THE DUTY TO PROVIDE ADEQUATE PROTECTION: LANDOWNERS' LIABILITY FOR FAILURE TO PROTECT PATRONS FROM CRIMINAL ATTACK

Michael J. Bazyler*

While the incidence of crime has been steadily increasing in the post-war era,[1] and especially since the early 1960's,[2] analysis of the crime problem has revealed that certain segments of society have been hit with a disproportionate share of crime.[3] The hardest hit have been commercial establishments operating in the poorer areas of the inner

* Associate, Morrison & Foerster; Law clerk to Judge Ozell M. Trask, U.S. Court of Appeals, Ninth Circuit, 1978-1979; J.D. University of Southern California, 1978; A.B. University of California, Los Angeles, 1974. The author would like to thank Professor Martin Levine and Professor Robert Ellickson of the University of Southern California Law Center for their review of the earlier drafts of this Article.

1. J. CONCKLIN, THE IMPACT OF CRIME 3 (1975); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: A COMPARISON OF 1973 AND 1974 FINDINGS (1977) [hereinafter cited as LEAA VICTIMIZATION SURVEY]; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 10, 12-14 (1973) [hereinafter cited as A NATIONAL STRATEGY TO REDUCE CRIME]; C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 3-6 (1978); U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS (1976) [hereinafter cited as FBI UNIFORM CRIME REPORTS]. See note 3 *infra*.

2. *See* sources cited in note 1 *supra*.

3. J. CONCKLIN, *supra* note 1, at 91, 133-42. FBI UNIFORM CRIME REPORTS, *supra* note 1, at 12; LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE NATION'S FIVE LARGEST CITIES 12 (1975) [hereinafter cited as FIVE LARGEST CITIES STUDY]. *See also* LEAA VICTIMIZATION SURVEY, *supra* note 1, at 10.

The actual amount of crime that occurs in our society is unknown. Not all crimes are observed by a witness or are reported to the police. The recorded amount of crime is that proportion of actual crime that is officially noted by the police and reported through the Uniform Crime Index compiled by the Federal Bureau of Investigation. [FBI Uniform Crime Index]. The difference between those statistics and the actual number of crimes is often referred to as the "dark figure," the number that occur but are not officially recorded. To determine, as closely as possible, the magnitude of this dark figure, the National Crime Commission in 1965 began a nationwide survey to learn the extent to which individuals had been victims of crime. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: A REPORT OF A NATIONAL SURVEY (1967). Subsequent surveys have been done by the Law Enforcement Assistance Administration (LEAA). *See* LAW ENFORCEMENT

cities.[4] It seems that businesses and other organizational establishments are frequent crime high-risk targets,[5] that those found in poorer neighborhoods are more likely to be vicitimized than those in middle or upper class neighborhoods,[6] and that the crime rate, in general, is higher in the cities than in the rural areas.[7]

Of the commercial establishments, retail stores and proprietary parking structures head the list of targets.[8] The crime rate for these targets is usually proportionally higher than for other businesses, so that patrons of these establishments face a greater risk of being personally assaulted.[9]

This rising rate of patron vicitimization, and society's inability to stem it through traditional law enforcement methods, calls for turning to tort law for a possible answer. The decision whether to impose tort duty in any given situation ultimately depends upon the seriousness of the dilemma that tort law is called upon to solve.[10] If the dilemma is serious enough, tort law, by imposing a duty, can be used as a tool to help remedy the situation.[11]

This Article examines the dilemma of the rising rate of criminal

---

ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: A COMPARISON OF 1974 AND 1975 FINDINGS (1977).

Because these surveys reflect the amount of actual crime rather than merely reported crimes, they, rather than the FBI Uniform Crime Index, should be examined to determine the actual scope of crime. *See* Y. CHO, PUBLIC POLICY AND URBAN CRIME 15-20 (1974). *But see* C. SILBERMAN, *supra* note 1, at 445-55.

4. J. CONCKLIN, *supra* note 1 at 5, 73, 91. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 35, 41 (1967) [hereinafter cited as THE CHALLENGE OF CRIME IN A FREE SOCIETY]; FIVE LARGEST CITIES STUDY, *supra* note 3 at 32.

5. A. Reiss, *Assessing the Current Crime Wave*, in CRIME IN URBAN SOCIETY 36 (B. Mclennan, ed. 1970). The FIVE LARGEST CITIES STUDY shows a large gap between commercial and personal or household victimization rates. Commercial robberies were four to five times as high; commercial burglaries were three to four times as high. FIVE LARGEST CITIES STUDY, *supra* note 3, at 32; CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 4, at 35-36. *See also* sources cited in notes 15 & 16 *infra*.

6. J. CONKLIN, *supra* note 1, at 91; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 80 (1967) [hereinafter cited as TASK FORCE REPORT]. *See* CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 4, at 35-36, 38-39.

7. J. CONCKLIN, *supra* note 1, at 91, 133-42. CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 4, at 35; C. SILBERMAN, *supra* note 1, at 5; TASK FORCE REPORT, *supra* note 6, at 87.

8. CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 4, at 41; J. CONCKLIN, *supra* note 1, at 111-12; C. JEFFERY, CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN 191-92 (rev. ed. 1977); S. SCHAFER, THE VICTIM AND HIS CRIMINAL: A STUDY IN FUNCTIONAL RESPONSIBILITY 92, 93 (1978). For this reason, while this Article deals with crimes committed at all kinds of commercial establishments, see note 12 *infra*, retail stores and parking garages in particular should be kept in mind when dealing with possible solutions to the commercial crime problem.

9. According to one study, those persons outside at night are three times as likely to be victimized as those who stay indoors after dark. *See* M. HUNT, THE MUGGING 13 (Signet ed. 1972) (citing S. SCHAFER, *supra* note 8). It has also been estimated that in cities over 250,000 a person's chances of being personally assaulted ("mugged") are one in 340; in cities over 1 million, one in 260. FBI UNIFORM CRIME REPORTS, *supra* note 1, at 60-61.

10. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 3, at 15 (4th ed. 1971); *see also* 1 F. HARPER & F. JAMES, THE LAW OF TORTS xl-xlii (1956).

11. *Id.*

attacks upon patrons of commercial establishments. First, it examines the seriousness of the patron vicitimization problem and the need for application of tort law. Next, it demonstrates the failure of traditional tort law to deal with the problem. It then focuses upon other fields, similar to the landowner-patron field, where traditional tort law has been abandoned in favor of more modern tort analysis. Finally, this Article proposes that such an analysis also be applied to the landowner-patron relationship, so that tort law can effectively be used as a tool to stem the rising rate of patron attacks.[12]

THE PATRON VICITIMIZATION PROBLEM AND ITS ATTENDANT CONSEQUENCES

In order to determine whether tort law can, or should, deal with the crime problem, the impact of crime upon the affected parties must first be examined. An examination of the crime problem within the commercial setting, and present methods of dealing with it, will demonstrate whether a need exists to bring tort liability into the commercial crime area.[13]

Landowners' Failure to Adequately Deal with the Commercial Crime Problem

As commercial crime has continued to rise, those responsible for running the commercial establishments—commerical landowners—

12. The focus of this Article is upon crimes occurring within the commercial setting, and their relevance to the relationship between business invitor and patron. The problem at issue is whether a business invitor, who operates a commercial enterprise open to the public, should be placed under a legal duty to take reasonable precautionary measures to protect his patrons from possible criminal attack by third parties.

A business invitor is defined here as a commercial landowner who invites people upon his land for business purposes, either profit or nonprofit. Common examples of such commercial enterprises are stores, ranging from large shopping-center supermarkets and department stores to small family-run enterprises. The landowner owns not only the store but also the parking facilities. In situations where the landowner leases to the store owner the land and building, and is under a duty to protect patrons of that store, he could contract with the store owner to indemnify him in case of liability. Thus, there should exist no elements of difficulty or unfairness in imposing on absentee landowners a duty to protect patrons. *See* Mile High Fence Co. v. Radovich, 175 Colo. 537, 541 n.1, 489 P.2d 308, 311 n.1 (1971).

A patron is a person who enters the premises with the intention of patronizing what the commercial enterprise may offer. Whether trespassers who are hurt on the premises can successfully sue landowners is a separate question not within the scope of this Article. See discussion of person's status and duty, as it applies in California and other states, at text & notes 65-70 *infra*.

The third-party criminal is a person, who may be another patron, who criminally assaults a business visitor.

The focus of this Article is upon injuries to person, and not to property. While protection of property may fall within the landowner's duty, the most serious aspect of the crime problem is the risk of personal injury or death to the patron. Ultimately, it is the seriousness of this risk, and not danger to property, that should call for imposition of the duty upon landowners. *See* text & notes 26, 148-51 *infra*. Nonetheless, both personal injuries as well as property damage will be called "commercial crimes."

13. See note 12 *supra*.

have failed to provide an adequate response to the problem.[14] Businesses are being chastised continually by enforcement officials for inviting criminal attack by failing to provide adequate security devices to protect against crime.[15] Considered as a group, commercial establishments have inadequate gate and guard service, lack proper anti-theft devices, and fail to provide proper lighting to protect themselves and their patrons against criminal attack.[16] While this failure to take adequate precautions against crime may have had little effect in the past, today it is a significant factor contributing to the crime problem.[17] This failure has led not only to an increase in the rate of crimes against property, but also a concomitant rise in the rate of personal assaults upon patrons.[18] An increasing fear to patronize these establishments at times other than in optimal daytime conditions has developed as a result.[19]

The Costs of Crime

In studying public reactions to crime, the National Crime Commission found that people feared most those crimes which are associ-

14. V. Bunn, *Business Management for Crime Prevention*, in COMBATING CRIME AGAINST SMALL BUSINESSES 10-41 (R. Post ed. 1972); W. CLIFFORD, PLANNING CRIME PREVENTION 26 (1976); SENATE SELECT COMM. ON SMALL BUSINESS, 91ST CONG., 1ST SESS., CRIME AGAINST SMALL BUSINESS (Comm. Print 1969) [hereinafter cited as SMALL BUSINESS REPORT]. *But see* J. CONCKLIN, *supra* note 1, at 209 n.1.

A study prepared by the Dillingham Corporation for the Southern Association of Governments also pointed to the neglect on the part of planners and designers:

> The importance of considering crime prevention in physical planning has not been recognized by other professions, agencies and activities. A perusal of the planning literature including comprehensive plans for jurisdictions across the country demonstrated that crime prevention is not a crucial factor with planners. Some of the later plans have brief generalities concerning the need to include safety and security in the planning objectives but there is little evidence that the concern has been expressed in specific physical features.

Cited in NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COMMUNITY CRIME PREVENTION 196 (1977) [hereinafter cited as COMMUNITY CRIME PREVENTION]. This neglect is, in part, a reflection of the lack of demand by building owners for better-designed buildings.

15. *See* sources cited in note 14 *supra*.

16. A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 64. *See also* COMMUNITY CRIME PREVENTION, *supra* note 14, at 198-200.

17. *See* text & notes 8-9; R. Dodge, H. Lentther, & F. Shenk, *Crime in the United States: A Report on the National Crime Survey*, in SAMPLE SURVEYS OF THE VICTIMS OF CRIME 11-12 (W. Skogan, ed. 1976).

18. *See* sources cited in notes 8-9 *supra*. One of the most intensive studies of the spatial distribution of crime, performed on the crime of robbery in Oakland, California, suggests that women are the most frequent victims of patron attacks. The study found that "crimes against women were concentrated on the fringes of the downtown shopping area or neighborhood commercial centers, suggesting that women are highly vulnerable while moving between active shopping areas and parked cars or nearby residences." B. Boland, *Patterns of Urban Crime*, in SAMPLE SURVEYS OF THE VICTIMS OF CRIME, *supra* note 17, at 35. This and other studies also found that "[a] sizeable portion [of urban crime] occurs in areas of cities that provide services to all residents, i.e., major commercial and retail centers." *Id.*

19. *See* text & notes 23-30, 150 *infra*.

ated with patron attacks: Murders, rape, and aggravated assault.[20] Fear of crime is fear of the stranger, the unknown person who commits an unpredictable and violent act on a vulnerable and innocent citizen.[21] The stranger is seen as intending harm and indiscriminate in his selection of a victim, thus making it difficult for the victim to avoid him. The popular view of the criminal is that he is an outsider, someone different from those who fear crime.[22]

It is this fear of crime, rather than its actual occurrence, that makes attacks on patrons so devastating. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals [The National Advisory Commission] in its study, *A National Strategy to Reduce Crime*,[23] focused on preventing the crimes most feared as a means of best minimizing the national increase in crime.[24] The "high-fear crimes" were listed as homicide, forcible rape, aggravated assault, robbery, and burglary.[25] The Commission isolated these crimes because "of their cost to society—economic cost to some degree but, more importantly, their cost to citizens in fear, psychic damage and mistrust."[26] According to the Commission:

> To add up economic costs alone would be to underestimate seriously the total cost of crime in America. No price tag can be put on the fear that, as much as any other factor, is speeding the exodus from the cities, strangling businesses, and causing people to mistrust each other.[27]

The effect of this commercial crime increase, and the landowners' fail-

---

20. *See* J. CONCKLIN, *supra* note 1, at 6.

21. CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 4, at 3; *see* J. Concklin, *supra* note 1, at 7.

> Victims of muggers—and virtually all who fear they might become victims—feel helpless, unprotected, and without any means of redress. . . .
>
> It is for such reasons that robberies, and muggings in particular, have so powerfully corrosive an effect upon American life, for, over and above everything else they do to us, they cause a loss of faith in our society, and a pervasive and demonstrated fear. . . . Other things which might be expected to cause far greater fear do not, and have no such demoralizing effect. Automobiles, to take but one example . . . [cause] roughly 20 times as many deaths, and 25 times as many injuries as were caused by muggers. Yet in comparison to our fear of muggers, our fear of automobiles is almost non-existent.

M. HUNT, *supra* note 9, at 33-34. For a contemporary guide, suggesting to the urban dweller how to deal with the problem, see generally L. GRIFFITH, MUGGING: YOU CAN PROTECT YOURSELF (1978).

22. J. CONCKLIN, *supra* note 1, at 7.

23. A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1.

24. *Id.* at 7-8.

25. *Id.* at 7.

26. *Id.* at 8; C. SILBERMAN, *supra* note 1, at 3-6, 14-18.

In 1967, six years earlier, the President's Commission came to the same conclusion. It stated: "The most damaging of the effects of violent crime is fear, and that fear must not be belittled. Suddenly becoming the object of a stranger's violent hostility is as frightening as any class of experiences. . . ." CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 4, at 3.

27. A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 8. *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, REPORT: PILOT STUDY IN THE DISTRICT OF COLUMBIA ON VICTIMIZATION (1967). "Crimes therefore have significance in proportion to the extent to which they affront the moral sensibilities of persons. This

ure to take adequate measures to stem it, has been to create losses for all parties affected by crime—patron, landowner, and society in general.[28] Because people are afraid to go out at night, landowners suffer loss of business.[29] Patrons, themselves, are caught in a dilemma. If they go out at night, they face risk of attack. If they stay at home, they forego the benefits derived from night-time activity.[30] Ultimately, society itself must suffer. As society fails increasingly to protect its members from criminal attack, loss of faith in our system of government develops.[31]

Reduction of Criminal Opportunity

This imperative need to do something about the crime problem, and the failure to present methods to adequately deal with it, have led many, including the National Advisory Commission, to turn to more direct and immediate methods of preventing crime.[32] There has been a recognition that of all the things that an individual, a business, or the community can do to reduce crime, the most direct approach is to elim-

---

impact is not limited to those who are victimized directly." *Id.* at 129-30, *cited in* J. CONCKLIN, *supra* note 1, at 8.

28. *See* Scarr, *The Nature and Patterning of Residential and Non-Residential Burglaries*, in LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, DETERRENCE OF CRIME IN AND AROUND RESIDENCES (1972) [hereinafter cited as DETERRENCE OF CRIME IN AND AROUND RESIDENCES].

> Three agencies impose patterns on the environment of any area to produce the characteristic patterns of criminal behavior . . .
> The offender, by taking advantage of existing opportunities and/or creating his own opportunities, commits crimes; The citizen, by things he does or does not do, increases and/or decreases the probability that he will or will note become a victim of a particular crime.
> The political jurisdiction—largely via its major law enforcement component, the police—attempts to counter the moves of the offender and support the moves of the citizen, in the never-ending interaction among these three elements of the patterning of criminal behavior.

Id. at 78.

29. J. CONCKLIN, *supra* note 1, at 5.

30. *Id.* at 3-4.

31. *See* McIntyre, *Public Attidues Toward Crime and Law Enforcement*, 374 ANNALS 34 (1967).

> As social interaction is reduced and fear of crime becomes fear of the stranger, the social order is further damaged. Not only are there fewer persons on the street and in public places than there might be, but persons who are afraid may show a lack of concern for each other. The logical consequences of this reduced sociability, mutual fear, and distrust can be seen in the reported incidents of bystanders indifferent to cries for help.

Id. at 41. *See also* C. SILBERMAN, *supra* note 1, who states: "It is not too much to conclude that crime threatens the social order in much the same way as does totalitarianism." *Id.* at 19; L. DEWOLF, CRIME AND JUSTICE IN AMERICA (1975). Professor DeWolf states:

> Our present conflict with crime is a struggle for the very existence of our democratic republic. Every crime is both a symptom and a further aggravation of an insidious infection eating at the vitals of our national life. Crimes have many victims; but one victim is always the health and strength of American freedom. There is no guarantee that this freedom will survive.

Id. at 3.

32. A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 74.

inate the obvious opportunities for criminals.[33]

By focusing upon crime deterrence, this approach treats crime not as a symptom of other factors that must be corrected, but as an act that itself must be prevented. Its emphasis is on methods which produce direct deterrence of the criminal attack.[34] A major goal is to inhibit illegal acts through a controlled physical environment.[35] Direct controls include those that reduce environmental opportunities for crime, such as security hardware,[36] street lighting,[37] surveillance,[38] and building design.[39] The environment can be designed so that the individual considering a criminal act thinks that there is a good chance that he will be seen and recognized, that he will be identified immediately as an attacker or intruder, and that someone will either take action on his own or contact the authorities.[40]

The general economic principle behind such physical planning for crime prevention is to make criminal behavior high-risk behavior. If the risk of being apprehended is large, many potential attackers or intruders will not commit the crime.[41]

---

33. *Id.* at 62; *see* W. CLIFFORD, *supra* note 14, at 39; COMMUNITY CRIME PREVENTION, *supra* note 14, at 194; J. CONCKLIN, *supra* note 1, at 145-48; O. NEWMAN, DEFENSIBLE SPACE 2-4 (1972). For a discussion of this goal, as it relates to imposition of a duty of adequate protection upon the commercial landowner, see Samson v. Saginaw Professional Building, 393 Mich. 393, 224 N.W.2d 843 (1975) and text & notes 127-51 *infra*.

34. W. CLIFFORD, *supra* note 14, at 34-35. The leading proponent of this method of crime prevention is Oscar Newman, a New York City planner and architect. Newman's book sets out his program for reducing criminal opportunity in public housing, thus reducing the fear and anxiety of its residents. *See generally* O. NEWMAN. *supra* note 33.

The core of Newman's proposal is a concept he calls "defensible space," which deals with architectural design as a tool of crime prevention. The emphasis is upon mechanical prevention. Newman describes it this way:

> *Mechanical prevention* involves efforts at placing obstacles in the paths of criminals. It is a policy which accepts the existence of criminals, their modus operandi, and their victims, and frames a program for hardening criminal targets by making them more inaccessible. This is accomplished by providing more intensive barriers of both a physical and personnel nature. The operating mechanisms are target-hardening, increasing the risks of apprehension, and, finally, increasing the criminal's awareness of these risks.

Newman, *Defensible Space: Architectural Design for Crime Prevention*, in LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, DETERRENCE OF CRIME IN AND AROUND RESIDENCES 53 (1972).

35. W. CLIFFORD, *supra* note 14, at 34; COMMUNITY CRIME PREVENTION, *supra* note 14, at 196; C. JEFFERY, *supra* note 7, at 191-212; V. Bunn, *supra* note 14, at xviii.

36. COMMUNITY CRIME PREVENTION, *supra* note 14, at 196, 200.

37. *Id.* at 198-200, 302; A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 64.

The National Commission considers installation of proper lighting—installation of lights in accordance with the code set by the Illuminating Engineers Society—to be an effective method of minimizing criminal opportunity. COMMUNITY CRIME PREVENTION, *supra* note 14, at 200, 302; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, PRIVATE SECURITY 183 (1976) [hereinafter cited as PRIVATE SECURITY].

38. COMMUNITY CRIME PREVENTION, *supra* note 14, at 195. *See also* note 150 *infra*.

39. A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 62. *See generally* O. NEWMAN, *supra* note 33.

40. A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 62. See note 34 *supra*.

41. See note 34 *supra*. One argument put forward against adopting measures designed to reduce criminal opportunity is that of the displacement of crime, or the "mercury effect." The term refers to the shifting of criminal activity from relatively secure high-risk areas to unprotected low-risk areas. Skeptics of the usefulness of security measures argue that they merely move

The need to focus upon the direct deterrence approach of crime prevention, and the landowners' failure to adopt such an approach[42] calls for turning to tort law and its purposes. An examination of tort law goals will reveal whether tort law, in fact, can effectively shape the parties' behavior so as to deal effectively with the commercial crime problem.

PRESENT TORT LIABILITY IN THE LANDOWNER-PATRON RELATIONSHIP

One of the major goals of tort law is the deterrence of socially undesirable acts.[43] Crime, socially undesirable by definition, thus could be affected by tort liability rules. Imposition of a duty affects an individual's behavior, since a person will almost always conform his behavior to the duty to avoid potential tort liability.[44] For this reason, imposition or lack of imposition of tort liability upon the parties involved in the commercial crime problem—patron, landowner, or criminal[45]—could influence their behavior,[46] and ultimately should affect the rate of commercial crime.[47]

Currently, the victim of a criminal assault on the landowner's premises can attempt recovery on the basis of two legal theories: The

---

criminals around, rather than reduce total crime. There are two responses to this argument. First, many crimes, including patron attacks, are crimes of opportunity, so that when the opportunity is taken away through security measures, the crime will not be committed. Second, it is doubtful that criminals are infinitely mobile; their area of operations usually does not extend beyond their neighborhood. A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 64-65.

42. *See* text & notes 14-16 *supra*.

43. W. PROSSER, *supra* note 10, § 2, at 7. *But see* Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 173-74 (1976).

Professor Klemme argues that the deterrence theory is not internally consistent. *Id.* at 173. One inconsistency, he argues, lies in allowing a tortfeasor to insure against the actual damages he may incur as a result of having engaged in faulty, tortious conduct.

> Of course, to the extent one suffers an increase in his liability insurance premiums and he knows the increase is the result of his tortious conduct, some specific and possibly general, deterrence can be expected. But because the economic impact of an increase in insurance rates on any one insured is almost always likely to be less than the amount of any tort judgment, the amount of individual deterrence achieved by imposing this financial burden on the actor is likely to be substantially diminished.

Id.

This argument, however, fails to take into account the requirements that insurance companies impose before they will issue a policy. If a duty is imposed upon the commercial landowner to protect his patrons, he will probably seek to obtain insurance coverage to protect himself against potential liability. The insurance carrier will, however, not issue a policy until the landowner takes preventive measures to minimize the risk of attack, so as to minimize the carrier's payments. If the landowner does not take adequate measures he still may be able to obtain a policy, but only with smaller policy limits. The extent that a judgment may exceed policy limits will, in itself, have deterrent effects.

Thus, contrary to Professor Klemme's assertion, imposition of a tort duty will influence an individual's behavior. By imposing the duty, the amount of preventive measures the landowner takes (deterrence), should equal the risk of attack.

44. *See* W. PROSSER, *supra* note 10, § 5, at 23.

45. *See* text & note 28 *supra*.

46. *See* text accompanying notes 130-31 *infra*.

47. *See* text accompanying notes 142-51 *infra*.

"special relationship" notions,[48] and the general rules of negligent conduct.[49] An examination of these two theories will reveal, however, that outside of some particularly limited instances, the patron will fail to recover from the landowner for his injuries.

The "Special Relationship" Rule

Current tort law is unsympathetic to the assaulted patron's plight unless he can prove some special relationship to the landowner. Mere patronage of the landowner's premises is not necessarily enough to impose liability upon the landowner. This result derives from the historical application of the general rule of tort law, stated almost as a truism, that a private individual has no duty to protect another from criminal attack.[50] The rule derives its effect from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter.[51] Presently it owes its survival to "the difficulties of setting out any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty men might fail to rescue."[52]

The common law, however, has carved out recognized exceptions to the rule when a special relationship exists between the parties that calls for one party to protect the other from criminal attack.[53] Courts have thus created a number of instances where affirmative duties are imposed, not by direct rejection of the common law rule, but by creation of a list of special relationships which will justify departure from that rule. Thus, as examples, an innkeeper is under a duty to take reasonable steps to protect his guests from criminal attack,[54] a common-

48. *See* text accompanying notes 50-59 *infra*.

49. *See* text & notes 60-61 *infra*.

50. W. PROSSER, *supra* note 10, § 56, at 340-41. *See also* RESTATEMENT (SECOND) OF TORTS § 315 (1965).

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other the right to protection.

Id.

51. W. PROSSER, *supra* note 10, § 56, at 339-40. *See also* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934).

52. W. PROSSER, *supra* note 10, § 56, at 341.

53. See Tarasoff v. Board of Regents, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), explaining development of the rule:

> As a general principle, a "defendant owes no duty of care to all persons who are foreseeably endangered by his conduct." . . . [H]owever, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim.

Id. at 434-35, 551 P.2d at 342-43; 131 Cal. Rptr. at 22-23.

54. Fortney v. Hotel Rancroft, 5 Ill. App. 2d 327, 331, 125 N.E.2d 544, 546 (1955); McFadden

carrier its passengers,[55] and a school district its pupils.[56]

The singular rationale for labeling those relationships as special relationships, and consequently finding duty, is that the victim in these situations has placed himself under the control and protection of the other party, with consequent loss of control to protect himself.[57] The other party is accordingly under a duty to protect him from criminal attack.

The common law, however, refuses to recognize such a special relationship between the commercial landowner and his patron since the patron has not placed himself under sufficient control of the landowner to warrant imposition of liability.[58] For this reason, unless the victimized patron characterizes himself to the court as a guest of an inn, a passenger, or a school pupil, he will not, under most circumstances, recover from the landowner.[59]

General Principles of Negligence

The victim may attempt to avoid altogether the special relationship requirement, and try to obtain recovery by focusing instead upon the general notions of actionable negligence. Under most circumstances, however, he will fail under this theory as well.

The *Restatement (Second) of Torts*, section 344, provides the general negligence rule that a landowner who holds his land open to the public for business purposes is subject to liability to members of the

v. Bancroft Hotel Corp., 313 Mass. 56, 60, 46 N.E.2d 573, 575 (1943). For a recent decision in this area see Garzilli v. Howard Johnson's Motor Lodges, 419 F. Supp. 1210 (E.D.N.Y. 1976) (Connie Francis rape case).

55. Hillman v. Georgia R.R. & Banking Co., 126 Ga. 814, 817, 56 S.E. 68, 70 (1906); Nute v. Boston & Me. R.R., 214 Mass. 184, 188, 100 N.E. 1099, 1101 (1913); Green v. Atlanta R.R., 131 S.C. 124, 133-34, 126 S.E. 441, 444-45 (1925); Hines v. Garrett, 131 Va. 125, 133, 108 S.E. 690, 695 (1921). *See also* Lillie v. Thomson, 332 U.S. 459, 462 (1947).

56. McLeod v. Grant County School Dist., 42 Wash. 2d 316, 319, 255 P.2d 360, 362 (1953).

57. RESTATEMENT (SECOND) OF TORTS § 320 (1965) formulates this rationale by providing that one who takes custody of another under circumstances that deprive the other of his normal power of self-protection, or that subject him to association with persons likely to harm him, is under a duty to exercise reasonable care in controlling the conduct of third persons so as to prevent them from intentionally harming him.

58. Fulfer v. Sherry's Liquor Stores, 149 P.2d 734, 736 (Cal. App. 1944); Goldberg v. Housing Auth., 38 N.J. 578, 589, 186 A.2d 291, 296-97 (1962).

A number of reasons have been given why the duty did not extend to landowners. It has been suggested that it is due to historical considerations stemming from the high place that land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism. 2 F. HARPER & F. JAMES, *supra* note 10, at 1432.

59. *See* Trice v. Chicago Housing Auth., 14 Ill. App. 3d 97, 100, 302 N.E.2d 207, 210 (1973) (court stating that it would not impose a duty of protection upon either "residential, commercial [or] industrial landlords"); Daniels v. Shell Oil Co., 485 S.W.2d 948, 951 (Tex. Civ. App. 1972).

In some jurisdictions, it is possible for a patron to characterize himself as an invitee of a tenant and consequently recover on a landlord-tenant theory. *See* text & notes 93-96 *infra*. *But see* Totten v. Moore Oakland Residential Hous., 63 Cal. App. 3d 538, 546, 134 Cal. Rptr. 29, 35-36 (1976) (no duty to protect mere guest of one of the tenants in the building).

public who are upon the land for such business purposes and are harmed by third persons, if the landowner was aware of the dangerous conduct and failed to restrain it.[60] However, no duty is imposed upon the landowner to discover the extent of the risk of crime and to prevent such crime from occurring. For this reason, if the patron-victim is criminally assaulted by some third party outside the owner's or his agent's presence, the victim must bear the cost of his own protection and compensation.[61] This, under the common law liability rules applicable in most states, the landowner will not be liable for the patron's injuries either because no negligence exists or because no "special relationship" is found.

ABANDONMENT OF SPECIAL RELATIONSHIP NOTIONS IN FAVOR OF AN INTEREST ANALYSIS

While the patron, under most circumstances, will not recover from the landowner for criminally-inflicted injuries,[62] the modern trend in tort law is to abandon the traditional reasons supporting this nonrecovery in favor of a more rigorous analysis that takes into account more complex social and economic policies. The basic inquiry under the modern approach is to focus upon the extent of the current benefits that the parties and society receive from a transaction, the expectations of the parties, and the benefits and burdens thrust upon the parties by a new duty.[63] Taking social and economic policies into ac-

60. A possessor of land who holds it open to the public for entry for his 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 parties 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.

RESTATEMENT (SECOND) OF TORTS, § 344 (1965).

The duty of discovery in subsection (a) has been interpreted by courts very strictly, so that landowners have not been held liable for acts of unknown assailants. See Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975). Plaintiff, a patron of defendant shopping center, was assaulted in the parking lot as she was entering her car. *Id.* at 190. She brought suit alleging that the storeowners were negligent in not taking precautions to prevent such an attack, knowing that similar attacks had been committed in the area. *Id.* at 190-91. In affirming the trial court's dismissal of the suit, the court stated that the duty imposed by § 344 was vague and that it would be unjust to hold merchants liable for criminal acts of unknown persons. *Id.* at 197-98. According to the court, merchants have no duty to guard against criminal acts of a third party unless they know, or have reason to know, that criminal acts are occurring, or about to occur. *Id.* at 198. *See also* Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167, 169 (1977).

61. Bennett v. Cincinnati Checker Cab, 353 F. Supp. 1206, 1210 (D.C. Ky. 1973); Goldberg v. Housing Auth., 38 N.J. 578, 588, 186 A.2d 291, 296 (1962); Hart v. Hercules Theatres, 258 A.D. 537, 539, 17 N.Y.S.2d 441, 442-43 (1940); Cornpropst v. Sloan, 528 S.W.2d 188, 198 (Tenn. 1975).

62. *See* text & notes 58, 61 *supra*.

63. Smith v. Arbaugh's Restaurant Inc., 469 F.2d 97, 100 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Kline v. 1500 Massachusetts Ave. Corp., 439 F.2d 477, 481-82 (D.C. Cir. 1970); Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968); Trice v. Chicago Hous. Auth., 14 Ill. App. 3d 97, 99, 302 N.E.2d 207, 209 (1973). *See* Klemme, *supra*

count will, according to the modern view, produce a "fair and just result"—the ultimate aim of all legal rules.[64]

The Abandonment of the Relationship Notions to Decide Duty: Rowland v. Christian

Although other state courts have occasionally turned to the modern standard, the California Supreme Court has given the most influential impetus to the general acceptability of this modern analysis. In *Rowland v. Christian*,[65] the court was faced with the choice of following traditional law, which determined duty on the basis of status,[66] or abandoning the rule in favor of creating a new standard for determining duty. Opting for the latter, the court abrogated the traditional classifications of trespasser, invitee, and licensee in favor of the general duty standard to be applicable to all parties, regardless of status. Justice Peters, speaking for the court majority, recognized that liability should ordinarily be imposed "for an injury occasioned to another by his want of ordinary care or skill,"[67] so that

> [w]henever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger or injury to the person or property on the other, a duty arises to use ordinary care and skill to avoid such danger.[68]

In recognizing the importance of examining the interests of all affected parties, the court listed a number of factors to decide whether to impose duty: "The closeness of the connection between the injury and defendant's conduct, the moral blame attached to the defendant's con-

---

note 43, at 215. *See also* Putnam v. Stout, 38 N.Y.2d 607, 617, 345 N.E.2d 319, 324, 381 N.Y.S.2d 848, 853 (1976) (characterizing the old control test as "a test of fiction"); Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968). *Dillon* held:

> The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . "[D]uty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

Id.

64. O.W. HOLMES, THE COMMON LAW 27-28 (1881); Klemme, *supra* note 43, at 158; Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816, 847 (1977).

65. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

66. The common law divides visitors upon the landowners' property into three classes: Trespassers, licensees, and invitees. Status of the visitor determines extent of the duty that the landowner owes to the visitor. 2 F. HARPER & E. JAMES, *supra* note 10, at 1430.

If the plaintiff is considered an invitee, the occupier is obligated to exercise care sufficient to avoid any unnecessary exposure to danger. *Id.* at 1478. If the plaintiff is termed a licensee, the occupier must refrain from intentionally injuring the licensee and is required to warn of concealed dangers that the occupier is aware of and that the licensee could not reasonably discover from an inspection of the premises. *Id.* Finally, if the plaintiff is classified a trespasser, the occupier's duty is to refrain from wilfully or wantonly injuring the trespasser. *Id.*

67. 69 Cal. 2d at 112, 443 P.2d at 563, 70 Cal. Rptr. at 99.

68. *Id.*

duct, the policy of preventing future harm, and the prevalence and availability of insurance."[69] According to the *Rowland* court, identification and balancing of these social and economic factors, rather than merely looking at the relationship of the parties, dictates the "fair and just result."[70]

Following the *Rowland* decision, other state courts have similarly dropped the status terminology and adopted the general duty standard to determine liability of landowners.[71]

Protecting Another From Danger of Criminal Attack: Tarasoff v. Board of Regents

In its latest major pronouncement on the duty question, the California Supreme Court, in *Tarasoff v. Board of Regents*,[72] also applied the general duty standard. Relying extensively upon the policy considerations set out in *Rowland*,[73] the court found a duty on the part of the therapists-defendants to warn outside parties against danger of criminal attack from one of their patients when the therapists determine that the patient poses a danger to outside parties.[74] While the court found it

69. *Id.* at 117, 443 P.2d at 567, 70 Cal. Rptr. at 98. These public policy factors have been restated this way: (1) The forseeability of harm to the plaintiff; (2) the degree of certainty that plaintiff suffered injury; (3) the closeness of connection between the defendant's act and the plaintiff's injury; (4) the moral blame attached to defendant's conduct; (5) the policy of preventing future harm; (6) the extent of defendant's burden and the consequences to the community of imposing a duty and liability; and (7) the availability of insurance. Connor v. Great Western Savings and Loan Assn., 69 Cal. 2d 850, 865, 447 P.2d 609, 617, 73 Cal. Rptr. 369, 377 (1968); Valdez v. J.D. Diffenbaugh Co., 51 Cal. App. 3d 494, 507, 124 Cal. Rptr. 467, 475 (1975). *Accord*, Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100, 102 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

70. In an oft-quoted passage the *Rowland* court stated its major reason for abolishing the invitee-licensee-trespasser distinctions: "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose." 69 Cal. 2d at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104.

In spite of this mandate, not all California courts have been willing to completely abolish status distinctions in order to decide the extent of landowners' duty. For the most recent example of a California state court relying upon status to determine duty within the criminal attack setting, see Totten v. More Oakland Residential Hous., 63 Cal. App. 3d 538, 546, 134 Cal. Rptr. 29, 35 (1976) (because victim was only a guest of tenant recovery barred against landlord).

71. To date, in addition to California, Colorado, the District of Columbia, Hawaii, New Hampshire, New York, and Rhode Island have completely abrogated the traditional classifications governing liability of landowners to invitees, licensees, and trespassers, replacing them with the general negligence test of reasonableness under the circumstances. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Mile High Fence Co. v. Radovich, 175 Colo. 537, 548, 489 P.2d 308, 314 (1971); Pickard v. Honolulu, 51 Haw. 134, 135, 452 P.2d 445, 446 (1969); Ouelette v. Blanchard, 364 A.2d 631, 634 (N.H. 1976); Basso v. Miller, 40 N.Y.2d 233, 242, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976); Marirorenzi v. Joseph DiPonte, Inc., 114 R.I. 294, 307, 333 A.2d 127, 133 (1975).

72. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

73. *See* text & note 69 *supra*.

74. The court characterized the duty as follows:

> [O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the

useful to characterize the potential victim as coming within the protection of the doctor-patient relationship, it nevertheless applied the general negligence standard of "the rendition of reasonable care under the circumstances,"[75] rather than end its inquiry upon discovering the existence of a special relationship.[76]

Tarasoff, unlike *Rowland*, did not involve liability of landowners. It did, however, deal specifically with the duty of one party to protect another from criminal attack. By imposing a duty in such a fact situation, the *Tarasoff* decision demonstrated that an individual may be held to a duty to protect another. By recognizing this duty, the *Tarasoff* court opens the possibility that this duty may be applied in situations other than in the medical area.

Landlord-Tenant Law and the Duty to Provide Protection Against Criminal Attack: Kline v. 1500 Massachusetts Ave. Corp.

Similar recognition of the above mentioned factors has led some jurisdictions to recognize a duty of protection in the area most similar to the landowner-patron relationship:[77] landlord-tenant law.[78] Imposition of a duty upon landlords to protect their tenants bodes well for its expansion to commercial landowners.[79]

---

facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances.

17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 28. This duty parallels the landowner-patron duty. See text & note 109 *infra*.

75. 17 Cal. 3d at 437, 551 P.2d at 345, 131 Cal. Rptr. at 25.

76. *Id.* at 439, 551 P.2d at 347, 131 Cal. Rptr. at 28. The court characterized the common law's reluctance to impose a duty of protection at times other than when "special relationships" are found as "morally questionable." *Id.* at 435 n.5, 551 P.2d at 343 n.5, 131 Cal. Rptr. at 23 n.5.

77. Both are possessors of land, which they operate for commercial purposes. Both deal with clients who come with the expectation of obtaining security as consideration for payment. Both have better knowledge about the crime problem. *See* text & notes 111-16 *infra*.

78. Kline v. 1500 Massachusetts Ave. Corp., 439 F.2d 477 (D.C. Cir. 1970); O'Hara v. Western Seven Trees, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977); Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973); Sherman v. Concourse Realty Corp., 47 A.D.2d 134, 365 N.Y.S.2d 239 (App. Div. 1975).

At common law, the landlord was generally not held to be under a duty to protect his tenants from the criminal acts of third persons. *See* Mutual Coat Corp. v. Dorsyl Realty, Inc., 346 Mass. 777, 777, 195 N.E.2d 512, 512 (1964); Teall v. Harlow, 275 Mass. 448, 452, 176 N.E. 533, 535 (1931); Sedberry v. Velrplanck, 31 S.W. 242, 242 (Tex. Civ. App. 1895). The rationale was that the common-law lease created a possessory estate in land for the tenant while the landlord received remuneration in the form of the payment of rent. Since the landlord relinquished his control over the premises and the tenant paid rent for the use of the property, no duty of protection against the criminal acts of a third person could be found because of the absence of control and lack of presence of the landlord.

79. *See* text accompanying note 109 *infra*. Consider also the relatively recent statement of the New Jersey Supreme Court in Braitman v. Overlook Terrace Corp., 68 N.J. 368, 376, 346 A.2d 76, 78 (1975):

> It is appropriate to observe that the depressing specter of rising crime rates in our urban areas may soon call for reconsideration of the general principle that the mere relationship of landlord and tenant imposes no duty on the landlord to safeguard the tenant from crime. Many prospective tenants undoubtedly consider the landlord's security measures in selecting apartments, particularly in middle and upper income complexes.

The courts have found a number of reasons for imposing such a duty upon landlords. First, rather than looking at how much control a landlord retains over a tenant, the courts have recognized that the modern landlord is not a rural farmer who incidentally leases land to a neighbor. Rather, he is a businessman, many times a corporation, deriving primary economic benefit from his business.[80] Moreover, the modern tenant is not a farmer who leases land for farming with imputed expertise, but an apartment dweller who rents the premises with little knowledge of its condition and methods of future upkeep. He, therefore, expects a package of services from the landlord.[81] As part of this package and in exchange for his rent, he desires protection from criminal assault.[82] Finally, as between the two parties, the landlord is the party best able to prevent these attacks because, as owner of the property, he is best able to discover the extent of the crime risk and prevent it by reducing criminal opportunity through better lighting, stronger locks, safer windows, or providing doorman services.[83]

The major case standing for the recognition of these factors, and consequent establishment of this duty, is *Kline v. 1500 Massachusetts Ave. Corp.*[84] In *Kline*, the plaintiff-tenant was attacked in a common hallway of a residential apartment building. At trial, he showed that the defendant-landlord had, from the inception of plaintiff's lease, systematically decreased guard and doorman services. The defendant was

---

A glance at any newspaper reveals that landlords frequently respond to this understandable concern by including references to their security measures in soliciting rentals. In light of the growing threat which crime poses to the urban dweller and the increasing reliance which must be placed upon multiple dwellings to meet contemporary housing needs, it may indeed soon be necessary to impose upon the landlord the contractual duty of taking reasonable precautions to safeguard his tenants from crimes committed in his apartment buildings. We must be concerned with present and future living patterns.

Id.

The New Jersey Supreme Court was the court which, in Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 291 (1962), set the modern precedent for nonliability of all landowners from criminal attacks. That this court should now begin to reconsider its stand in the landlord-tenant area bodes well for the eventual expansion of this duty to the landowner-patron area.

80. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *See also* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969).

81. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078, *cert. denied*, 400 U.S. 925 (1970). *See also* Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises*, 62 HARV. L. REV. 669, 670-71 (1949).

82. *See* text accompanying note 89 *infra*.

83. *See* text & note 90 *infra*. *See also* O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 803, 142 Cal. Rptr. 487, 490 (1977). *O'Hara* was the first reported California decision to hold a landlord liable for negligence in failing to protect the tenant against criminal conduct. *Id.* In reversing the trial court, the *O'Hara* court distinguished a previous California Court of Appeals decision, Totten v. More Oakland Residential Hous., Inc., 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976), which had denied liability. *O'Hara* thus marks an important first step toward imposing this duty of protection upon California landlords and adds another state to the ranks of those jurisdictions that recognize this duty. *See* note 78 *supra*. The *O'Hara* court based its decision directly on the reasoning and holding of *Kline*. O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 803, 142 Cal. Rptr. 487, 490 (1977). *See* notes 86-92 *infra*.

84. 439 F.2d 477 (D.C. Cir. 1970).

aware not only that the neighborhood crime rate was rising, but also that a number of crimes recently had been committed in the apartment building itself.[85] In light of these facts, the court held that the defendant-landlord was under a duty to take reasonable measures to prevent an attack on tenants in the common areas when that attack was foreseeable to the landlord.[86] The reasons for the decision were similar to the factors stated above.[87] The landlord here was a corporation, running the apartment building as a business. While obtaining the same level of rent benefits from the tenants, it decreased the protection it was offering. In light of its knowledge of the increasing risk of crime in the neighborhood and in the building itself, the failure to reduce this risk constituted negligent conduct.[88] Moreover, tenants expected protection, for they continually complained to the landlord about the security problem.[89] Finally, the court reasoned that the landlord was in a better position to take the necessary protective measures, and that the burden of doing so consequently should be placed on him.[90] Analyzing the costs and benefits derived from the new duty, the court concluded that its imposition of the duty on the landlord was justified.[91]

Expansion to the Commercial Setting and Increasing the Scope of Duty: Samson v. Saginaw Professional Building

The most recent recognition of the duty of protection is contained in *Samson v. Saginaw Professional Building*.[92] *Samson* is important not only because it deals with the duty in the commercial setting, but also because it determines the scope of the duty to be imposed upon landowners.

In *Samson*, the victim, an employee of one of the tenants in the commercial building, was accosted in an elevator. The attacker was a mental patient visiting an out-patient clinic located in the building. The victim sued the owner of the building and recovered.[93] On appeal, the Michigan Supreme Court, in language couched in landlord-tenant law, held that a landlord leasing space to a mental health clinic owes a duty to its other tenants and their invitees to inquire as to what precau-

85. *Id.* at 479, 483. At the time plaintiff signed the lease, a 24-hour doorman service existed at the main entrance and a lobby desk with an attendant stood by the elevators. Two attendants were also stationed at the entrance to the adjoining parking structure. All these protective services were removed by the time of the assault. *Id.* at 479.

86. *Id.* at 481.

87. See text & notes 80-83 *supra*.

88. 439 F.2d at 487.

89. *Id.* at 479.

90. Indeed, the court felt that the landlord, as owner, was in a better position to protect the tenant than the municipal police. *Id.* at 484.

91. *Id.* at 488.

92. 393 Mich. 393, 224 N.W.2d 843 (1975).

93. *Id.* at 399, 224 N.W.2d at 843-44.

tions may be necessary to protect them from criminal attack and to take appropriate measures to prevent the attack from occurring.[94] The defendant's failure to meet thse obligations supported the jury's imposition of liability.[95]

Expansion to the Commercial Setting

In *Kline*, the duty to provide adequate protection was applied to a residential landlord in whose apartment building a tenant was attacked.[96] After *Kline*, while some called for expansion of this duty of protection to the commercial setting,[97] no case before *Samson* had imposed this duty on a strictly commercial lessor. Moreover, *Kline* involved liability for injury of a tenant; *Samson* imposed liability even though the victim was a business visitor.[98] Thus, *Samson*, through a *sub rosa* use of landlord-tenant terminology, expands the duty of protection to the general area of commercial landowners and patrons.[99]

Expansion of the Scope of Duty

Samson not only brought the duty of protection into the commercial setting, but also severely expanded the requirements that landowners must satisfy under the duty. In *Kline*, the duty was breached presumably because the landlord was aware of the crime rate and of the previous attacks on the tenants.[100] In *Samson*, however, no previous attacks had occurred, nor was there evidence presented that the defendant owner was even aware of a risk of attack. By holding the landowner liable, *Samson* specifically imposed upon the landowner the twin duties of inquiry and protection. Not only must the landowner fix any defects in security of which he is aware, but he must also investi-

94. *Id.* at 411, 224 N.W.2d at 851.

95. *Id.* at 406, 224 N.W.2d at 849.

96. 439 F.2d 477, 486 (D.C. Cir. 1970).

97. *See* Comment, 45 N.Y.U. L. REV. 943, 951 n.52 (1970), noting that under certain circumstances there are several compelling reasons for extending *Kline* to commercial lessors. For cases denying liability in a commercial context, see Andrews & Co. v. Kinsel, 114 Ga. 390, 391-92, 40 S.E. 300, 301 (1901); Mutual Coat Corp. v. Dorsyl Realty, Inc., 346 Mass. 777, 777, 195 N.E.2d 512, 512 (1964); Cornpropst v. Sloan, 528 S.W.2d 188, 198 (Tenn. 1975); Daniels v. Shell Oil Co., 485 S.W.2d 948, 951 (Tex. Civ. App. 1972).

98. Note that a landlord obtains no economic benefit from a visitor of one of his tenants. For a case denying liability in part for that reason, see Totten v. More Oakland Residential Hous., Inc., 63 Cal. App. 3d 538, 543, 134 Cal. Rptr. 29, 33 (1976). *But see* note 83 *supra*.

99. The dissent, written by Justice Levin, recognized the enormous leap that the majority opinion made from current law and distinguished this case from all previous cases, including *Kline*. 393 Mich. at 414, 224 N.W.2d at 852 (Levin, J., dissenting).

The *Samson* holding has been criticized. *See* 62 VA. L. REV. 383, 412 (1976); 22 WAYNE L. REV. 1483, 1491 (1976). "The [*Samson*] court expands the standard of care required to avoid liability without delineating the parameters. The commercial landlord is well advised to increase his liability insurance, circulate memos and hope for the best." *Id.*

100. *See* text & note 88 *supra*. *See also* O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 804, 142 Cal. Rptr. 487, 490 (1977).

gate the risk and extent of the crime problem and then take precautions to prevent its occurrence.[101] Mere lack of inquiry, without even making any affirmative acts to aggravate the problem, can constitute negligent conduct.[102]

PROPOSAL

In order to determine whether tort law can, and should deal with the crime problem, the impact of crime upon the affected parties was first examined.[103] An examination of the crime problem within the commercial setting, and the inability of present methods to deal with it, has demonstrated that a need exists to bring tort liability into the patron victimization area.

Under most circumstances, however, tort law has failed to meet that need by limiting its analysis to whether a "special relationship" exists between the commercial owner and patron.[104] In almost every instance such an analysis will free the landowner from liability.[105]

In some jurisdictions, however, courts have abandoned this special relationship rule.[106] Focusing rather on the interests of the affected parties to determine liability, they have imposed duties in circumstances where traditional tort law would deny a duty.[107] Application of such an analysis has resulted in landlords becoming liable in certain instances for criminal attacks committed upon their tenants.[108]

A similar analysis should be applied to the landowner-patron relationship. Tort law, by taking account of the interests of the involved parties in the landowner-patron situation, should impose a duty on the landowner to take adequate precautions for the safety of his patrons against criminal attack by third parties. By focusing upon the interests analysis enunciated by modern courts and the costs analysis developed by modern commentators, the imposition of the duty of protection in the landowner-patron situation will achieve the most fair and just re-

101. 393 Mich. at 409, 224 N.W.2d at 851.
102. *Id.* at 408-09, 224 N.W.2d at 850.
103. *See* text & notes 14-31 *supra.*
104. *See* text & notes 50-59 *supra.*
105. *See* notes 59 & 61 *supra.* See also Houston & Tex. Cent. R.R. v. Phillio, 96 Tex. 18, 20-21, 69 S.W. 994, 995 (1902), holding that a railroad owed a duty of protection against criminal attack to a "passenger" (wife), but not to the "invitee" (husband), who accompanied the wife to the station. Even though attack on both was simultaneous, the court's conclusory labels of calling the former a special relationship, but not the latter, resulted in only one party being compensated. *Id.* at 20-21, 69 S.W. at 995.

For a recent California case in which the court refused to hold the landlord liable because the victim was a guest of the tenant and not a tenant herself, hence finding no special relationship, see Totten v. More Oakland Residential Hous. Inc., 63 Cal. App. 3d 538, 547, 134 Cal. Rptr. 29, 35 (1976).
106. *See* note 71 *supra.*
107. *Id.*
108. *See* text & notes 77-91 *supra.*

sult. This approach is more appropriate than attempting, as some courts have done, to fit this situation within landlord-tenant law.[109]

APPLICATION OF THE PROPOSAL

Application of the Interests Analysis to the Landowner-Patron Relationship

An examination of the landowner-patron relationship will reveal that the interests analysis set out in *Rowland v. Christian* and adopted in the landlord-tenant area, if applied, would favor imposition of the duty of adequate protection upon the commercial landowner. The interests analysis involves three major factors.[110]

The first important factor to consider when assessing the commercial landowner's duty to patrons is the benefit that the landowner derives from the potential victim's patronage.[111] In the landlord-tenant situation, recognition of this factor has led to the imposition of a duty of protection upon the landlord who benefits from the tenant's presence.[112] Similarly, in the landlord-patron relationship, the commercial landowner derives economic benefit from his patrons. Therefore, the law should impose upon the commercial landowner a duty to protect those patrons when they are upon his land.

The second factor that modern law will consider is whether the victim, when entering the owner's property, expects to be protected

109. *See* text & notes 92-95, 99 *supra*. In a similar vein, the negligence standard itself could be questioned. It might be proposed, as an alternative, that a theory of strict liability should be adopted, since, supposedly, the same factors that call for imposition of a duty of protection upon the landowner, see text & notes 110-15 *infra*, also call for making him strictly liable for criminal attacks upon his premises. *See generally* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

Several answers may be given in response to this argument. First, the strict liability standard and the standard proposed here differ. The proposed duty is not the duty to protect the patron, so that the landowner becomes an insurer of the patron's safety, but rather the duty to provide for adequate protection of the patron. More precisely, it is the duty to take adequate precautions to protect the patron from attack. Where adequate precautions have been taken, it is argued here, the landowner should not be held liable. *See* note 12 *supra*.

Additionally, the goals of prevention and deterrence of patron attacks through reduction of criminal opportunity, see text & notes 32-42 *supra*, would not be served better through a strict liability approach. Strict liability rules are adopted for policy reasons that call for compensation of the injured party regardless of the fault of the defendant. *See* Calabresi & Hirschoff, *supra* at 1057-58; W. PROSSER, *supra* note 10, §§ 75-81, at 492-540. Since the proposed goal of this Article is not compensation of the victim, but deterrence of the criminal attack, strict liability would be tantamount to overkill. With strict liability, there is no incentive for the landowner to take adequate preventive measures to prevent the attack (as there would also be under the duty standard), because even when the landowner does all that he can do to prevent the attack, he would still be liable if the attack occurred. Liability under such circumstances will not promote deterrence, and therefore should be rejected.

110. *See* text & note 63 *supra*. *See also* Coulter v. Superior Court, 21 Cal. 3d 144, 153-54, 577 P.2d 669, 674-75, 145 Cal. Rptr. 534, 539-40 (1978).

111. *See* text & note 63 *supra*.

112. *See* text & notes 84-91 *supra*.

from criminal attack.[113] As in landlord-tenant law, the expectation question[114] is not whether the patron placed himself under sufficient control of the landowner, but whether he possesses enough information of the possibility of being attacked. As owner of the premises, the commercial landowner should have better information as to the risk of criminal attack upon his premises than the ordinary patron. Thus, a patron who enters the premises should have a right either to be informed of the risk of attack or to be protected from that attack.

Finally, employing the modern approach, one considers the practical effects, the extent of costs imposed, and the benefits to be derived by the parties from the new duty.[115] The next section will reveal that the benefits to be gained from such a duty of protection should outweigh its burdens.

Application of the Costs Analysis to the Landowner-Patron Relationship

Modern courts, in determining duty, take into account interests of the parties. Through such an analysis they have attempted to reach a fair and just result.[116] Determination of interests, however, is in reality merely an attempt to take into consideration the benefits and burdens of establishing a new duty.[117] For this reason some commentators,[118] as well as some courts,[119] have turned directly to these cost-efficiency notions to determine duty. This has been labeled the economic meaning of negligence.[120]

In the law of torts, the major contribution to the determination of these economic costs has been in the fields of accident law[121] and land

113. *See* text & note 63 *supra*. *See generally* Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1 (1953); Klemme, *supra* note 43, at 231; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1208-18 (1967) (all commenting that expectations of parties must be considered in determining whether to impose a duty).

114. *See* text accompanying notes 81-82 *supra*.

115. *See* note 63 *supra*. *See also* text & notes 90-91 *supra*.

116. *See* text & notes 63-64 *supra*.

117. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS, A LEGAL AND ECONOMIC ANALYSIS (1970); Klemme, *supra* note 43.

118. *See generally* G. CALABRESI, *supra* note 117; R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972).

For Posner, the relevant question from the standpoint of economic analysis is who could prevent the loss at lower cost, not whose fault the damage really is. R. POSNER, *supra*, at 94. Posner would apply this economic analysis directly to determine duty. *See* Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 32-34 (1972).

119. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 105 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 775 n.20, 478 P.2d 465, 477 n.20, 91 Cal. Rptr. 745, 757 n.20 (1970); Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 103 (1968).

120. *See* Klemme, *supra* note 43, at 160-61.

121. G. CALABRESI, *supra* note 117; Calabresi & Hirschoff, *supra* note 109, at 1055. Professor

use law.[122] Legal scholars in these fields have noted that the sole way of achieving a fair and just result, so that the interests of the parties will be taken into account, is to consider the costs involved in establishing duty.[123] First, by identifying all the costs under the old rule, and then determining the costs necessary to minimize them, economic analysis will suggest whether the new rule, in light of the costs necessary to establish it, is worth adopting. If the benefits derived from the new rule outweigh the costs involved, the decision will then be made to establish the duty.[124] This scheme seeks, then, to find the party upon whom duty is to be imposed. This party will be best able to reduce the problem—in other words, minimize its costs—at the lowest possible cost.[125] In Calabresian parlance, this individual is called the best cost-avoider.[126]

Economic Costs and the Commercial Crime Problem

Analysis of the commercial crime problem, and the decision on whom to impose duty, involves realization of two kinds of costs: (1) The total cost of crime existing today;[127] and (2) the cost involved in minimizing existing crime.[128] Taking into account both costs to achieve a balance goal—greatest crime reduction at the lowest possible cost—[129] will demonstrate that the commercial landowner can best achieve this goal.[130]

First, of all the involved parties, the cost of crime reduction is cheapest to the landowner. For the criminal, imposing civil liability on him in addition to existing criminal sanctions does not deter him from committing the crime. Imposing duty on the patron, so that he must protect and compensate himself, may result in crime reduction, but only at the expensive cost of the patron staying home.[131] While the patron can prevent crime by not going out at night, the price of staying home is high not only for him but also for society in general.[132] As opposed to the transient patron, who has little information about the crime problem on the landowner's premises and little ability to directly

Calabresi has been the major proponent of the costs analysis theory.

122. *See* Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Michelman, *supra* note 113, at 1165.

123. *See* sources cited notes 117-18 *supra*.

124. *See generally* G. CALABRESI, *supra* note 117.

125. *See* sources cited note 118 *supra*.

126. G. CALABRESI, *supra* note 117, at 175. *See also* Klemme, *supra* note 43, at 183.

127. *See* text & notes 20-31 *supra*.

128. *See* text & notes 32-42 *supra*.

129. *See* S. Rottenberg, *The Social Cost of Crime and Crime Prevention*, in CRIME IN URBAN SOCIETY 45-46, 52-53 (B. McNenan, ed. 1970).

130. *See* notes 131-51 *infra*.

131. *See* text & note 30 *supra*.

132. *See* text & note 31 *supra*.

influence it, the landowner can be much more effective in dealing with the problem.[133] While the patron holds just one expensive option, staying home,[134] the landowner holds many options, ranging from installation of better lighting,[135] fences, or guard service,[136] to even varying hours of operation.[137] All of these options should be less expensive[138] and much more effective in deterring crime[139] than the patron's sole choice of staying home.

Moreover, the benefits of crime reduction achieved by imposing a duty on the landowner will outweigh the costs of imposing that duty. Costs of crime fall upon all interested parties—patron, landowner, and society[140]—and involve both direct and indirect costs.[141] These costs are especially large, since attacks upon patrons produce consequences way out of proportion to their frequency. Fear of crime is the greatest single negative consequence of these attacks.[142]

The direct costs of patron attacks can be measured in dollars lost, injuries suffered, and lives taken.[143] Indirect costs are those associated with changes in attitudes and behavior of people who are never directly involved in a crime, but who incur losses because they try to prevent their own victimization.[144] These costs have a disproportionate effect upon those who can afford them the least: the poor and the elderly.[145] The commercial businessman himself suffers from the danger of criminal attack. Public fear of crime in an area may reduce patronage of local businesses after dark.[146] Finally, society itself begins to feel these costs. Crime may generate a distaste for a community, especially in the inner cities, because of feelings of insecurity and vulnerability in the

133. *See* text & notes 36-39 *supra.*
134. *See* text & notes 27-30 *supra.*
135. *See* text & note 37 *supra.*
136. *See* text & notes 36, 38 *supra.*
137. *See* note 35 *supra.*
138. *See* text & notes 29-31 *supra.*
139. *See* note 34 *supra.*
140. *See* text & note 28 *supra.*
141. *See* text & notes 26-27 *supra*; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 120 (1967) (report of economist Thomas C. Schelling suggesting that we must look at the direct and indirect costs of crime in order to determine what it would be worth to reduce crime and who would benefit from the reduction).
142. *See* text & notes 26-27 *supra.*
143. J. CONCKLIN, *supra* note 1, at 3.
144. *Id.* at 4.
145. *See* text & note 6 *supra*; C. SILBERMAN, *supra* note 1, at 4. The elderly, because of their age and weakness, are especially likely to engage in avoidance behavior. A report from the Special Senate Committee on Aging found that the elderly often stay home both night and day for fear of crime, becoming prisoners in their own homes. In fact, attendance at the Committee's hearings by the elderly was poor because so few were willing to brave the Washington D.C. streets to attend the meeting. J. CONCKLIN, *supra* note 1, at 109-10. *See generally* J. GOLDSMITH & S. GOLDSMITH, CRIME AND THE ELDERLY (1975); P. HAHN, CRIMES AGAINST THE ELDERLY (1976).
146. *See* text & note 29 *supra.*

area.[147] Those able to leave the community do so. This leaves the community economically unbalanced, since those who have the money can more easily move from the community.

Thus, the costs of patron attacks are, in actuality, much greater than those the landowner himself incurs. By considering the indirect costs of crime, which must be examined to obtain the entire crime picture, it becomes clear that it is not unduly expensive, in economic, social, and political terms, to deal with the crime problem through the proposed duty. Increased costs to landowners in terms of providing extra protection may mean higher prices to the patron.[148] In addition, it may produce possible financial failure of those commercial establishments who are unable to meet the protection costs,[149] and may increase violations of civil liberties by landowners providing private police protection.[150] These potential drawbacks should be outweighed, however,

147. J. CONCKLIN, *supra* note 1, at 85, 91.

148. Kalven, *Torts: The Quest for Appropriate Standards*, 53 CAL. L. REV. 189, 206 (1965); Klemme, *supra* note 43, at 164. *But see* Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 774, 478 P.2d 465, 477, 91 Cal. Rptr. 745, 756 (1970), where the California Supreme Court imposed liability upon a motel for failing to take adequate precautionary measures to minimize risks of guests drowning in its pool. In answer to the argument that such measures would affect all parties through higher prices, the court observed:

> In the instant case the defendant motel owner, and more generally the entire class of those who frequent defendants' motel, were, in an economic view, the beneficiaries of the "cost savings" accompanying the non-employment of a lifeguard. It is better that this entire group bear the burden of the loss resulting from this "economy," rather than to require one particular guest to absorb the entire loss.

Id. at 775 n.20, 478 P.2d at 477 n.20, 91 Cal. Rptr. at 757 n.20.

A similar analysis is applicable to the landowner-patron situation. Since the landowner and his patrons are beneficiaries of the "cost savings" accompanying the nonemployment of adequate security devices, the *Haft* analysis would hold that it is better for them to bear the loss of these savings rather than requiring one particular patron to bear the entire loss. For discussion of the theory of cost distribution, see Dippel v. Sciano, 37 Wis. 2d 443, 450-51, 155 N.W.2d 55, 58 (1967); 1 F. HARPER & F. JAMES, *supra* note 10, at xlii-xliv; Klemme, *supra* note 43, at 183-84, 190-94.

149. *See* Klemme, *supra* note 43, at 164-65. This result, however, should be balanced against present hardships suffered by landowners because of the crime problem. Stores may go out of business because they cannot absorb losses from the present number of robberies or burglaries, or because fear of crime causes customers to stay away and thus lowers their profit margins. These businesses may fold because they cannot afford to provide additional security devices either to reduce their robberies or to make their stores safe for customers. Thus, the fact that they "go under" because of imposition of the duty does not affect, in the aggregate, the number of businesses adversely affected by the duty. *See also* Cooper v. Goodwin, 478 F.2d 653, 656 (D.C. Cir. 1973) ("[f]inancial hardship should be no excuse for failing to take those measures which are within a defendant's capacity").

150. In response to such abuses states might also consider ways to more tightly regulate security guards, ensuring that they attain certain minimum qualifications. *See* People v. Zelinski, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1005, 155 Cal. Rptr. 575, 580 (1979) (applying exclusionary rule to unlawful private police conduct, presumably to deter such conduct). Moreover, the fact that some guards do commit civil liberties violations does not mean that private guard services cause more harm than good. In fact, in light of the recent discovery that it is impossible for the public police force to adequately deal with the crime problem, there has come a realization that networks of private guards are necessary to assist the police in their crime prevention role.

Consider the following:

> There has been an effort in New York City to integrate the activities of private security guards by using walkie-talkies to establish communication among the guards in a particular area. In that way, the guards could act as eyes and ears for the police, watching suspicious people in the neighborhood and alerting the police to behavior that might

by the reduction of crime, greater frequency of economic transactions, reduction of fear, and the convenience of safer patronage of all commercial establishments.[151] Imposing duty on the landowner to provide protection will thus achieve the greatest possible crime reduction at the lowest possible cost.

The Samson Negligence Standard as a Practical Test for Establishing Duty

In utilizing the standards of the *Samson* case,[152] a suit by a victimized patron against a commercial landowner should call forth a twin inquiry: (1) Whether, in the particular instance, there arose a duty to provide for adequate protection; and (2) whether the landowner, by his failure to take adequate precautions to protect the patron, breached that duty.[153]

---

suggest a crime was about to be committed. This network of guards might bring people back to the streets because they would feel safer there. One person who has attempted to organize the guards says, "What we are trying to do is to create life in the area. We do not want the area to start going dead after sundown. We want people to come to the area to walk through it at night and enjoy it."

J. CONCKLIN, *supra* note 1, at 124.

151. *See* text & notes 32-41 *supra*. *See* COMMUNITY CRIME PREVENTION, note 14 *supra*, where the National Advisory Commission concludes:

> Law enforcement is not a game of cops and robbers in which the citizens play the trees. Unfortunately, there are still too many trees. If crime reduction is to become anything more than wishful thinking citizens must care enough to devote energy, money, and—most of all—themselves to the fight for positive results.

Id. at 325.

Involvement of owners of private businesses in crime reduction is especially necessary. As the holders of economic power in this country, private businesses are in a key position to help reduce the rate of crime. Involvement of those citizens who hold the greatest amount of economic power and influence, necessarily should produce the greatest positive effect. Thus, affecting businessmen's pocketbooks through the imposition of a duty in tort should increase their efforts to reduce crime. Consider the conclusion of the President's Commission on Law Enforcement: "Business and industry are in a particularly favorable position to help the criminal justice system. They have the financial and technical resources that are essential both for developing new equipment to modernize law enforcement and justice, and for devising means to protect against crime." CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 4, at 289.

152. *See* text & notes 92-102 *supra*.

153. An interesting inquiry is whether the landowner could meet his duty through posting of adequate warnings to patrons regarding the risks of crime on his premises. The question is especially relevant for small businesses, particularly those in high-crime areas, which would opt to meet their duty through posting of proper warnings rather than through installation of more expensive security devices. *See* notes 36-39 *supra*. A proper warning is one that would adequately inform potential patrons of either general risks of crime in the area or of a specific crime problem.

The argument that the landowner should be able to discharge his duty through a proper warning is a strong one. As owner of the commercial establishment, the landowner should have the best information regarding the risks of crime on his land. The fact that he may not know the risks of crime does not refute the argument, but rather is a greater reason for imposing the duty on the landowner, since he now has an incentive to accurately determine the risks of crime and then pass this information on to the patron. Landowners, patrons, and the general public would be better informed.

Thus, the benefits achieved through a duty to warn make it an adequate substitute for the duty to provide adequate security measures. Commercial establishments that would be financially unable to provide adequate security devices could now meet their duty through adequate warnings. More information should lead to greater involvement by all parties—especially landowners—with the crime problem. *See* note 151 *supra*. Ultimately, the benefits derived through

The duty proposed here is not the duty to protect the patron, but the duty to provide for adequate precautions for the protection of the patron. The distinction is important because the proposed duty does not make the landowner an insurer of the patron's safety.[154] Mere occurrence of an assault on the landowner's property should not necessarily mean that the landowner is liable for the attack.

Existence of the duty should be based upon the notion of foreseeability, so that when it is reasonably foreseeable that a patron might be attacked, the landowner should be held to a duty to provide adequate protection.[155] Within this notion of foreseeability the *Samson* test would include the duty to investigate the risk of attack. Thus, a landowner's lack of foreseeability, because of his failure to investigate the extent of the crime problem on his property, would not be a proper defense and could constitute negligent conduct.[156] Thereafter, the question remains whether the landowner, in fact, took reasonable pre-

---

requiring adequate warnings should approximate those of providing adequate security measures. Thus, while not foreclosing the matter, in some circumstances, the duty of adequate protection could be discharged by providing a proper warning to potential patrons. The jury, as the ultimate arbiter of the issue, should look at the factors mentioned above, or at least these should be argued before the jury. *See* Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 409, 224 N.W.2d 843, 850 (1975) (court majority indicating that landowner could have discharged his duty through adequate warnings).

154. A similar distinction was developed in landlord-tenant law. *See* Warner v. Arnold, 133 Ga. App. 174, 178, 210 S.E.2d 350, 353-54 (1974); Braitman v. Overlook Terrace Corp., 68 N.J. 368, 380, 346 A.2d 76, 87 (1975).

The distinction is important in easing the financial burden upon poorer landowners. Consider the following statement made by the District of Columbia Circuit Court in its decision to impose a reasonable standard of care upon all landowners and abolishing the status distinctions to determine duty:

> Furthermore, the harsh results . . . predict[ed] upon application of the standard of reasonable care to homeowners of limited means and apartment dwellers need never occur. There is sufficient flexibility retained in the determination of what is reasonable "under all the circumstances" for the jury to avoid undue harshness. In certain cases there may well be . . . "rough common sense" to the notion that a host should take no greater care of his social guests than his own family. If so, the jury can find the host's conduct 'reasonable.' On the other hand, the jury might consider that a host must be more careful towards those who have no notice of any dangers or defects. Also, what might be a "reasonable" maintenance burden for one homeowner may require unreasonable sacrifices for another. We cannot set these standards in abstract. All these considerations are crucial to the jury's evaluation of the degree of care demanded "under all the circumstances" of a specific situation.

Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973). *See also* note 160 *infra*.

155. *See* Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 406-07, 411, 224 N.W.2d 843, 849-50, 851; W. PROSSER, *supra* note 10, § 43, at 250.

In its latest pronouncement of the duty question, the California Supreme Court turned to the foreseeability standard as a practical test of establishing duty. In Coulter v. Superior Court, 21 Cal. 3d 144, 147, 577 P.2d 669, 670, 145 Cal. Rptr. 534, 535 (1978), the court dealt with the question of whether liability could be imposed upon a social host for personal injuries caused by a person to whom the host furnished liquor. The court held that liability could be imposed where there is a reasonably foreseeable risk of harm to others. *Id.* at 150-51, 577 P.2d at 672, 145 Cal. Rptr. at 537. In applying the foreseeability standard to the facts before it, the court concluded: "Simply put, one who serves alcoholic beverages under circumstances which create a reasonably foreseeable risk of harm to others fails to exercise reasonable care." *Id.* at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.

156. *See* text accompanying notes 101-02 *supra*.

cautions against the foreseeable risk.[157]

The resolution of these two questions should be apportioned between judge and jury. Since existence of duty is regarded as a question of law,[158] the judge should rule whether, upon the evidence presented, a reasonable juror could find that a foreseeable risk of attack existed on the landowner's premises. The jury question is what precautions the landowner, in fact, did take. A question of fact, it must be decided on the basis of how a reasonable landowner, in the same or similar circumstances, would have approached the crime problem.[159]

---

157. One might hypothesize a situation where the duty arose but was not breached. If a patron attack occurred during the day in a parking lot of a commercial shopping center, when the risk of attack for that commercial center was small, the landowner should not be found liable. While the owner was still under a duty to protect the patron, it is doubtful that the duty would have been breached in this instance. The attack occurred in the daytime, when the risk was small, and it would be unreasonable for the landowner to extend extra security during low-risk hours. *See* Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975): "If the risk involves possible death or serious bodily injury to a number of persons, the law requires that some care be exercised even though the probability is slight that the accident will occur. Whether the care exercised under the circumstances was reasonable is for the jury to determine." *Id.* at 407, 224 N.W.2d at 849.

See also Dietz v. Miles Holding Corp., 277 A.2d 108 (D.C. 1971) (the court commenting that "[t]he securing of a large downtown office building to which the public must have free access during the business day presents a more difficult problem than providing security for a residential apartment") *Id.* at 110.

Arguably, the commercial landowner may have to provide extra security only during the evening and nighttime hours when, according to his building's particular circumstances, the risk of attack is foreseeable.

158. W. PROSSER, *supra* note 10, § 37, at 205.

159. In addition to the suggested duty which would be judicially recognized, the legislature may desire to enact a statute setting forth adequate standards for crime prevention. Such a proposed statute, rather than leaving exclusively to the jury the decision of whether the preventive acts that the landowner took in each case satisfied the duty, would set out specific crime prevention standards which all landowners must meet. If the landowner does not meet these standards and an attack occurs, the landowner's failure could constitute evidence of negligent conduct.

An analysis of one existing legislative scheme would be instructive. Presently, one state, California, has a crime prevention statute. In 1971, the California legislature recognized the need for standards and enacted California Penal Code § 14050 which deals with the crimes of burglary and robbery. Although this statute itself does not specifically set out security standards, it recognizes the goal of security and the need for focusing upon the technological methods of crime prevention. In its relevant portions, it states:

> (a) The Department of Justice shall encourage the use of technology in the prevention of crime. To this end it shall develop for recommendation to the Legislature, and thereafter continually review, building security standards . . . [The Department of Justice] shall, but is not limited to:
>
> (1) Develop standards for a statewide building security code designed to prevent or reduce the likelihood of burglary or robbery in any building, including new single-family residences, apartments, public-owned buildings, commercial, and industrial buildings.
>
> (2) Develop means of testing and certifying equipment and materials designed to prevent or reduce the likelihood of burglary or robbery in such buildings. . . .

CAL. PENAL CODE § 14050 (West 1973).

In compliance with the California legislature's assignment, the California Department of Justice Attorney General's Building Security Commission has proposed standards for both residences and commercial establishments. These standards prescribe criteria for doors, windows, and alarm systems and are based upon performance and effectiveness, using as a standard the degree of force and length of time needed to overcome a particular system. *See* ATTORNEY GENERAL'S BUILDING SECURITY COMM., CALIF. DEPT. OF JUSTICE, A TECHNOLOGICAL APPROACH TO BUILDING SECURITY STANDARDS (1972-73).

An alternative method to adopting a general crime prevention standards statute is to make

A possible criticism of the above approach is that the application of the "amorphous" negligence standard to this area would create more problems than it would solve. Each case, it could be argued, would have to be decided on its own facts, without any consistent rules being developed. Moreover, under the new standard, juries would be given greater leeway, and this latitude would allow the reputed sympathy of jurors for plaintiffs to control their decisions.

These criticims can be answered in a number of ways. First, under the proposed approach, the judge still makes the decision as to whether a duty of adequate protection arose in the particular situation.[160] Having the power to decide this initial question, the judge can dismiss at the beginning stages the most spurious kinds of cases. Directed verdicts, moreover, can effectively block jury action.[161] When the case reaches the jury there are several ways in which a judge can assure that the jury properly performs its function.[162] Greater control of the jury can be achieved by careful phrasing of jury instructions and the use of special or interrogatory verdicts.[163] Other traditional means of checking irresponsible jury behavior are also available to judges, such as judgment n.o.v.[164]

Finally, such arguments as those mentioned above are, in actuality, attacks on the negligence standard itself. The logical implication is that the negligence standard is inappropriate in any situation. Given its long-standing viability in other areas of tort law,[165] it seems likely that the negligence standard would be workable in the context of landowner-patron liability.

In applying negligence theory to a new area, courts refer to an existing body of relevant concepts and policies with which they are al-

---

such standards part of an already-existing building code. Presently, there are four major model building codes in effect in whole or in part in most local jurisdictions. None of these models has any security provisions. DETERRENCE OF CRIME IN AND AROUND RESIDENCES, *supra* note 28, at 14-15. A number of students of technological means of crime prevention, however, have urged the adoption of security provisions in these codes. *See id.*; A NATIONAL STRATEGY TO REDUCE CRIME, *supra* note 1, at 64.

Nevertheless, there exist major problems with the adoption of statutory standards for reduction of patron victimization. Most important is the difficulty of adopting specific standards to guard against patron victimization. It is almost impossible to determine what specific measures should be taken in all patron attack situations, since the risks of patron attack are varied and depend greatly on the particular circumstances of the business. Rather, measures can be taken only to minimize its risk of occurrence. *See* text accompanying notes 36-39 *supra*. Thus, a statutory standard setting out what every landowner must do is not feasible.

160. *See* text & notes 154, 157 *supra*.

161. James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 679 (1949); James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 704 (1952).

162. *See* James, *supra* note 161, at 680-85.

163. *Id.* at 679-85.

164. *Id.*; Comment, *supra* note 64, at 848.

165. Posner, *supra* note 118, at 29, 73-77.

ready familiar.[166] Use of the negligence standard in patron victimization cases could be analogized to other contexts where similar duties have been created.[167]

Although existing law at times may consider the issues of foreseeability, costs spreading, and deterrence of the attack, these questions are never systematically weighed as they would be under the proposed standard. The wider scope of issues considered under the proposed theory is thus more compatible with the complex range of competing interests in modern society and will tend to more often reach a fair and just result.

CONCLUSION

By applying modern analysis of both interests of parties and costs involved, this Article has demonstrated that commercial landowners should be put under a duty to protect their patrons from criminal attack. A similar analysis in the field of landlord-tenant law has persuaded courts to establish a duty of landlords to protect tenants. Moreover, in cases involving a general duty analysis, the old common law notions were abandoned. This Article contends that the landowner must be saddled with this duty to decrease the commercial crime problem.

Cases on the frontiers of tort law indicate that courts may be receptive to the establishment of the duty in the commercial landowner-patron area. In addition, one case has advanced a practical test for application of this duty. The application of this duty would help stem the rising rate of attack upon patrons of commercial establishments.

166. *See* Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564-65, 79 Cal. Rptr. 97, 100 (1968); James & Sigerson, *supra* note 161, at 698-701.

167. *See* text & notes 72-91 *supra*.