the owner of the complex, the Port Authority, alleging premises liability for its negligence in assessing the foreseeability of the attack or providing protection in anticipation of such an attack. However, the World Trade Center owner will not likely be liable for the September 11, 2001 attack, which involved commercial airplanes flying into the buildings, because such an attack could not be protected against by security measures within the owner's control. Nevertheless, given that there were previous acts of terrorism in 1993, the Port Authority may be subject to suit for failing to disclose the danger of a terrorist attack to tenants who leased space after 1993. It could be argued that disclosure would not be necessary due to the publicity and general knowledge of the 1993 attack. Such an argument would be similar to the claim that a landowner does not have to disclose the susceptibility of the premises to crime or to a local sex offender because such information is publicly available through police records.

Finally, recent "rage" incidents, such as those that have occurred at ballparks between coaches and referees or parents, or on airplanes between passengers or between passenger and agent, may generate third party premises liability claims. A Continental Airlines agent is suing the Port Authority of New York and New Jersey and the security firms responsible for the airport's gate areas under a negligence theory for injuries he received when a passenger waiting to board attacked the agent for stopping him from entering the jetway without his boarding pass.

In Hills v. Bridgeview Little League, a little league coach was attacked and beaten by the manager and assistant coaches from the

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141. See Melinda L. Reynolds, Landowner Liability for Terrorist Acts, 47 CASE W. RES. L. REV. 155, 174 (1996) (discussing the "tempting target" theory which "proposes that some leaseholds are by their nature particularly attractive for crime: bars, concert halls, and casinos").

142. See id. at 158.


144. Id. at 30 (noting that the agent will rely on a 1993 New Jersey Supreme Court decision which held the Port Authority liable for injuries suffered by a passenger who was attacked by a homeless man inside a bus terminal).

opposing team during a little league baseball tournament. The Illinois Supreme Court held that the baseball league, which hosted the tournament, had no special relationship with the coach who was attacked by the opposing team's coaches and that the nature and severity of the attack was not foreseeable. Nevertheless, it has been suggested that leagues and sport facilities can help avoid these rage incidents by properly training coaches and officials, holding mandatory parent meetings regarding the rules of appropriate spectator behavior, and enforcing the rules and policies.

2. Apportionment and Comparative Liability

Because of the dramatic increase in the number of claims brought against landowners on behalf of crime victims alleging that the landowner negligently failed to warn or protect them against third-parties on the premises, determining whether and how to apportion this liability between the "deep-pocket" landowner and the judgment-proof assailant is an important issue. In Rosh v. Cave Imaging Systems, Inc., the court upheld a jury verdict assigning greater fault for the victim's injuries to the security firm than was assigned to the disgruntled employee who returned to the company premises to shoot the manager who terminated him. The court found that the apportionment of 75 percent fault to the security firm was supported by evidence that the firm was hired to protect the employees against terminated employees posing a security risk and that the firm allowed the terminated employee to remain on the premises on three different occasions within twenty-six hours of his termination.

Fault for injuries suffered from a third party criminal act may also be apportioned between the landowner and the victim in situations where the victim fails to take appropriate protective action. If the victim fails to use proper door locks, somehow provokes or initiates the attack, or is aware of the danger or risk and does not take appropriate precautions against injury, the victim's compensation may be reduced according to such fault.

146. See id. at 1170.
147. See id. at 1191 (explaining that no special relationship could be found because playing field was not a business open to the general public and because there was "no evidence of record to support the conclusion that youth coaches and managers in Illinois are, as a group, prone to commit criminal attacks").
148. Tebo, supra note 143, at 33.
150. 32 Cal. Rptr. 2d 136 (Ct. App. 1994).
151. See id. at 139-40.
152. See id. at 140.
3. Insurance Coverage

Insurance policies for homeowner liability typically include an exclusion for bodily injury or property damage “expected or intended” by the insured. The exclusion is intended to bar coverage for injuries caused by the insured which are the result of intentional, not negligent, homeowner conduct. Jurisdictions are split as to what constitutes the insured’s intent:

1. The minority view follows the classic tort doctrine of looking to the natural and probable consequences of the insured’s acts;
2. The majority view is that the insured must have intended the act to cause some kind of bodily injury;
3. A third view is that the insured must have had the specific intent to cause the type of injury suffered.\[153\]

The third view requiring specific intent was applied by the court in *Economy Fire & Casualty Co. v. Haste*\[154\] where the insured was sued for the wrongful death of his victims, whom the insured took captive and held against their will in his home and subjected to torture, which resulted in their deaths.\[155\] The trial court found that insurance coverage for these acts was barred because the insured intended to kill the victims.\[156\] However, the reviewing court reversed the trial court’s summary judgment in favor of the insurance company on the question of damages based on the death of the victims because it found a genuine issue of material fact as to whether the insured “expected or intended the result which occurred, i.e. the death of these individuals.”\[157\] In light of this result, it has been suggested that homeowners’ policies should include a specific criminal acts exclusion so that “if a crime is serious enough for the criminal courts to permit or require the offender to be incarcerated, then there is no reason for insurers (and each of their law-abiding policyholders) to have to pay the cost of such crime.”\[158\]

Similarly, in *State Auto Mutual Insurance Co. v. McIntyre*,\[159\] a federal court applying Alabama state law held against the insurance company by concluding that a grandfather had no specific intent to

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155. See id. at 43-44.
156. See id. at 44.
157. Id. at 46 (holding additionally that “[t]he trial court did not err by precluding recovery against Economy on the question of damages for injuries to the victims prior to death” because there was no question that the insured intended to harm the victims).
cause injury when he sexually abused his minor granddaughter and, therefore, he "neither expected nor intended that his nonviolent sexual abuse . . . would cause her bodily harm." 160 Because the state's interpretation of the insurance coverage exclusion clause "expected or intended by the insured" required the court to determine specific intent from the insured's standpoint, the exclusion did not bar coverage unless "the insured subjectively possessed a high degree of certainty that bodily injury to another would result from his or her act." 161

Some jurisdictions have not required the finding of a specific intent by the insured in order to bar insurance claims for intentionally harmful acts. In State Farm Fire & Casualty Co. v. Smith, 162 the Ninth Circuit held that an exclusion provision in the homeowner's insurance policy which denied coverage for injury "either expected or intended by an insured" was not to be applied using a subjective standard. 163 As a result, the insurance company was not liable for the insured's sexual molestation of his adopted daughter since under Nevada state law such molestation of minors is presumed to be harmful. 164

The cases discussed above involve claims against the insured's homeowner policy for criminal acts perpetrated by the insured. However, claims brought against an insured's homeowner policy for the criminal acts of a third party on the insured's premises are also subject to policy exclusions for intentional and criminal acts. In C.P. v. Allstate Insurance Co., 165 the insured homeowners' adult son sexually assaulted an eleven-year-old friend of the homeowners' daughter while the homeowners were out of town. 166 The victim and her parents sued the homeowners and their son for personal injury alleging that the son's assault caused their daughter injury and that the homeowners were negligent in failing to watch over the victim and in failing to warn her parents of the son's alleged propensity to assault children. 167 The claims against the homeowners were based on their alleged negligence, not by attributing the criminal actions of their son to them. 168

The Alaska Supreme Court accepted certification of three questions of state law from the federal district court, including the question of whether

160. Id. at 1194.
161. Id. at 1193-94.
162. 907 F.2d 900 (9th Cir. 1990).
163. See id. at 902.
164. See id. ("[U]nder the law of the state, one cannot intend the act of molestation without also intending the harm.").
166. See id. at 1218-19.
167. See id. at 1219.
168. See id.
a homeowner's liability insurance policy that provides coverage against 'accidental' injuries and excludes coverage for intentional and criminal acts... treats the acts of one insured as the acts of all insureds... and [indemnifies] an insured homeowner who is sued for... negligent failure to protect a visitor lawfully on the premises from foreseeable criminal activity.169

The court concluded that the exclusions for intentional and criminal acts do not apply to negligence claims against the homeowners because the alleged negligence was neither intentional nor criminal, therefore, the victim's claims against the homeowner's policy were covered.170 Because premises liability for landowners is based on negligence concepts of duty under a foreseeability standard, homeowners' insurance policies that cover "accidents" and exclude intentional and criminal acts will likely cover claims against homeowners for injuries caused by the criminal acts of third party perpetrators.

Commercial landowners, on the other hand, may find themselves unprotected against claims for third party criminal acts. In light of the recent terrorist attacks, insurance companies are expected to exclude terrorist attacks, in addition to acts or war, from property insurance policies.171 Alternatively, insurance companies may provide only limited terrorist coverage by restricting the overall policy limits and charging higher premiums.172 Even with insurance coverage for the World Trade Center destruction, the owner of the lease to operate the World Trade Center, Larry Silverstein, is arguing that the attacks constitute two incidents, not one, requiring insurers to pay $7 billion instead of $3.5 billion.173 The U.S. Congress has been debating legislative relief to address the problems of terrorist insurance, but as of January 2002, has not yet developed an insurance bill to handle the issues.174

169. Id. at 1222.
170. See id. at 1226.
171. See National Policy Bulletin, Terrorism Insurance Coverage May Be Unavailable Unless Congress Acts Soon (2001) (proposing that the U.S. government help commercial property owners by ensuring that they will be covered against terrorist acts in the future).
174. See Branigan, supra note 172 (noting that retail insurance companies are in the "position of not having reinsurance for terrorist risk").
III. A DUTY TO WARN OR DISCLOSE SUSCEPTIBILITY OF PREMISES TO CRIMINAL ACTIVITY?

Part II above surveyed the general contours of premises liability, which potentially holds landowners and possessors liable for the criminal acts of third parties. Liability is typically based on a negligence standard which requires that the landowner/possessor have a duty to warn or protect invitees against foreseeable criminal activity and that the breach of this duty proximately causes injury to the invitee. Part III develops an approach towards landowner disclosure duties from this historical baseline and proposes that: (1) a landowner has a duty to warn others of potentially dangerous individuals on its premises; (2) a landlord has a duty to disclose to prospective tenants the susceptibility of rental premises to criminal activity; and (3) a landowner has a duty to disclose to a purchaser of the property criminal activity in a neighborhood.

A. Duty of Landowner or Possessor to Warn Others of the Presence of a Dangerous Person

Landowners cannot always protect against third party criminal activity, especially when the condition of the property is not the cause of injury and the criminal is already permitted on the premises. However, victims of third party criminal acts may sue those knowledgeable about the potential for criminal activity based on a failure to warn. In *Eric J. v. Betty M.*, the mother of a molested child sued the family members of a man convicted of child molestation, but the court held they had no liability under the longstanding “no duty to aid” rule for failing to warn the man’s girlfriend of his criminal record. The convicted felon molested his girlfriend’s eight-year-old son at the homes of several of the felon’s family members and the girlfriend sued the family members on the basis of premises liability. The court found that in the guest-residence scenario, the issue is different from a business possessor’s duty to protect or warn against foreseeable third party criminal acts in that it deals with “whether landowners can incur tort liability for failing to predict the actions of a real, flesh-and-blood human being, not just a general threat of crime based on the

175. See, e.g., J.S. v. R.T.H., 714 A.2d 924, 935 (N.J. 1998) (holding that a spouse has a duty to warn minors of the potential for sexual assault by his or her mate, if the spouse knows, or has reason to know, that the mate is likely to engage in sexually abusive activity). But see Apple v. Tracy, 613 N.E.2d 928, 929 (Mass. App. Ct. 1993) (finding that a homeowner was not liable for the sexual assault of a neighborhood child for failing to warn neighbors about the presence of a houseguest who had been convicted and imprisoned for the sexual assault of a minor).
176. 90 Cal. Rptr. 2d 549 (Ct. App. 2000).
177. Id. at 560.
178. See id. at 552-53.
laws of probability given statistics that the property is in a 'high crime area.'

Citing the Anaya v. Turk \textsuperscript{180} decision, the Eric J. court noted that the Anaya finding that defendants were not liable for the injuries inflicted on their invitees in their apartment by another guest, who was an ex-convict, was because the defendants had only generalized knowledge of the criminal propensity of the guest.\textsuperscript{181} Therefore, the factual basis for the Anaya holding that the defendants were not liable for a failure to warn the other invitees was different from the case at hand where the ex-convict's family members were specifically aware of his dangerous propensities as indicated by his criminal history and his probation officer.\textsuperscript{182}

The Eric J. court also discussed the underlying basis of the plaintiff's argument in Anaya, that the dangerous propensities of an ex-convict were "the functional equivalent of a dangerous animal."\textsuperscript{183} The court dismissed this analogy of an ex-convict child molester to a dangerous animal based upon the societal goal of rehabilitation of individuals who have been released after serving their criminal sentence.\textsuperscript{184} Without a special relationship and without considering the ex-convict to be a dangerous condition on the property, the residential landowners/occupiers could not be held liable for failing to warn or protect children on their premises under a premises liability theory.\textsuperscript{185}

In 2001, a California court in Romero v. Superior Court\textsuperscript{186} did find a special relationship between the homeowners and two minors they invited into their home to visit with their minor son, which visit resulted in a sexual assault on one of the invitee minors by the other invitee minor.\textsuperscript{187} This special relationship was based on the court's adoption and application of a duty rule that:

an adult defendant who assumed a special relationship with a minor by inviting the minor into his or her home will be deemed to have owed a duty of care to take reasonable measures to protect the minor against an assault by another minor invitee while in the defendant's home when the evidence and sur-

\textsuperscript{179} Id. at 555.
\textsuperscript{180} 199 Cal. Rptr. 187 (Ct. App. 1984).
\textsuperscript{181} Eric J., 90 Cal. Rptr. 2d at 555-56. But see Kargul v. Sandpiper Dunes Ltd. P'ship, No. 50-56-00, 1991 WL 28051, at *10 (Conn. Super. Ct. Jan. 29, 1991) (holding a tenant, who allowed a person she knew to be dangerous to live with her, liable to another tenant for failure to warn the other tenant about the criminal propensities of her guest).
\textsuperscript{182} Eric J., 90 Cal. Rptr. 2d at 556.
\textsuperscript{183} Id. at 556.
\textsuperscript{184} See id. at 557.
\textsuperscript{185} See id. at 558.
\textsuperscript{186} 107 Cal. Rptr. 2d 801 (Ct. App. 2001).
\textsuperscript{187} See id. at 810.
rounding circumstances establish that the defendant had actual knowledge of, and thus must have known, the offending minor's assaultive propensities.  

However, despite this special relationship, the court held that the homeowners were not liable for the injuries to the invitee minor because there was not sufficient evidence indicating that the homeowners had prior knowledge of the other minor's assaultive propensities.

In another recent California case, reported in the *National Law Journal*, a jury awarded the plaintiff a nine million dollar judgment for the shaking of a six-month old baby in a home child care facility. The owner of the house was the mother of the childcare operator and the mother knew about an investigation of her daughter for child abuse and failed to warn or protect the plaintiff from her daughter's foreseeable criminal activity on the premises. This baby shaking case can be distinguished from the *Romero* and *Eric J.* rulings because the former involved a commercial childcare facility while the latter two involved a social guest situation. However, these decisions implicate the issue of whether there should be liability for failing to warn others about the dangerous propensities of a human being on your premises, particularly when minor children are involved, similar to the liability of landowners who fail to warn others of dangerous animals on their premises.

**B. Lessor's Duty to Disclose Potential Danger to Prospective Tenants During Rental Process for Lease of Premises**

Although a landlord may have a duty under common law to protect tenants from foreseeable criminal activity by third parties, it is consid-

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188. *Id.* at 812 (adopting and applying the “Chaney duty rule” from Chaney v. Superior Court, 46 Cal. Rptr. 2d 73 (Ct. App. 1995)).

189. *Romero*, 107 Cal. Rptr. 2d at 813.


192. For examples of cases involving landowner liability for dangerous animals, see *Donchin v. Guerrero*, 41 Cal. Rptr. 2d 192, 201 (Ct. App. 1996) (holding landlord liable for off site injuries if landlord is aware of dangerous animal being kept on premises and it escapes because of defects in the property, such as a broken fence); *Portillo v. Aiassa*, 32 Cal. Rptr. 2d 755, 758 (Ct. App. 1994) (finding that landowner owed duty of care to inspect his commercial property and remove or restrain tenant's dog who injured invitee). *But see* Wylie v. Gresch, 236 Cal. Rptr. 552, 553 (Ct. App. 1987) (holding that “a landlord has no duty to warn a prospective tenant of the presence of a vicious dog in the neighborhood”).
erably less certain whether a landlord has the duty to warn a prospective tenant of the potential for criminal activity in the complex prior to leasing the premises. Indeed, if a prospective tenant asks the landlord about the safety of the premises or whether the property is subject to criminal activity, the landlord must answer truthfully or be subject to liability for misrepresentation. However, even a misrepresentation as to the safety of the premises may not justify holding the landlord liable to a tenant for injury suffered from third party criminal activity unless the court determines that the injury was proximately caused by the misrepresentation.

When Alex Yuzefovsky discussed his interest in renting an apartment with the apartment complex's employees, he was told in response to his specific question about safety "that there had been no crimes at [the property of] St. John's Wood, and that it was safe."193 In reliance on these assurances of safety, Alex leased the apartment.194 Approximately one year and nine months later, Alex was assaulted and shot in the shoulder on a walkway inside the complex and adjacent to his apartment.195 The victimized tenant sued the apartment owners alleging fraud, based on the misrepresentations of the employees, and negligence because they failed to warn him of previous violent crimes that had occurred at the development.196

The Virginia Supreme Court in Yuzefovsky v. St. John's Wood Apartments held that under the same foreseeability standard used to determine whether there is a duty to protect, the owners did not have a duty to warn the prospective tenant about crime in the neighborhood because it was not imminent.197 Although the court determined that the tenant was fraudulently induced to enter into the lease, it held that the damages suffered by Yuzefovsky as a result of the third-party criminal attack did not directly result from the fraudulent inducement because the assault was remote in time from the signing of the lease.198 However, misrepresenting that the premises are safe and free from criminal access or activity may also violate consumer fraud statutes and, as discussed above, may subject the property owner to liability for injury to a tenant from foreseeable criminal acts.199

194. See id. at 137.
195. See id.
196. See id. at 137-38.
197. Id. at 141 (citing Dudas v. Glenwood Golf Club, 540 S.E.2d 129, 132 (Va. 2001)).
198. See id. at 142.
199. See, e.g., O'Hara v. W. Seven Trees Corp. Intercoast Mgmt., 142 Cal. Rptr. 487, 491 (Ct. App. 1977) (involving a tenant who relied on assurances that complex was safe and brought a misrepresentation cause of action against apartment owners for misrepresentation following her injury from rape by a man who had assaulted several other women in the same complex); Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1369-70 (Ill. 1988) (holding that landowner has duty to warn tenants of security dangers especially when such information is known only
The duty to disclose finds its roots in the tort of misrepresentation and imposes a duty on the landowner to affirmatively acknowledge defects in the premises, even if a prospective tenant does not ask about the condition of the premises. At common law, a landlord had no duty as to the condition of the premises under the doctrine of caveat lessee. However, one of the exceptions to caveat lessee arose if there was a latent defect in the premises known only to the landlord—the defect was required to be disclosed. Therefore, if a physical defect in the property makes the premises susceptible to crime, the landlord will be required to disclose such a latent defect to a prospective tenant. Additionally, the landlord may be under a duty to warn tenants about a danger of criminal activity even when the danger is not the result of a physical property defect.

Apartment owners in O'Hara v. Western Seven Trees Corp. Interstate Management failed to disclose a "latent" danger of rape to a female tenant who was raped in an apartment complex by a man who had raped several other female tenants. The court concluded that the landlords were potentially negligent because they knew of past assaults and failed to act, by either providing security or warning the tenant. However, in Bartley v. Sweetser, the Arkansas Supreme Court upheld a summary judgment in the landlords' favor where a tenant was raped in her apartment and alleged that the landlords had failed to warn her that the apartment complex was vulnerable to crime. Under Arkansas law, a landlord has no duty to insure the safety of its tenants or others on its premises.

200. See, e.g., Whelan v. Dacoma Enters., 394 So. 2d 506, 508 (Fla. Dist. Ct. App. 1981) (observing that landlord may be responsible for rape and assault of tenant if there was a latent defect in the locking mechanism unknown to the tenant, but known to the landlord); New Summit Assocs. Ltd. P'ship v. Nistle, 533 A.2d 1350, 1355 (Md. Ct. Spec. App. 1987) (holding that "peepholes in appellee's bathroom mirror constituted a latent defect in the apartment she rented" and landlords owed a duty to disclose this known defect from which she suffered injury from invasion of privacy by a third party).

201. See, e.g., N.W. by J.W. v. Anderson, 478 N.W.2d 542, 544 (Minn. Ct. App. 1991) (involving tenants that sued landlord for failing to warn them that another tenant was a convicted child molester, but court held that because there was not a specific threat against a specific victim, landlord had no duty to warn tenants of criminal background of other tenant).


203. Id. at 489.

204. Id. at 490.

205. 890 S.W.2d 250 (Ark. 1994).

206. Id. at 250.

207. Id. at 252.
Landowners may also be held liable for failing to disclose susceptibility of commercial premises to third party criminal activity. In Vermes v. American District Telegraph Co., a tenant jewelry store sued the commercial landlord alleging that the landlord failed to disclose to the tenant prior to the signing of the lease that the premises were insecure and, thus, unsuitable for a jewelry business requiring physical security. The Minnesota Supreme Court determined that the jury decision to hold the landlord liable based upon the foreseeability of the burglary was not clearly contrary to the evidence and should be upheld.

In contrast to this decision to hold a commercial landlord liable for failing to disclose the potential for foreseeable criminal activity, the Texas Supreme Court in Lefmark Management Co. v. Old concluded that the property manager of a shopping center had no duty under the Restatement (Second) of Torts, section 353, to disclose to a subsequent management company that the premises were subject to danger from criminal activity. Therefore, the transferor management company had no liability to a tenant's customer who was killed during the armed robbery of a donut shop for failing to disclose that there had been several previous incidents of robbery and burglary at the shopping center.

Some states have statutorily required disclosure of specified items to both prospective property purchasers and lessees. Of particular concern is the disclosure of registered sex offenders living in the area as required under the federal "Megan's Law." California Civil Code section 2079.10a requires that written leases and rental agreements for residential real property entered into on or after July 1, 1999, contain a notice disclosing the existence of a database of registered sex offenders maintained by law enforcement authorities. This code section also relieves the lessor of any further disclosure of specific information regarding the proximity of registered sex offenders and precludes the sex offender from bringing suit against the disclosing lessor.

208. See, e.g., Morris v. Barnette, 553 S.W.2d 648, 650 (Tex. Ct. App. 1977) (holding that washteria business has duty to warn or provide reasonable protection to invitees based on location of premises, past experience, and foreseeability of third party criminal conduct).
209. 251 N.W.2d 101 (Minn. 1977).
210. Id. at 105.
211. Id. at 106.
212. 946 S.W.2d 52 (Tex. 1997).
213. Id. at 54.
214. Id. at 53.
217. Id. at § 2079.10a(b).
Unless there is a statutory disclosure requirement, it is uncertain in many jurisdictions whether a residential landlord or a commercial landlord has a duty to disclose to prospective tenants the susceptibility of the premises to third party criminal activity. In jurisdictions recognizing the existence of a special relationship between landlord and tenant, the landlord may have a duty to protect tenants against foreseeable criminal acts and this duty may be most appropriately accomplished by disclosure.

Since a landlord will probably not prevent harm to tenants from the criminal acts of fellow tenants already permitted in the complex by increasing security, the only way to protect other tenants from this type of harm may be by disclosure of the dangerous tenant's criminal propensities. If the jurisdiction considers the susceptibility of the premises to criminal activity to be a latent defect, the common law exception to caveat lessee may require the landlord to disclose this susceptibility to prospective tenants. However, in jurisdictions which refuse to acknowledge a special relationship between landlord and tenant or which restrict the concept of latent defect to physical defects only, courts will likely find that the landlord has no duty to disclose either the criminal propensities of a fellow tenant or the susceptibility of the premises to third party criminal acts.

In those jurisdictions finding a duty on the part of the landlord to protect the tenant against third party criminal acts, the landlord may have a duty to investigate their tenants, either prospectively or in response to complaints by other tenants, to determine the tenant's propensity for criminal behavior. Part IV will discuss a landlord's duty to investigate tenants and either refuse to rent to those with criminal propensities or to evict those who appear to be dangerous to others. It will also explore the potential landlord liability to victims for failing to appropriately control a dangerous tenant. Finally, Part IV will also address a landlord's liability to a potentially dangerous tenant for disclosing personal facts to other tenants in an attempt to discharge the landlord's duty to protect or to warn other tenants.

C. Seller's Duty to Disclose Third Party Criminal Activity to Property Purchasers

Unlike a landlord/tenant relationship, in which the parties have a continuing relationship and the landlord may be liable for subsequent injury, a seller of property has no duty to protect a subsequent purchaser against criminal activity that may occur in the future. Therefore, a duty to disclose does not arise from a special relationship between buyer and seller, nor is it an appropriate response to a duty to protect, since there is no such ongoing duty on the part of the seller.

218. See supra notes 54-82 and accompanying text.
In fact, under common law, the concept of caveat emptor relieves the seller from any duty to make disclosures to a prospective buyer about the condition of the premises. Nevertheless, the Prosser view, adopted in California and other states, is that strict caveat emptor "is proper only where the undisclosed fact is patent, the purchaser has an equal opportunity to discover it, or the seller has no reason to think that the purchaser is acting under any misapprehension." Thus, a seller must "disclose conditions that the buyer could not be expected to discover by a diligent inspection, but which the seller knows or should know would materially affect the value of the property to the buyer."  

Although the susceptibility of property to third party criminal activity is not necessarily a physical defect, it is a condition which the buyer may or may not be expected to discover by a diligent inspection and it may materially affect the property's value to the buyer. Similar to situations involving property that is psychologically tainted by a premises history involving such incidents as homicide, suicide, or previous occupancy by someone with AIDS or HIV, susceptibility of property to criminal activity may be a condition that requires disclosure by the seller, unless specifically shielded from disclosure by statute.

The psychological taint issue was dramatically illustrated in Stambosky v. Ackley, where a New York court held that an exception to the doctrine of caveat emptor was appropriate to hold a seller, who "deliberately fostered the public belief that her home was possessed by poltergeists," liable for failing to disclose this information to the property buyer. The court distinguished this nondisclosure claim from typical cases where vendors have failed to disclose information regarding the physical condition of the property. Here the condition was a psychological taint created by the seller, which would materially impair the value of the contract and was unlikely to be discovered by a buyer exercising due care.

Another notable psychological taint case involved the sale of a house which was the site of a multiple murder. In Reed v. King, 223 the psychological taint issue was dramatically illustrated in Stambosky v. Ackley, 224 where a New York court held that an exception to the doctrine of caveat emptor was appropriate to hold a seller, who "deliberately fostered the public belief that her home was possessed by poltergeists," liable for failing to disclose this information to the property buyer. 225 The court distinguished this nondisclosure claim from typical cases where vendors have failed to disclose information regarding the physical condition of the property. Here the condition was a psychological taint created by the seller, which would materially impair the value of the contract and was unlikely to be discovered by a buyer exercising due care.

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220. Ronald Benton Brown, Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted, 49 OKLA. L. REV. 625 (1996) (discussing property that is psychologically impacted by issues such as ghosts, multiple murders, and AIDS).
221. However, physical defects such as broken locks not discoverable upon inspection may make the premises unsafe and susceptible to third party criminal acts.
222.See generally Brown, supra note 220.
224. Id. at 260.
225. Id. at 259.
a California court allowed a claim for nondisclosure where a seller and
the seller's agent failed to disclose to the buyer that a woman and her
four children were murdered in the home ten years earlier.\textsuperscript{228} Finding
that the murder was not a fact that a buyer should reasonably
have the burden of discovering, the court allowed the claim assuming
that the buyer could prove that the murder, as a psychological and
non-physical impact, has a significant effect on the market value of
the property.\textsuperscript{229}

Since the cases of \textit{Stambosky} and \textit{Reed} were decided and the Fair
Housing Act was used to prevent unsolicited disclosure of AIDS, a ma-

\textit{Journal of Law and Society}}

\textit{Statutes Dealing With HIV and AIDS: A

\textit{Id. at 133.}
\textit{Id. at 133.}
\textit{See Brown, supra note 220, at 629.}
\textit{Id.}
\textit{Id. at 635-36.}
\textit{Id. at 636.}
\textit{623 N.E.2d 731 (Ohio C.P. 1993).}
glarized, and she received threatening phone calls. The defendants argued that psychological impairments are not physical defects requiring disclosure under exceptions to the caveat emptor doctrine.

Finding that the stigma attached to the property was analogous to a latent property defect, which is an exception to the caveat emptor doctrine, the court refused to accept the defense of caveat emptor and upheld the recognition of a cause of action for failure to disclose information about psychologically tainted property. In addition, the buyer asserted a claim against the defendants for misrepresentation because when the buyer noticed bars on the basement windows and asked the seller about the purpose and necessity of the bars, the seller stated that a break-in had occurred sixteen years earlier and that there was not a current problem with the property. The defendants pointed to nondisclosure statutes in other states as an indication that sellers should not be liable for failing to disclose stigmatizing events, however the court found that these statutes "still require a good faith response to an inquiry regarding a potential psychological impairment."

While susceptibility of the property to criminal activity may certainly have more than just a psychological effect on the buyer, the presence of a sex offender in the neighborhood is a psychological taint that could also have ramifications as to the foreseeability of third party criminal activity. "Megan's Law" was enacted in New Jersey after a seven-year-old girl was raped and murdered in 1994 by a convicted pedophile who lived across the street. This law requires that local authorities notify neighborhoods when convicted sex offenders are released into the community. A federal version of Megan's Law was enacted in 1996 in order to protect the public from what are considered by some to be reasonably foreseeable criminal acts. Because studies have shown that sex offenders have a risk of repeating their behavior, even after imprisonment and rehabilitation efforts, all fifty states now require some type of registration for released sex offenders and many require community notification.

237. Id. at 734.
238. Id.
239. Id. at 736-37. Note that as of 1996, Ohio did not yet have a shield statute for psychologically tainted property. See Brown, supra note 220, at 640.
240. Van Camp, 623 N.E.2d at 734.
241. Id. at 739 ("Nondisclosure statutes are not designed to allow sellers to make false representations regarding property defects in response to affirmative questioning by the buyer").
243. Id. at 2039-40; see also 42 U.S.C. § 14071(d)(2) (Supp. V 1996) (requiring states to "release relevant information that is necessary to protect the public" from sex offenders in order to obtain federal anti-crime funds).
244. Telpner, supra note 242, at 2048-50.
The type of community notification required under Megan's Law legislation varies by jurisdiction and may involve active notification of the public by local authorities or passive notification by providing a database of information which the public may inspect. Disclosure of registry information may also be limited depending upon the size of the community, who is authorized to access the information, and the level of risk that the offender will commit another crime. However, in many cases, either directly or indirectly, homeowners will potentially know whether or not there is a sex offender in the neighborhood.

Deciding whether a home seller is required to disclose the presence of a sex offender in the neighborhood will be based on policy considerations similar to those involved in the disclosure of facts which may psychologically taint a particular property or neighborhood. These policy considerations include the remaining viability of the caveat emptor doctrine, whether such "defects" are actually "latent," whether "off-site" hazards should be disclosed, moral obligations to warn newcomers to the neighborhood, impact on the market value of the premises, the availability of this information to the buyer through other means, real estate brokers' disclosure duties, and protection of the public against foreseeable off-site risks through disclosure. Nevertheless, one major difference exists. The initial psychological taint situations, such as a previous murder or an AIDS death, do not involve a continuing danger of harm to the new occupants whereas the presence of a sex offender may involve such a potential danger.

245. Id. at 2050; see also Lori A. Polonchak, Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers, 102 Dick. L. Rev. 169, 176-78 (1997) (discussing four categories of methods used by various states to notify the public of sex offenders).
246. See Telpner, supra note 241, at 2051 (stating that disclosure may be made only to schools in some cases, but to the public in general if the risk of recidivism is high).
248. See id. at 680.
249. See id. at 690-94 (comparing California real estate disclosure law where home seller in Alexander v. McKnight, 9 Cal. Rptr. 2d 453, 456 (Ct. App. 1992), was required to warn buyer about "noisy" neighbors, with New Jersey's approach, which offers few protections for buyers where sellers fail to disclose off-site hazards).
250. See id. at 697.
251. See id. at 700 (discussing whether a sex offender's presence in the neighborhood is a fact material to the transaction).
252. See id. at 702-03 (discussing how a buyer's ability to discover information on this issue impacts the application of the caveat emptor rule).
253. See id. at 704-05.
254. See id. at 705-06 (concluding that the expansion of the real estate seller's duty to disclose "is consistent with the recognition of residents' right to know" of the presence of a sex offender in the community to protect the public).
The disclosure dilemma for real property sellers is especially onerous in the situation where a parent of small children is warned of the presence of a "sexually violent predator" in the neighborhood and decides to sell her house. If she or her real estate broker disclose the presence of this dangerous individual to potential purchasers, she will likely experience a decrease in the market value of the property and she may be unable to sell her home and move to protect her children from the known danger in her neighborhood. This dilemma has been addressed directly in some states by adding a provision to their psychologically tainted or stigmatized property shield statutes stating that the presence of sex offenders is a nonmaterial fact that does not require disclosure. Other states have addressed this issue by enacting specific statutes addressing the sole issue of whether the presence of a sex offender needs to be disclosed.

Some states only require that the real estate contract or lease agreement contain statutorily specified language informing the buyer or tenant where to find information about registered sex offenders. This particular approach essentially makes the "defect" patent instead of latent because the information can be obtained by the buyer or lessee using the public records. By providing a notice to the property transferee that the information about registered sex offenders is available, the burden to check the public sex offender registry is placed on the transferee, analogous to the existing burden to check title, zoning laws, building codes, etc. Buyers or renters may also have the ability to check with the local police records to determine the level of criminal activity in the neighborhood into which they are moving.

In 1999, the Arizona state legislature amended its Real Estate Disclosure Act to protect transferors, licensors, and lessors from liability for failing to disclose not only AIDS, felonies, or deaths occurring on
the property, but also the fact that the property is located near a sex offender, by declaring this fact to be "nonmaterial" to the real estate transaction. 259 Although sellers in Arizona may still feel a moral obligation to disclose this information to prospective buyers, they will be legally shielded by statute from having to make such a disclosure.

This Arizona shield statute appears to be in conflict with the purpose of the state's Community Notification Statute that the public be protected "through notification of sex offenders residing in the vicinity." 260 Because the Community Notification Statute requires that the community be notified only when a sex offender first moves into the area, new home buying or renting families will not be protected by the "Megan's Law" notification. The Arizona Real Estate Disclosure Act protects sellers and lessors from having to disclose the initial notification they received under the notification statute. 261

Like the situation in Arizona, many states may have a perceived conflict between real estate disclosure shield statutes and legislative provisions designed to protect the public by notifying the community about the presence of sex offenders. Those states which have added protection for the nondisclosure of the presence of a sex offender in the neighborhood to the shield statutes may be defeating the purpose of Megan's Law. They fail to protect subsequent buyers and lessees from dangerous individuals by not requiring at least warning of their presence.

Situations where criminal activity is foreseeable differ from the psychological taint cases because buyers may unknowingly confront life-threatening danger when they purchase property that is susceptible to sex offenders or other third party criminal acts. Society has already expressed an interest in protecting children from repeat sex offenders by enacting various versions of Megan's Law and certainly failing to disclose the presence of sex offenders, as well as other types of foreseeable criminal activity in the neighborhood, puts the children of unsuspecting buyers and lessees at risk.

Although all fifty states have enacted some form of "Megan's Law," many states have not yet legislatively addressed the real estate disclosure issues associated with sex offender registration. Those state legislatures that have acted have done so by protecting property transferors and their agents who fail to disclose the presence of sex offenders in the neighborhood. This protection cannot be reconciled with the purpose of Megan's Law, which is to protect our most vulner-

261. Id. at 370-71.
able citizens, our children, by notifying the neighbors about the presence of registered sex offenders.

The comparable issue of whether sellers or lessors should disclose the fact that there is a high or unusual level of criminal activity in the area has not been legislatively addressed by most states. Both the sex offender disclosure and criminal activity disclosure could help prevent injury to otherwise unsuspecting transferees of the foreseeably dangerous premises. Unless these facts are specifically excepted from a duty to disclose by shield statutes, sellers or lessors could be liable for failing to disclose facts material to a transferee’s decision of whether to move into the premises.

Protecting sellers, lessors, and real estate agents from liability for failing to disclose a psychological taint or stigma associated with the property, such as the fact that a person with AIDS lived and maybe died on the property\(^2\) or that a murder or suicide occurred on the property, is a legislative solution that makes sense in balancing subjective and unpredictable responses to these facts by potential buyers or lessees with preserving property marketability. Buyers or renters, who find out about these facts after they have already moved onto the premises, may be disturbed at some mental level,\(^3\) but they and their families are not in physical danger based upon these facts.

The presence of sex offenders and the foreseeability of third party criminal activity in the neighborhood are continuing dangers that a buyer or renter can protect against, but only when they are appropriately informed. Thus, a sex offender’s presence is not a fact that should be included in a state’s shield statutes. Instead, a state’s real estate disclosure law should reconcile the handling of these facts with the Megan’s Law legislation and should expressly state that a sex offender’s presence in the neighborhood is a materially adverse fact that could impact a transferee’s decision regarding the property transaction.\(^4\)

Disclosure of these adverse facts will impact the marketability of the property. However, the marketability of property is often impacted by other off-premises factors such as the presence of a nearby landfill, the type of businesses in the area, the reputation of the local

\(262.\) Disclosing AIDS information about the owner or occupier of property may constitute discrimination under the federal Fair Housing Act. See Brown, supra note 220, at 644. 

\(263.\) See id. at 646 (observing that shield statutes have shifted the burden of psychological taint and stigma to the buyers who may no longer want the property “because of their personal beliefs or sensitivities”).

\(264.\) For those few states still adhering to the caveat emptor doctrine, these facts will be considered material, but may not require disclosure because they are patent, not latent defects, which can be discovered by the buyer through the use of public records and the local police department.
school district, or the nearby location of a group home or halfway house. If we must balance property values against the health and safety of the future occupants of property, we must err on the side of protecting our citizens by making them aware of the dangers around them. We have seen this policy choice implemented by the enactment of Megan's Law and other notification laws such as California's Proposition 65, which requires companies to notify citizens of health risks in products and premises from toxic components.

Misrepresentation about the presence of a sex offender in the community or the level of criminal activity in a neighborhood will be actionable, but only if the prospective buyer or tenant asks the right questions. The policy of disclosure in real estate transactions, adopted by the majority of states, allows buyers and lessees to make informed decisions about one of the most important things in their lives—where they are going to live and raise their families. Disclosure of these material adverse facts is not only morally right, it corresponds with our current societal approach to help people make choices about how to deal with the dangers in our society by properly informing them of where the dangers exist.

IV. LANDOWNER LIABILITY FOR DISCLOSURE OR REFUSAL TO RENT OR SELL TO POTENTIALLY DANGEROUS PERSONS

This part of the Article will discuss the impact of a dangerous person's presence on the premises or in the vicinity from the aspect of the landowner or possessor who has knowledge of this dangerous condition. First, assuming a landowner will be required to warn either a prospective buyer, a current or prospective lessee, or the neighbors, of the presence of a dangerous person on the premises or in the vicinity, the issue will be whether the disclosing party should be subject to liability for such a disclosure. Second, in the case of a landlord, the land-

265. See Brown, supra note 220, at 644 (discussing Wisconsin's shield statute that protects real estate agents from not disclosing the location of a nearby "adult family home").

266. Proposition 65 which is also known as "The Safe Water Drinking and Toxic Enforcement Act of 1986" was passed on November 4, 1986. See AFL-CIO v. Deukmejian, 260 Cal. Rptr. 479, 480-81 (Ct. App. 1989) (discussing Proposition 65 in detail and stating that the second operative part of the proposition is that it "prohibits any person in the course of doing business from knowingly and intentionally exposing, without prior clear and reasonable warning, any individual to any chemical known to the state to cause cancer or reproductive toxicity").

267. For a good discussion about the public policy considerations in favor of disclosure and those against, see Thomas D. Larson, To Disclose or Not To Disclose: The Dilemma of Homeowners and Real Estate Brokers Under Wisconsin's "Megan's Law," 81 MARQ. L. REV. 1161, 1192-97 (1998).

268. Other examples of disclosure include labeling on prescription drugs, warnings on cigarettes and alcohol, consent forms in hospitals, etc.
lord may face several issues such as whether to screen prospective tenants for criminal propensity, refuse to rent to such individuals, or evict tenants who are potentially dangerous to other tenants. If the landlord does take action to protect other tenants, the landlord may face claims from the dangerous tenant who has been subjected to the landlord's protective actions.

A. Landowner's Disclosure of Private Facts to Warn Others

If a landowner learns of the criminal propensity of a person on their premises and alerts others to this fact in order to protect them from potential danger, is the landowner liable in tort to the potential criminal? In jurisdictions where a landlord owes a duty to protect tenants against third party criminal acts, a landlord may be faced with a decision either to warn tenants about the criminal propensities of another tenant, or to evict the potentially offending tenant in order to avoid harm to others. If the landowner discloses adverse information about property possessors on the owner's premises, he or she may be subject to liability for an invasion of the possessors' right to privacy or possibly the intentional infliction of emotional distress.269

The right of privacy protects individuals against the publication of private matter that "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."270 Although claims of invasion of privacy based on this type of publication are typically asserted against the media, landlords or landowners may also be subject to such claims for disclosing information about a person's criminal background to other tenants or to neighbors. However, facts concerning a person's criminal record would be on the public record and would not be considered private. Disclosure of this information would most likely be offensive to the individuals who have been convicted, but a criminal background, particularly one with sexual offenses, is a public fact which is of legitimate public concern to those who are living in close proximity to a person with such a record.271 In addition,

269. See Ray Dozier, A Consultant's View of the Future of Real Estate, J. Rec. (Oklahoma City), Aug. 25, 2000, 2000 WL 14297953 (predicting a "flood of privacy and should-have-been-told lawsuits" and predicting that the "sharing, or disclosing, of data on tenants with others will be rigorously fought by lessees").

270. RESTATEMENT (SECOND) OF TORTS: PUBLICITY GIVEN TO PRIVATE LIFE § 652D (1976).

271. See Elizabeth Kelley Cierzniak, There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester Is Released into the Community, 28 IND. L. REV. 715, 749-50 (1995) (noting that a community's flyer announcing the presence of a child molester in the neighborhood would probably not be considered an invasion of privacy because the information has already appeared on the public record, there is a reduced expectation of privacy, and it is a matter of public significance); see also Doe v. Sears, 263 S.E.2d 119, 123 (Ga. 1980) (observing that a tenant in default may have this information published to those who are concerned and "general public properly is concerned with whether or not public hous-
criminals, particularly sexual predators and those on probation or parole, have a “reduced expectation of privacy because of the public’s interest in public safety.” Some states, however, have determined that a privacy action can go forward if the crime “occurred in the distant past and the offender has been rehabilitated.”

In *Briscoe v. Reader’s Digest Ass’n,* the California Supreme Court determined that a person convicted of a crime eleven years earlier stated a valid cause of action for invasion of privacy by a publisher who included his name in an article about hijacking, subjecting him to injury by publicly disclosing his past criminal activity. The court noted that although there are strong interests at stake in publication of newsworthy events and the protection of privacy, the state has a compelling interest in rehabilitating criminals and returning them to society.

Therefore, in order to prevail on a claim for invasion of privacy, a trier of fact must determine “(1) whether the plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff’s identity existed.” Applying these factors, a landowner should only disclose past criminal behavior if it is truthful, if it appears that the person is not rehabilitated, and if it is for the independent justification of warning those whom the landowner has a duty to protect. The warning would contain the announcement that the other person has a continuing propensity for

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272. See Cierziak, supra note 271, at 719.
273. *Id.* at 750 (citing Conklin v. Sloss, 150 Cal. Rptr. 121, 124 (Ct. App. 1978); Briscoe v. Reader’s Digest Ass’n, 483 P.2d 34, 44 (Cal. 1971); see also Jones v. Taibbi, 512 N.E.2d 260, 269-70 (Mass. 1987) (“A person’s arrest must be recorded by the police, and that record is public information. Moreover, the public has a right to be informed about matters in which it has a legitimate concern.”).
274. 483 P.2d 34 (Cal. 1971).
275. *Id.* at 44.
276. *Id.* at 43.
277. *Id.* at 44.
278. Making false or untrue statements might subject the landowner to a libel action. *See* Baker v. Burlington N., Inc., 587 P.2d 829, 832-33 (Idaho 1978) (finding termination letter delivered to company officials regarding an employee who lied about his criminal record on his application not libelous because it was truthful and was not an invasion of privacy because it was a disclosure of public, not private facts).
dangerous activity.\textsuperscript{279} In the case of sex offenders, there is some support for the belief that these individuals are never rehabilitated and that regardless of how much time has passed, it may not be an intrusion on their privacy to warn others of their propensity to commit this type of crime.

B. Landlord's Duty to Protect Tenants from a Dangerous Tenant

1. Duty to Investigate or Screen Prospective Tenants

One method for protecting tenants from the criminal activity of another tenant is for the landlord to screen all prospective tenants during the application process and reject those applicants with criminal records or those who are potential criminals.\textsuperscript{280} Using a criminal record to reject a tenant should not call for potential liability for the landlord. However, using certain factors to predict criminal propensity, such as drug addiction, may be considered a violation of the Fair Housing Amendments Act of 1988 (FHAA) since the FHAA prohibits discrimination against handicapped individuals. Individuals with a past record of problems due to drug use or addiction would be considered handicapped unless they are currently using drugs or addicted to them.\textsuperscript{281}

A criminal record or a record of mental health problems might implicate a landlord's duty to protect other tenants from reasonably foreseeable criminal activity by excluding such tenants.\textsuperscript{282} Nevertheless, "[a] landlord is not competent to assess the dangerous propensities of his mentally ill tenants," and assessing whether a tenant might be

\textsuperscript{279} The right of privacy is not absolute and invasions may be justified for business reasons. \textit{See} Elmore v. Atl. Zayre, Inc., 341 S.E.2d 905, 907 (Ga. Ct. App. 1986) (holding intrusion into person's seclusion in store restroom justified by store's "interest in providing crime-free rest rooms for its customers, and there existed sufficient cause for suspicion of criminal activity to justify any intrusion which occurred"); Hougum v. Valley Mem'l Homes, 574 N.W.2d 812, 818 (N.D. 1998) (finding that a Sears employee's alleged intrusion of privacy of a person masturbating in the store's public restroom was "consistent with his work responsibilities").

\textsuperscript{280} \textit{See} Glesner, \textit{supra} note 70, at 780.

\textsuperscript{281} \textit{Id.} at 781 (noting that a "landlord may ask only whether the prospective tenant is a current drug user/addict or has been convicted of manufacturing or distributing illegal drugs" and that this question must be asked of all applicants, not just selected ones).

\textsuperscript{282} Guzin Collins, \textit{Landlords & Tenants: Mobile Home Issues Governed by Manufactured Home Act}, \textit{Virginian-Pilot}, Jan. 13, 2001, at 18 (observing that if prior criminal record is found based on check of prospective tenant, landlord is allowed to refuse to rent if "it involved harm to persons or property, and is likely to cause a clear and present threat to the health and safety of other persons").
subject to violent behavior against other tenants is difficult for even the best-trained mental health expert.  

Encouraging landlords to perform exhaustive screening of applicants in order to protect other tenants is not necessarily in the best interests of public policy because it does not further the goals of the criminal rehabilitation system for "ex-criminals" to be denied housing as they attempt to assimilate back into society. An analogous legal issue is whether to hold employers liable for the criminal acts of their employees against other employees based on a claim of negligent hiring.

In a case involving a negligent hiring claim, the Michigan Supreme Court in *Hersh v. Kentfield Builders, Inc.* explained that "an employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer." Determining that a jury, rather than a judge, should decide whether or not the employer knew or should have known of the employee's vicious propensities, the court noted that "the mere fact that a person has a criminal record, even a conviction for a crime of violence, does not in itself establish the fact that that person has a violent or vicious nature" such that the employer should not hire the individual. The court also expressed sympathy for the lower court's concern "for those persons who, having been convicted of a crime, have served the sentence imposed and so are said to have paid their debt to society and yet find difficulty in obtaining employment." Similarly, landlords should not necessarily be found negligent for renting to a tenant with a past criminal background if that tenant later injures another tenant in an act that is unforeseeable to the landlord.

Another problem landlords may face in the investigation of prospective tenants is that it may be the child of the prospective tenant who has a record of previous criminal activity or who is on a list of sexual offenders. If the landlord screens only the parents for criminal records and checks the sex offender registry for the parents, the juvenile's information will not be revealed. In fact, most jurisdictions will protect a juvenile offender from public disclosure, in which case the

286. Id. at 288.
287. Id. at 289.
288. Id.
information will not be publicly available to either the landlord or to the other tenants.

Recently, some homeowners associations have prohibited sex offenders, who have a high risk of reoffending, from residency within the association. In *Mulligan v. Panther Valley Property Owners Ass'n*, the association amended its rules to prohibit a Tier 3 offender (the most serious offender on New Jersey's Megan's Law registry) from residing in Panther Valley. One of the association members claimed that this amendment was "an unlawful infringement on her right to alienate her property." The court determined that the restriction on her right to sell or lease was very limited since there are only about 80 people out of a population of 8.4 million who would be prohibited from buying or leasing from her. Additionally, the court noted that the restriction does not fall on her unfairly because it affects all association members equally; the association member was not a proper party to vindicate the rights of a Tier 3 offender; and Tier 3 offenders and convicted criminals are not protected under state discrimination laws.

The *Mulligan v. Panther Valley Property Owners Ass'n* court did express concern that if a large number of common interest developments in the state adopt similar restrictions, the housing market for these high risk offenders would be very limited and might "approach 'the ogre of vigilantism and harassment,' the potential dangers of which the Supreme Court recognized even while upholding the constitutionality of Megan's Law." It also noted that the association might be viewed as a government actor and subject to constitutional constraints because some of the functions it performs are quasi-municipal in nature.

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291. See Baker, supra note 289, at 24.


293. Id.

294. Id.

295. Id. at 1192-93.

296. Id. at 1193. For a discussion about the constitutionality of Megan's Law, see Cierzniaik, supra note 271, at 727-50; Daley, supra note 7; Earl-Hubbard, supra, note 7; Donna-Marie Korth & Candace Reid Gladston, Megan's Law Should Survive the Latest Round of Attacks, 13 ST. JOHN'S J. LEGAL COMMENT. 565 (1999); Maria Orecchio & Thersa A. Tebbett, Sex Offender Registration: Community Safety or Invasion of Privacy?, 13 ST. JOHN'S J. LEGAL COMMENT. 675 (1999); Jennifer L. Poller, Provisions of Megan's Law Held Unconstitutional: State Should Bear Burden of Proof in Sexually Violent Predator Proceeding, 1 No. 12 LAW. J. 2 (Sept. 10, 1999); Small, supra note 7.
Once the landlord has appropriately screened a prospective tenant, the landlord may refuse to rent to the individual so long as excluding the tenant does not violate public policy or civil rights. If the landlord determines that despite a criminal record the prospective tenant has been rehabilitated and is not a risk to other tenants, there will probably not be a need to warn other tenants of the criminal background because criminal activity will not be foreseeable.

An authorized check of a prospective tenant's background in *Stephens v. Greensboro Properties, Ltd.* revealed that the individual had a history of arrests and convictions of violent crimes, although he had not been convicted of any felony within the prior five years. The policy of the property management company was to disapprove any tenant with a felony conviction within the last five years, but shortly after renting to this convicted felon, the policy was changed to exclude any convicted felon from residency. Nevertheless, the property manager agreed to lease an apartment to the individual and he was later hired as the apartment complex's maintenance man. The fourteen-year-old son of one of the tenants was shot and killed by the maintenance man and the decedent's mother sued the property owners and managers alleging negligence by allowing the perpetrator to become both a resident and an employee of the complex.

The *Stephens* court determined that a jury must decide whether the property manager was negligent by renting to an individual with a long history of arrests and convictions for violent crimes based on whether the assault on his co-tenant was reasonably foreseeable and whether the property owner failed to exercise ordinary care in guarding against such an occurrence. However, the management was not negligent per se since its rules only excluded a tenant with felony convictions which had occurred within the last five years and the offending tenant's convictions occurred previous to the five year period.

298. See Montgomery L. Effinger, *Premises Liability and Owner's Duty: Adequate Security for the Enemy Within*, 70 N.Y. St. B.J., Jan. 1998, at 51. Landlords or managers of federally-assisted housing will be required to refuse to rent to sex offenders who are subject to lifetime registration under a state program. See 42 U.S.C.A. § 13663(a) (West 2001); see also Jennifer S. Fahey, *Landlord Liability in West Virginia for Criminal Acts on the Premises*, 98 W. Va. L. Rev. 659, 674 (1996) (noting that "a private landlord in West Virginia may consider any criteria in screening prospective tenants, including criminal convictions, subject only to constitutional and statutory limits").


300. *Id.* at 466.

301. *Id.*

302. *Id.*

303. *Id.* at 468.

304. *Id.*

305. *Id.* at 469.
If a jurisdiction holds the landlord liable for the criminal acts of one tenant against another tenant and the court determines that the landlord had knowledge of the criminal propensity prior to renting, the landlord may be taking a risk to rent to any individual with a criminal record. Just like taking the risk that the rent will not be paid by renting to individuals with a bad credit record, a landlord may be taking the risk that an applicant with a criminal record will injure another tenant and the landlord will be liable.

Jurisdictions determining whether or not to hold a landlord liable for the foreseeable criminal acts of one tenant against another must decide who will bear the risk of crime—the landlord or the innocent tenant victim. Because the landlord is in the best position to avoid the harm to the tenant victim by thoroughly screening incoming tenants and either rejecting them or warning other tenants, the landlord should bear the risk of foreseeable criminal activity against its tenants if it results from the landlord's negligence in either screening, renting, or failing to warn others.306

Assuming the landlord is held liable for foreseeable criminal acts by one tenant against another for negligently renting to the offending tenant, there will be an issue as to whether the landlord has a continuing duty to check the local police records for information regarding its current tenants. If the landlord determines during the tenant's occupancy that the tenant has a criminal propensity based upon police reports or complaints from other tenants, the landlord may be under a duty to either evict the offending tenant or, at a minimum, warn other tenants in the complex.307 As discussed above, the landlord should have a heightened duty to disclose the presence of a sex offender to other tenants in order to protect individuals particularly susceptible to such crimes, such as children. Apartment complexes are typically very close living environments with shared common areas such as laundry rooms, playgrounds, and pools. These close living arrangements make it easier for innocent tenants to fall victim to a criminal tenant living in the apartment complex.

306. See Glesner, supra note 70, at 782-83 (discussing how a landlord can shift the risk of crime by using lease provisions "requiring tenants to indemnify landlords for the tenant's own criminal activities, through waiver clauses excusing the landlord from responsibility for the criminal acts of third parties (even if the landlord's negligence enhanced the risk of crime), and through security deposit provisions financing security measures and defraying liability stemming from the tenant's actions").

307. See id. at 715 (noting that "it is likely that a duty to police tenants will develop further" and that the "extension of landlord liability to include tenants' criminal activities could serve to reduce the incidence of crime").
2. Evicting Dangerous Tenants

If a landlord discovers during the course of a tenant’s occupancy that the tenant is dangerous to others in the complex, the landlord may have a duty to evict the offending tenant. Although a landlord may refuse to rent to a convicted felon based upon a screening process, discovering later that the tenant has a criminal record or is a registered sex offender may not be sufficient grounds to terminate a tenancy once the lease has been signed.

In *Lambert v. Doe*, the landlord had an opportunity to require a juvenile sex offender to vacate the complex without giving a reason because the lease expired and was renewed only on a month-to-month basis. The landlord continued to rent to a mother whose twelve year-old son had sexually molested several other children in the complex and management had enough information to know that it was reasonably foreseeable that the boy would continue to victimize young children in the complex. The court determined that the landlord could have refused to renew the lease on a month-to-month basis and that the terms of the lease gave the landlord the right to terminate if a tenant or guest creates a nuisance or annoyance to another tenant, which the boy’s actions in this case certainly did. The court upheld the jury’s verdict in favor of a nine-year-old resident who was sexually molested, finding that “the jury could have properly concluded that the landlord should reasonably have been expected to warn new tenants, such as the Does, of the potential threat posed by Sean Roe to young children in the complex, notwithstanding the landlord’s fear that such warning might have exposed it to a possible slander suit.”

Local codes and laws will guide whether a landlord must show “just cause” to terminate a tenancy. In New York, a landlord is

309. Id. at 848.
310. Id.
311. Id.
312. *Id.* But see *Molosz v. Hohertz*, 957 P.2d 1049, 1050 (Colo. Ct. App. 1998) (finding that landlords who rented a rural home to their adult son owed no duty to neighbor for negligent retention of a violent tenant resulting in injury when the tenant son fired several shots through the neighbor’s windows); *Smith v. Howard*, 489 So. 2d 1037, 1038 (La. Ct. App. 1986) (holding that “Housing Authority does not have a duty to evict persons with reportedly violent propensities nor to maintain its own private police protection of its premises”); *Blatt v. N.Y. City Hous. Auth.*, 123 A.D.2d 591, 593 (N.Y. App. Div. 1986) (holding that New York City Housing Authority had no duty to evict tenant who later shot a cotenant after a personal dispute involving a romantic relationship).
313. See, e.g., WASH. REV. CODE ANN. § 59.12.030(5) (West 2000) (providing that landlord may terminate lease of tenant who commits waste, nuisance, or engages in unlawful activity on premises). This is not an issue for month-to-month leases where the landlord can terminate a lease with proper notice, but only for long-term leases being terminated before the end of the lease.
required to show that the tenant "has conducted himself in a non-desirable way" in order to evict.\textsuperscript{314} The court in \textit{Gill v. New York City Housing Authority}\textsuperscript{315} determined that the tenant parents' refusal to cooperate with an investigation of their son's psychiatric condition was not grounds for eviction and that prior to the stabbing of a cotenant by their son, there was no evidence supporting an eviction action.\textsuperscript{316} The court stressed that under the New York City Housing Authority rules, "it is not upon the mere prospect of future misconduct that a non-desirability eviction proceeding may be premised, but upon misconduct which has actually occurred."\textsuperscript{317}

Just cause is required to evict a tenant from public housing, but it does not include the criminal activities of family members or guests over which the tenant has been unsuccessful in controlling.\textsuperscript{318} When family members or guests of an apartment resident are involved in criminal activity such as drug dealing, a housing authority does not have a right under the U.S. Housing Act,\textsuperscript{319} to evict a tenant for the wrongdoing of these third parties unless it can show some type of culpability.\textsuperscript{320} In \textit{Rucker v. Davis},\textsuperscript{321} the Ninth Circuit determined that although "tenants who personally engage in drug activity or . . . tenants who turn a blind eye to the activities of household members or guests" can be evicted, an innocent tenant, who has already taken reasonable steps to prevent third-party drug activity, cannot be evicted from public housing without some other showing of good cause.\textsuperscript{322}

Unless the court finds that a landlord had a duty to evict an offending tenant, other tenants in the complex will not be allowed to terminate their leases or claim damages from the criminal acts of another tenant under theories such as the covenant of quiet enjoyment or the implied warranty of habitability. In \textit{Williams v. Gorman},\textsuperscript{323} the court held that because the violent tendencies of a tenant who lived upstairs from the victim were not known to the landlord, there was no duty to evict the tenant in advance of a gunshot blast through the victim's ceiling.\textsuperscript{324} The court also found that the victim's damages could not be

\textsuperscript{315} Id. at 262.
\textsuperscript{316} Id. at 261-65.
\textsuperscript{317} Id. at 265.
\textsuperscript{320} See Rucker, 237 F.3d at 1126.
\textsuperscript{321} Id.
\textsuperscript{322} Id. at 1120-21.
\textsuperscript{324} Id. at 765.
compensated as a breach of an implied warranty of habitability because the criminal conduct of the tenant was not foreseeable.\textsuperscript{325}

Similarly, in \textit{North Ridge Apartments v. Ruffin},\textsuperscript{326} the Virginia Supreme Court held that a tenant who wished to terminate her lease because she felt unsafe in the leased premises and was afraid of crime could not assert the theory of constructive eviction because the landlord had no duty to protect her from the criminal acts of an unknown third party.\textsuperscript{327} The court held that "because there was no duty on the lessor in this case to control third parties' criminal conduct, the failure of the lessor to protect the lessee from such conduct cannot be deemed an intentional act of omission" which would establish constructive eviction.\textsuperscript{328}

\section*{V. CONCLUSION}

Under common law principles, landowners do not have a duty to protect or warn others against the criminal activities of others that occur on their premises. However, the modern trend in tort law has been to hold landowners liable for injuries occurring on their premises if the criminal activity is reasonably foreseeable and, in some jurisdictions, also imminent. Liability assessment requires that the plaintiff establish the landowner's duty to the victim, the breach of that duty through the negligence of the landowner, and that the breach proximately caused the plaintiff's injury.

Although duty has sometimes been based on the existence of a special relationship such as business possessor/invitee or landlord/tenant, or more recently, employer/employee or bank/ATM customer, other theories such as the latent defect exception to caveat lessee, the implied warranty of habitability, exceptions to caveat emptor, and statutory disclosure legislation have resulted in landowner liability for failure to protect or warn against foreseeable criminal acts. Once landowner liability to victims of third party criminal activities is established, courts modernly struggle with issues such as comparative liability, apportionment of damages between the landowner and the perpetrator, and whether insurance will provide coverage or exclusion under premises insurance policies.

Jurisdictions are divided as to whether landowners should be responsible for failing to protect possessors or invitees against foreseeable criminal activity. Exceptions to the common law "no duty to aid" rule have been based on policy decisions that either a special relationship requires such protection or that the landowner is in the best posi-

\begin{itemize}
  \item \textsuperscript{325} \textit{Id.}
  \item \textsuperscript{326} 514 S.E.2d 759 (Va. 1999).
  \item \textsuperscript{327} \textit{Id.} at 761.
  \item \textsuperscript{328} \textit{Id.}
\end{itemize}
tion, both in knowledge and financial means, to protect against the foreseeable harm. Jurisdictions supporting a landowner's duty to pro-
tect may also support a duty to warn as one way to protect the foreseeable victim. However, the contours of a duty to warn or disclose the potential for criminal activity are not nearly as well-developed as the theory of the landowner's duty to protect under premises liability rules.

In circumstances where a landowner cannot protect against third party criminal activity by making physical changes to the premises such as installing security fences, locks, extra lighting, guards, etc., disclosure by the landowner of known criminal danger is the only way to protect innocent victims. If a landowner is aware of criminal activity in the area or of the criminal propensity of a person living either near or on the premises, the landowner may have a duty to disclose this information to either a purchaser or a lessee of the property.

In the case of a landlord/tenant relationship, the landlord may have an ongoing duty to protect the tenant against foreseeable criminal activity by warning the tenant of the potential danger associated with premises occupation. This duty may include not only a duty to disclose this information to the tenant at the time of rental, but to screen other prospective tenants for criminal propensity, evict existing tenants who are either involved in criminal activity or have a known propensity for such activity, or warn existing tenants of newly discovered information about the criminal propensity of another tenant.

The emergence of Megan's Law legislation in all fifty states has expanded a community's knowledge of the existence of registered sex offenders living in the area with the express policy of protecting children against harm from repeat offenders through the disclosure process. However, several states have legislatively protected home sellers and lessors who fail to disclose their knowledge of nearby sex offenders. These shield statutes state that such information is not material to the transaction, similar to other psychological taints such as a prior murder in the house or the fact that a prior occupant had AIDS. Unfortunately, shielding landowners from liability for failing to disclose the existence of nearby criminals is in direct conflict with Megan's Law legislation which was enacted to protect the susceptible against criminal acts.

Requiring landowners to disclose the potential for criminal activity on or nearby the premises being rented or sold will most likely have a detrimental impact on the market value of the premises and the neighborhood. However, such disclosure may be appropriate since the common law rule that there is no duty to aid others has been undercut by modern recognition that a landowner may have the duty to protect others from reasonably foreseeable criminal activity.
Jurisdictions recognizing premises liability for reasonably foreseeable injury from third party criminal activities should require disclosure of these dangers prior to actual injury in order to protect lessees or purchasers from harm. At a minimum, even in those jurisdictions which maintain that a landowner has no duty to aid others on the premises, the existence of a sex offender in the neighborhood should be disclosed to lessees or purchasers in order to fulfill the public policy concerns expressed by the nationwide enactment of Megan's Law.

Finally, landowners should not fear liability for disclosing the criminal propensity of an individual to other occupants or potential occupants of their premises. While such disclosure would probably be highly offensive to a reasonable person, it would be of legitimate concern to the public. If the disclosure was based upon an existing criminal record, such facts would be on the public record and would not be considered private. However, landowners may be liable under a privacy action if the crime was committed in the remote past and the criminal has been rehabilitated. In the case of a known sex offender, it is unlikely that a disclosure of this information, no matter how distant, will be considered an invasion of privacy if it can be shown that there is a legitimate expectation that future criminal acts might be committed against children. Therefore, landowners who are aware of reasonably foreseeable criminal activity against occupiers of their premises should have a duty to disclose this information to either prospective or existing occupiers, particularly when there is a potential danger of harm to the most vulnerable members of our society, children.