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Notes

ATM CRIME: EXPANDING THE JUDICIAL APPROACH TO A BANK'S LIABILITY FOR THIRD PARTY CRIMES AGAINST ATM PATRONS

I. INTRODUCTION

Douglas Lane stopped at an automated teller machine¹ to get some money before his Saturday night date.² As he conducted his transaction, a teenager in a T-shirt and baggy jeans walked up to the ATM.³ The teenager leaned against the wall behind Lane and took a drag on his cigarette.⁴ As Lane withdrew \$100 from his account, the teenager approached the ATM and put a semiautomatic pistol to Lane's head and led him from the machine.⁵ Lane was later found dead, with four bullet holes in his chest.⁶

Since the introduction of ATMs in the late 1960s,⁷ eye-catching headlines like the 1993 Los Angeles incident described above have drawn attention to the security and safety of ATMs.⁸ While ATMs have given bank customers

1. Hereinafter referred to as ATM.

2. Miles Corwin, *Brutality of Today's Crimes Bewilders Veteran Convicts Violence*, L.A. TIMES, Dec. 19, 1993, Home Edition §, at A1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Pamela Samuels, *Automated Teller Machine Crime: Are Banks Liable For Personal Injuries?*, 11 Legal Research Guides 1 (1990); Joan Miles, Note, *Automated Teller Machine Robberies: Theories of Liability*, 14 FORDHAM URB. L.J. 171, 171 n.5 (1985-86) (reporting that one of the first ATM machines was installed in the U.S. in 1969 in New York City by Chemical Bank).

8. See Vivian Marino, *High-Tech ATM Thieves Try to Pin Liability on You, With Bank Machine's Convenience Comes the Risk of Getting Ripped Off*, CHI. TRIB., June 8, 1993, Your Money §, at 3; see also Richard Perez-Pena, *Bystanders Join to Trap Robber at an East Side Cash Machine*, N.Y. TIMES, Oct. 19, 1994, at A5; Thomas Huang, *Living with Fear*, CHI. TRIB., Feb. 16, 1994, at 7; Michael Martinez & Jerry Thornton, *Man Held in Slaying After ATM Robbery*, CHI. TRIB., Aug. 18, 1993, at 6; Rebecca Cox, *Are Automated Tellers Also Automatic Threats?*, AM. BANKER, Dec. 5, 1989, at 11; William Gruber, *Security at ATMs is Under Scrutiny*, CHI. TRIB., Aug. 28, 1989, Business §, at 2; Ira Lipman, *Are ATMs Really as Safe as We Like to Think?*, AM. BANKER, Dec. 10, 1984, at 24; Joanna Sullivan, *Banks Pushing ATM Safety Legislation*, BALTIMORE BUS. J., Feb. 4, 1994, at 4 (stating that "ATM security is an issue sweeping the nation"). Sullivan

around-the-clock access to their bank accounts, this convenience has subjected ATM users to the criminal actions of third parties.⁹ Since crimes perpetrated against ATM customers occur on bank property, a new type of premises owner liability is developing, that of bank liability for ATM crimes.¹⁰ Injured customers are filing tort claims against banks for negligence in failing to protect patrons against crime at ATMs.¹¹ The extent of a bank's duty to protect ATM customers from injury caused by the intentional acts of third parties is a question courts are being asked to answer.¹²

Traditionally, premises owners did not have a duty to protect invitees from the intentional acts of third persons.¹³ However, the recognition of a "special

recounts several incidents in Baltimore in which ATM customers were forced to withdraw money. *Id.*

9. See generally Miles, *supra* note 7, at 171-72. Miles reports that according to a survey of banks, ATM customers at 2.5 percent of the responding banks had been robbed. *Id.* at 172 n.6 (citing Office of Technology Assessment of the Congress of the United States, Selected Electronic Funds Transfer Issues: Privacy, Security and Equity 49-50 (1982)). In addition to robberies, occurrences of bombings, muggings, torchings and shootings at ATMs have also been reported. *Id.* (citing Zimmer, *ATMs in 1983: A Critical Assessment*, MAG. OF BANK ADMIN., May 1984, at 32)). See also *infra* note 11 (listing cases filed by injured ATM victims against banks).

10. See generally Philip E. Strok, Comment, "Hi, My Name is Bob, I'll Be Your Robber," *Bank Liability for Criminal Activity at Automated Teller Machines*, 22 SW. U. L. REV. 483, 483-84 (1993).

For purposes of this note, ATM crime will refer to criminal activity occurring at ATMs and will be used as equivalent to ATM torts. While a tort is not necessarily equivalent to a crime, this note will discuss the potential of a bank's liability for injuries resulting in civil actions in tort rather than the potential criminal liability. An ATM crime has been defined as "any crime of violence or threatened violence in which the perpetrator[s] saw the victim use an ATM, or in which the attack occurred within 20 feet of an ATM." BANK ADMINISTRATION INSTITUTE, ATM SECURITY HANDBOOK 28-29 (2d ed. 1988) [hereinafter BAI].

11. Williams v. First Alabama Bank, 545 So. 2d 26 (Ala. 1989); Page v. American Nat'l Bank & Trust Co., 850 S.W.2d 133, 136-37 (Tenn. Ct. App. 1991); Dyer v. Norstar Bank, N.A., 588 N.Y.S.2d 499 (N.Y. Sup. Ct. 1992), cert. denied, 610 N.E.2d 390 (N.Y. 1993); Popp v. Cash Station, Inc., 613 N.E.2d 1150 (Ill. App. Ct. 1992); Fuga v. Comerica Bank of Detroit, 509 N.W.2d 778 (Mich. Ct. App. 1993); Faulkner v. Sun Bank of S. Florida, 532 So. 2d 1293 (Fla. Dist. Ct. App. 1988); Gillen v. Delaware Trust Co., 1993 Del. Super. LEXIS 332 (1993); Oppenheimer v. Chase Manhattan Bank, (N.Y. Civ. Ct. 1984), cited in Harry H. Lipsig, *Tort Trends: Duty of Banks to Safeguard Customers*, N.Y.L.J., Oct., 25, 1984, at 1; Stalzer v. European American Bank, 113 Misc. 2d 77 (N.Y. Civ. Ct. 1982).

12. See *supra* note 11 (citing the recent cases filed against banks by victims of ATM crimes). See generally Strok; *supra* note 10, at 484 (stating that as a result of crimes occurring at ATMs, "the potential for bank liability associated with ATM crime surfaces"); Miles, *supra* note 7, at 171-72 (stating that with the development of electronic banking, a new wave of criminal activity has developed).

13. Laura DiCola Kulwicki, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incident Rule*, 48 OHIO ST. L.J. 247, 249 (1987); Michael J. Yelnosky, Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883, 883, 888-90 (1986); Michael J. Bayzler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727,

relationship" created an exception to the traditional rule.¹⁴ In situations where a special relationship exists, a greater duty of care is required.¹⁵ The relationship between a bank and an ATM customer is that of business invitor-invitee and qualifies as a special relationship requiring a duty to protect invitees against foreseeable crime.¹⁶ However, whether or not this duty includes

735 (1979); RESTATEMENT (SECOND) OF TORTS, § 314, cmt. c. (1986) [hereinafter RESTATEMENT]; e.g., *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 383-84 (Mich. 1988) (stating that the landowner is not an insurer of the safety of invitees); *Santiago v. New York City Hous. Auth.*, 475 N.Y.S.2d 50, 52 (N.Y. Sup. Ct. 1984) (finding that the owner of a housing complex did not have a duty to protect a tenant from a third party attack); *Berdeaux v. City Nat'l Bank*, 424 So. 2d 594, 594 (Ala. 1982) (finding that a bank owed no duty to protect a bank customer injured during an armed robbery).

14. *Young v. Huntsville Hosp.*, 595 So. 2d 1386, 1387-88 (Ala. 1992) (stating that the existence of a special relationship or special circumstances is an exception to the traditional rule that a person has no duty to protect another from the criminal acts of a third person); *Figuroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1430-31 (7th Cir. 1989) (recognizing that where a "special relationship" exists, there is an exception to the rule that landowners have no duty to protect others from the crimes of third parties); *Balard v. Bassman Event Sec., Inc.*, 258 Cal. Rptr. 343, 344 (Cal. Ct. App. 1989) (stating that "[g]enerally a person does not have a duty to control another's conduct or to warn those who may be endangered by such conduct" but that an exception arises where a special relationship exists); *Comastro v. Village of Rosemont*, 461 N.E.2d 616 (Ill. App. Ct. 1984) (finding that in situations involving "special relationships" the business invitor is under a duty to exercise a "high degree of care" toward invitees to protect them from foreseeable injuries); *Treadway v. Ebert Motor Co.*, 436 A.2d 994, 998 (Pa. Super. Ct. 1981) (stating that the liability of a landowner depends upon the status of the entrant at the time of the accident) (citing *Crotty v. Reading Industries, Inc.*, 345 A.2d 259, 262-64 (Pa. Super. Ct. 1975)); RESTATEMENT, *supra* note 13, § 315(b) (stating that "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the other which gives to the other a right to protection"); JAMES A. HENDERSON, JR., *THE TORTS PROCESS* 486 (3d ed. 1988) (stating that "where courts have found a special relationship, they have not hesitated to impose [a] liability" to protect another); D. Mark Collins, *The Business Invitor's [sic] Duty to Protect Invitees from Third-Party Criminal Attacks on the Premises: An Overview and the Law in South Dakota After Small v. McKennan Hospital*, 33 S. DAK. L. REV. 90, 94 (1988) (discussing that several jurisdictions have departed from the no-duty rule and found that a business invitor has a duty to protect his patrons from criminal attack).

15. RESTATEMENT, *supra* note 13, §§ 314A, 315. Special relationships in which a premises owner has a greater duty include: common carrier/passenger, innkeeper/guest, landlord/tenant, business invitor/business invitee. *Id.* § 314A. Section 315 states that the existence of a special relationship may give rise to the right to be protected. *Id.* § 315. See, e.g., *Nappier v. Kincade*, 666 S.W.2d 858, 861 (Mo. App. Ct. 1984) (stating that a duty may arise in a special relationship or in special circumstances); *Figuroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1430 (7th Cir. 1989) (recognizing that the business invitor-invitee relationship is an exception to the general no-duty rule). See generally *Yelnosky, supra* note 13, at 883-84; *Kulwicki, supra* note 13, at 247-50.

16. RESTATEMENT, *supra* note 13, § 344 and cmt. f; see *infra* notes 156-57. The bank's action of giving bank customers ATM cards which provide 24-hour access to their accounts constitutes an invitation to the customer to enter the bank premises and expect certain protection while using the ATM. See W. PAGE KEETON ET. AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 419 (5th ed. 1984) [hereinafter PROSSER] (recognizing a bank as a typical example of a relationship which places a duty upon the premises owner to protect invitees); *Strok, supra* note 10, at 484-85. A number of

protecting ATM customers against third party crimes depends upon the foreseeability of the event.¹⁷

Courts deciding ATM cases have been reluctant to hold banks liable for third party crimes.¹⁸ This reluctance stems from the courts' narrow analysis of the foreseeability which leads to duty. Due to the lack of case law regarding ATM crimes,¹⁹ to determine a bank's duty courts have looked to other decisions addressing a business invitor's duty to protect invitees.²⁰ In other business invitor cases, the courts have primarily used four approaches. Two of

jurisdictions have relied on comment f to impose a duty on business inviters. *Morgan v. Bucks Assoc.*, 428 F. Supp. 546 (E.D. Pa. 1977); *O'Brien v. Colonial Village, Inc.*, 255 N.E.2d 205 (Ill. App. Ct. 1970); *Atamian v. Supermarkets Gen'l Corp.*, 369 A.2d 38 (N.J. Super. Ct. App. Div. 1976); *Kenny v. Southeastern Pa. Transp. Auth.*, 581 F.2d 351 (3d Cir. 1978).

17. Foreseeability is the key factor used to define the limits of an individual's duty. *Kulwicki*, *supra* note 13, at 249. See also *infra* notes 222-30 and accompanying text.

Throughout this note, notice and foreseeability will be used interchangeably to refer to a business invitor's knowledge of the potential for future harm to the invitee. This reference is based on the Restatement of Torts which places a duty upon the business invitor when the invitor knows or has reason to know of the potential for harm or injury to the invitee. RESTATEMENT, *supra* note 13, § 344 cmt. f; see *infra* note 157.

18. Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 746 n.255 (1986). See *Williams v. First Alabama Bank*, 545 So. 2d 26, 27 (Ala. 1989) (dismissing the ATM victim's complaint because of the courts reluctance to impose the duty to protect); *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133, 136-37 (Tenn. Ct. App. 1991) (stating that the Restatement of Torts § 344 mistakenly places a duty on business owners to protect invitees from the criminal acts of third parties); *Dyer v. Norstar Bank, N.A.*, 588 N.Y.S.2d 499-500, (N.Y. Sup. Ct. 1992), *cert. denied*, 610 N.E.2d 390 (N.Y. 1993) (holding that a bank did not have a duty to protect a ATM customer against an armed robbery); *Popp v. Cash Station, Inc.*, 613 N.E.2d 1150, 1152-53 (Ill. App. Ct. 1992) (dismissing the plaintiff's complaint despite the court's recognition that the existence of a special relationship creates a duty to protect); *Fuga v. Comerica Bank of Detroit*, 509 N.W.2d 778, 779 (Mich. 1993) (holding that requiring a bank to protect ATM users from the criminal acts of third parties would be too great a burden for banks to bear); *Faulkner v. Sun Bank of S. Florida*, 532 So. 2d 1293, 1293 (Fla. Dist. Ct. App. 1988) (affirming a summary judgment for the defendant bank of an ATM crime victim's negligence claim against the bank); *cf. McClendon v. Citizens & S. Nat'l Bank*, 272 S.E.2d 592, 593 (Ga. Ct. App. 1980) (finding that a bank was not responsible for the attack of a bank customer in the parking lot of the bank); *Berdeaux v. City Nat'l Bank of Birmingham*, 424 So. 2d 594, 595 (Ala. 1982) (refusing to place a 'special duty' on a bank for injuries caused to a bank customer during a bank robbery); *Nigido v. First Nat'l Bank of Baltimore*, 288 A.2d 127, 128 (Md. 1972) (finding that the bank did not have a special duty to protect a bank customer from injuries sustained during a bank robbery). *But see Gillen v. Delaware Trust Co.*, 1993 Del. Super. LEXIS 332 (Del. Super. Ct. Oct. 29, 1993) (denying the defendant-bank's motion for summary judgment in a ATM crime case). See also *infra* Section IV (discussing the courts' treatment of ATM cases).

19. See *Miles*, *supra* note 7, at 172 n.7 (stating that reported cases on ATM crimes are scarce).

20. See discussion *infra* section III. See also David E. Teitelbaum, *Violent Crime at ATMs*, 49 BUS. LAW. 1363, 1363 (1994) (discussing the fact that a court hearing an ATM case relied on the no-duty analysis used by another court hearing a business invitor-invitee case (citing to *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133 (Tenn. Ct. App. 1991) and *Compropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975)).

these, the no-duty approach and the special circumstances approach, view foreseeability and duty narrowly.²¹ The other two approaches, the totality of the circumstances approach and the prior related incidents approach, use a broader view of foreseeability and duty.²² Despite the general trend toward the broader approaches,²³ courts determining a bank's duty to protect ATM patrons have followed the narrower approaches.²⁴ As a result, courts have found as a matter of law that the ATM crime was not foreseeable and relieved the bank of liability.²⁵ This Note argues that courts should employ a broader approach to assess a bank's liability.

First, the court should broaden the current analysis of foreseeability by recognizing that prior related incidents may establish foreseeability. Presently, courts deciding ATM cases have found ATM crimes to be unforeseeable, despite evidence of prior criminal incidents related to the bank's premises.²⁶ However, courts should recognize that past experiences may make future crime foreseeable; therefore, evidence of prior criminal incidents related to the bank's premises may establish foreseeability.²⁷ However, whether the evidence is sufficient to establish foreseeability should be a question for the jury rather than the court, since such a determination involves questions of fact.²⁸

Therefore, the court should broaden the current analysis of ATM cases further and allow the jury to determine foreseeability. For example, when evidence of prior related incidents is presented, the jury should determine whether there were a sufficient number of prior incidents, whether the prior incidents were sufficiently similar, or whether the prior incidents were close

21. See *infra* Sections III.A. and III.B.1.

22. See *infra* Sections III.B.2. and III.B.3.

23. *Young v. Huntsville Hosp.*, 595 So. 2d 1386, 1388-89 (Ala. 1992) (stating that there is a "growing national trend in the law toward expanding the recognized" special relationships "that give rise to the exception to the general rule of no liability"); *Yelnosky*, *supra* note 13, at 883, 891 (reporting that the trend among courts is to recognize a duty to protect); *Butler v. Acme Markets, Inc.*, 445 A.2d 1141, 1144 (N.J. 1982) (recognizing that there is a gradual change in the law in favor of a broadening application of the obligation to exercise reasonable care to protect others from foreseeable harm). See *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572, 575 (Cal. Ct. App. 1984). The court in *Cohen* stated that "[a]ppellate decisions of federal and other state courts are virtually unanimous in holding possessors of business premises owe a duty of care to customers to take affirmative steps to control a third party's foreseeable wrongful conduct." *Id.* (citing numerous cases adhering to this view).

24. The courts confronted with ATM crime cases have applied either the no-duty approach or a special circumstances approach to their analysis of a bank's duty to protect ATM patrons from third party harm. See *infra* section IV.

25. See *infra* section IV.

26. See *infra* notes 193-200 and accompanying text.

27. See *infra* section V.A.

28. See *infra* section V.B.

enough in proximity to the bank to make the ATM crime foreseeable. Thus, when evidence of prior related incidents exists, the jury should determine whether the ATM crime was foreseeable. This should occur before the judge determines the bank's duty.

Finally, broadening the current approach used to determine a bank's liability should also include a flexible analysis of whether the bank breached its duty and was therefore negligent.²⁹ Recognizing that evidence of prior related incidents may establish foreseeability will result in more findings that a bank has a duty to protect ATM patrons.³⁰ However, a finding of duty will not automatically make a bank liable, since liability depends upon the jury's determination of negligence.³¹ To determine negligence, the jury should apply a flexible balancing test which weighs the burdens of imposing a duty on the bank plus the social utility of the ATM against the gravity of the ATM crime and the likelihood of its occurrence.³² As a result, banks will only be liable for a breach of the imposed duty which occurs when the burden and utility weigh less than the gravity and likelihood of the harm.³³ With this flexible balancing test, the jury can assess the bank's conduct and competing interests before a bank will be found negligent. This broader, more flexible approach to analyzing ATM crimes would prevent banks from being relieved of their duty to ATM patrons when future crime is foreseeable. Yet, under this approach, liability would not be imposed when the ATM crime was not foreseeable or when the bank did not breach its duty.

29. See *infra* section VI.B (discussing the proposed analysis of negligence).

A cause of action for negligence requires four factors in order for liability to be imposed. PROSSER, *supra* note 16, at 164. The basic elements may be stated as follows: (1) a duty or obligation; (2) a failure to conform to the required standard of care, often stated as a breach of duty; (3) a causal connection between the conduct and the resulting injury; and (4) an actual damage or injury to the plaintiff. *Id.* at 164-65. Traditionally, the first factor is said to be a question of law which the judge determines. *Id.* at 235-37. The remaining factors are said to be questions of fact which are determined by the jury. *Id.* See also *infra* section IV.B. (discussing the functions of the judge and jury).

Although all factors must be established before the defendant is found liable for negligence, this note will deal only with duty and breach. The proposed model approach broadens the current approach to ATM crime cases only at the stages of duty and breach in the traditional negligence analysis. Thus, only those two factors of negligence will be discussed in this note. After duty and breach are found, both causation and damages must be found before liability is imposed. However, for purposes of this note, liability will be referred to as arising after the breach is established, and it will assume that causation and damages have also been established.

30. See *infra* notes 127, 216, 231-47 and accompanying text.

31. See *infra* section VI.

32. See *infra* section VI.B.

33. See *infra* section VI.

Section II of this Note will present a brief background of the growth of ATMs and ATM crimes.³⁴ Section III will discuss the narrower and broader approaches currently used by courts to assess the duty of a business invitor to an invitee.³⁵ Section IV will demonstrate how the courts hearing ATM cases have adopted the narrower approaches to assess a bank's duty, and ultimate liability for ATM crimes.³⁶ This Note argues in Section V that the narrower approaches contradict both basic tort principles and public policy. This Note further asserts that prior related incidents should be evaluated by the jury to establish foreseeability before the judge determines the bank's general duty.³⁷ Finally, Section VI provides a model of court reasoning demonstrating a broader, flexible analysis of a bank's liability.³⁸ This model separates the functions of the judge and the jury in the analysis of the foreseeability which leads to the potential duty.³⁹ If a duty is found, the jury should determine a bank's liability using a flexible balancing test to evaluate each of the unique circumstances involved in the ATM crime.⁴⁰

II. GROWTH OF ATMs AND ATM CRIMES

A. Development of ATMs

The automated teller machine has become Americans' most popular way to get cash.⁴¹ By simply inserting a card coded with a unique user identification number, ATMs allow bank customers to access their accounts any time of day.⁴² Customers may withdraw and deposit money, transfer funds, or obtain balance information on checking or savings accounts.⁴³ The current rise in ATM transaction volume demonstrates that customers are taking advantage of this convenient banking method.⁴⁴ One network reported an increase in ATM transactions from seventy-two million in 1991 to eighty million in 1992.⁴⁵ Another major network predicts that customers will transact 300 million

34. See *infra* notes 41-83 and accompanying text.

35. See *infra* notes 84-174 and accompanying text.

36. See *infra* notes 175-213 and accompanying text.

37. See *infra* notes 214-69 and accompanying text.

38. See *infra* notes 270-313 and accompanying text.

39. See *infra* section VI.A.

40. See *infra* section VI.B.

41. Marino, *supra*, note 8, at 3.

42. BAI, *supra* note 10, at 5.

43. *Id.* at 5-7.

44. See *infra* notes 45-57 and accompanying text.

45. William Gruber, *Cash Station Spreads Wings Over Indiana*, CHI. TRIB., Nov. 23, 1992, Business §, at 5.

transactions on their ATMs in 1994 alone, up from fifty-nine million transactions conducted on their ATMs in 1989.⁴⁶

Hoping to push these transaction numbers even higher, banks are aggressively encouraging ATM use by increasing the accessibility of ATMs⁴⁷ as well as expanding the options and services offered.⁴⁸ Banks have expanded the off-site locations,⁴⁹ and customers may now find ATMs everywhere, from shopping malls and grocery stores to convenience stores and gas stations.⁵⁰

46. Irvin Molotsky, *Credit Cards, ATMs Gaining Wide Acceptance Abroad As Consumers Weigh the Convenience Against the Risks*, CHI. TRIB., Sept. 25, 1994, Travel §, at 24 (reporting figures for the Mastercard/Cirrus network and the Visa/Plus network). See also Peter Mantius, *An Eye to the Cash Dispensers*, AM. BANKER, Dec. 3, 1985, at 23 (reporting that Money Shop, a Chicago based network, averaged 200,000 transactions per month in 1985 or 1538 transactions per machine).

47. Gruber, *supra* note 45, at 5. Cash Station is extending their ATM network from Chicago and Northwest Indiana to Michigan, Wisconsin, Missouri, and Minnesota. *Id.* After an agreement between the Cash Station ATM network and Amoco which enabled Cash Station customers to use their ATM cards at Amoco gas stations, transactions rose from zero to 130,000 transactions at the Amoco stations in Indiana and Illinois. *Id.*

Banks are eager to generate high volume use of ATMs. Julie A. Monahan, *Safety Issues Shaping Future ATMs*, AM. BANKER, Dec. 5, 1989, at 6 (relating the concerns of payment services specialist Linda Fenner Zimmer that banks are over eager in their push to increase volume).

48. See *infra* notes 49-50 and accompanying text.

49. Off-site location refers to those ATMs located some place other than a bank branch or bank premises such as in a shopping mall. However, the majority of ATM crimes occur at ATMs located at banks. Jeffrey Kutler, *Survey Shows Violent Crime at ATMs is Rare and Controllable*, AM. BANKER, June 29, 1987, at 15 (reporting that in 1987, 98% of the ATM crimes occurred on bank premises). Kutler also reported that of these ATM crimes 75% occurred at ATMs located on the exterior of the bank, 15% at ATMs enclosed in vestibules, and 9% at indoor ATMs. *Id.*

This note addresses ATMs located on property which a bank owns or has the ability to control. For leased sites, a bank may have the ability to control the security surrounding the ATM in which case they may have a duty to protect ATM patrons at that site. However, if the bank leases the property on which the ATM is located, a bank may be relieved of liability due to the lessor-lessee relationship. However, the extent of a bank's liability for crimes on leased property is beyond the scope of this note. For further discussion of the liability of a lessor for crimes on the leased premises, see *Morgan v. Bucks Assoc.*, 428 F. Supp. 546 (E.D. Pa. 1977). In *Morgan*, the Pennsylvania Court stated that,

where the owner of real estate leases parts thereof to several tenants, but retains possession and control of the common areas which are to be used by business invitees of the various tenants, the obligation of keeping the common areas safe for such business invitees is imposed upon the landlord and not upon the tenants, in the absence of a contrary provision in the leases.

Id. at 549 (citing *Leary v. Lawrence Sales Corp.*, 275 A.2d 32 (Pa. 1971)).

50. Interview with Robert R. Gierman, Director of ATM Department at NBD Bank N.A., in Crown Point, IN (Sept. 6, 1994) [hereinafter Gierman Interview] (reporting that NBD had an ATM in a shopping mall which conducted an average of 13,000 transactions a month). Mantius, *supra* note 46, at 23 (reporting that Switched Transaction Services Inc. had ATMs in supermarkets and convenience stores in addition to their branch offices). John Randazzo, *County Mandates Safety Measures for Cash Machines*, N.Y. TIMES, Sept. 4, 1994, § 13WC, at 17. (reporting that banks

Not only have banks increased customers' access to ATMs within the United States, but abroad as well.⁵¹ Further, banks have encouraged customers to increase their use of ATMs by distributing as many cards as possible, and then by persuading cardholders to use them.⁵² In addition, banks are equipping ATMs with a host of new features, including distribution of postage stamps, movie tickets, and travelers checks, in hope of generating more business.⁵³

have installed ATMs in airport terminals). Michael Weinstein, *Are Off-Site ATMs Worth the Effort?*, AM. BANKER, Nov. 17, 1986, at 1 (reporting that banks were locating ATMs in supermarkets, convenience stores, and gas stations and were planning to increase the number and locations of off-site ATMs).

51. See Molotsky, *supra* note 46. The Mastercard/Cirrus network reported having 177,518 machines in use with 64 of these outside the United States in 1994. *Id.* The Visa/Plus network reported having 186,000 ATMs with 16 outside the United States. *Id.* American Express reports 80,000 ATMs with eight outside the United States. *Id.*

52. Roland E. Koch, *Consumer Banking: Automated Teller Machines—What Can Banks Do to Help Consumers Overcome Their Reluctance to Use ATMs for Making Deposits?*, AM. BANKER, Jan. 18, 1994, at 8A (reporting that banks encourage customers to use ATMs by giving demonstrations of the functions of the machine to both current and new customers); Janice Fioravante, *As the ATM Age Matures, Old Assumptions May Die*, AM. BANKER, Nov. 17, 1986, at 17 (reporting that banks are focusing on promotional efforts and trying to increase the number of cardholders); David LaGesse, *Wooing Customers to ATMs: Beyond Puppy Love*, AM. BANKER, Nov. 12, 1985, at 1 (reporting that to encourage ATM use, some banks provide an ATM card on the initial visit and have the customer make their first transaction on the ATM); Michael Weinstein, *Customer Lines Not Getting Longer at ATMs*, AM. BANKER, Oct. 28, 1986, at 1 [hereinafter Weinstein, *Customer Lines*]; Michael Weinstein, *Levying Fees for Use of ATMs Spreads to Florida from Texas*, AM. BANKER, Feb. 14, 1985, at 1 [hereinafter Weinstein, *Levying Fees*] (reporting that banks are working hard to persuade people to increase their ATM use).

To encourage customers to increase their use of ATMs, some banks offer rebates to customers if they make at least one ATM transaction monthly. Christina MacKenzie, *Increase in Crime at Teller Machines Prompts Introduction of Bill to Tighten Security Rules*, AM. BANKER, July 28, 1986, at 3 (reporting that the Bank of America offered customers overdraft protection and a benefit plan for customers who increase their use of ATM services). Banks have also taken measures to ensure that customers are comfortable using ATMs. For example, due to customer's reluctance to make deposits through the ATM, one bank invested in an ATM which shows a facsimile of the deposited check on the screen in order to make customers feel more at ease about depositing money into the machine. Koch, *supra*, at 8A (reporting that only 10% of the total transactions were deposits).

53. Matt Barthel, *Bank Appetite for ATM Fees May be Risky*, AM. BANKER, May 15, 1991, at 1 (noting that typically these additional features are placed on ATMs which have low volumes of transactions in hope of increasing the traffic at these ATMs rather than at ATMs which have a high volume of transactions). Lawrence M. Fisher, *A.T.M.'s to Dispense American Express Travelers Checks*, N.Y. TIMES, May 31, 1994, at D6. Customers can also purchase mutual funds and stock at ATMs. Glenn Burkins, *Mutual Funds Coming Soon to an ATM Near You*, CHI. TRIB., Sept. 23, 1993, at C3 (reporting that customers can "buy or sell shares, check their balances or transfer money from one fund to another" through the ATM); American Press, *Citibank Offers Stock Services at A.T.M.'s*, N.Y. TIMES, Oct. 6, 1994, at D3. Banks have even extended ATM services to allow customers to make donations to their favorite charity from ATMs. Doron P. Levin, *Giving to Charity Using Teller Machines*, N.Y. TIMES, Feb. 12, 1994, § 1, at 39.

The aggressive efforts to increase ATM accessibility and customer use are driven by the revenue that banks derive from these efforts. The economic benefit generated by the ATM varies with location and services.⁵⁴ Off-site ATMs, though generally more costly to maintain than ATMs at bank branch locations, generate a much higher volume of transactions.⁵⁵ Yet, banks have turned the expense of the off-site ATMs and additional features into profits by charging fees for transactions by non-bank users and for the use of the unique features.⁵⁶ However, the result of banks' efforts to increase use is that as customers increase their ATM use, they also increase their chances of becoming a victim of a criminal attack at the ATM.

B. ATM Crime

With banks actively encouraging ATM use and ATM use increasing,⁵⁷ the potential for an ATM customer to become a victim of a criminal act by a third

54. Gierman Interview, *supra* note 50.

55. *Id.* Mr. Gierman stated that off-site ATMs require the bank to bear costs not required of branch site ATMs. *Id.* For example, an ATM in a shopping mall requires the bank to hire someone to service and maintain the ATM at the off-site location. *Id.* The bank is also required to pay dataline costs of connecting the off-site location with the bank's on-site datalines. *Id.*; *Cf.* Weinstein, *Levying Fees*, *supra* note 52, at 1 (stating that electronic banking is cheaper for banks than other paper service banking); *see also infra* notes 301-03 and accompanying text.

56. According to a study by the Consumer Federation of America, banks reported savings of more than 2 billion dollars annually in teller costs from ATM use and profiting nearly 2 billion. Andrew Leckey, *Who Saves With ATMs?*, CHI. TRIB., June 16, 1994, at C9. *Cf.* Gierman Interview, *supra* note 50. Mr. Gierman stated that off-site ATMs were more profitable than on-site ATMs since a greater number of foreign transactions, transactions by non-NBD customers for which a service fee is charged, are conducted at off-site locations. *Id.* However, the increase in transactions must be substantial in order to off-set the dataline costs and servicing costs required for an off-site ATM. *Id.* *See also* Weinstein, *supra* note 50, at 1 (stating that banks earn profits from off-site ATMs by charging transaction fees to foreign customers).

In order to increase transactions, banks have aggressively pushed to increase customers' use and accessibility to ATMs. Barthel, *supra* note 53, at 1. By generating high transaction volumes at off-site ATMs and by increasing use of the attractive optional features, such as stamp dispensing, a bank increases its fee income. *Id.* Banks are also exploring new money making methods such as renting ATMs as billboards for advertising. Weinstein, *supra* note 50, at 1 (stating that banks started advertising on ATM screens in hopes of increasing profits); Mantius, *supra* note 46, at 23.

The average reported fee charged for non-bank customers is one dollar. Leckey, *supra*, at C9 (reporting that customers should expect fees to continue to rise). However, some banks charge fees as high as \$2.75 a transaction. Robert Heady, *The Price of Convenience*, CHI. TRIB., Aug. 16, 1994, at C11. For the service of buying or selling shares in a money-market mutual fund, banks charge a one dollar service fee. Burkins, *supra* note 53, at C3. In addition, some banks are charging fees for "dormant" ATM cards in order to get customers to use them more. *See* Leckey, *supra*, at C9. California now has a statute which requires banks to disclose any surcharge upon the usage of the ATM to the customer prior to the completion of the transaction. CAL. FIN. CODE § 13080 (West Supp. 1994); *see infra* note 71.

57. *See supra* notes 45-56 and accompanying text. *See also* Barthel, *supra* note 53, at 1 (stating that the average customer currently visits an ATM once a week).

party also increases.⁵⁸ The ATM's unique features, such as the convenient twenty-four hour access, and the ease of withdrawing and depositing cash when no bank personnel are present, are attractions that draw consumers to ATMs. Unfortunately, these attractive features draw criminals.⁵⁹ Furthermore, ATM customers are often transferring and exchanging money in a parking lot, making the customer particularly vulnerable to a criminal attack.⁶⁰

The public recognition of criminal acts occurring at ATMs, combined with the increase in ATM use, has made the safety of customers a widespread concern.⁶¹ The crimes are primarily robberies,⁶² but vary in degree, ranging

58. The possibility of being a victim of a third party crime is a very real threat for most Americans. With the United States having higher crime rates than other Western industrial societies, criminal violence is a legitimate concern for our nation. Yelnosky, *supra* note 13, at 885-86 (citing to W. SKOGAN & M. MAXFIELD, *COPING WITH CRIME* 28 (1981)). ATMs are a prime target because areas of commercial activity in particular have been a target for criminal activity. *Id.* at 886-87.

59. See generally Marino, *supra* note 8, at 3; Lipman, *supra* note 8, at 24 (quoting the Bureau of Justice Statistics that "electronic banking [provides an] environment that is potentially fertile for criminal abuse").

The criminally attractive nature of the 24-hour accessible ATM situation is comparable to the nature of a 24-hour convenience store which was recognized as an attractive target for crime in *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572, 578 (Cal. Ct. App. 1984). In *Cohen*, the court stated that the mere operation of the defendant's all-night convenience store created "an especial temptation and opportunity for criminal misconduct" thus increasing the foreseeability of injury resulting from third party misconduct in the early morning hours." *Id.* (quoting W. PAGE KEETON, *PROSSER AND KEETON ON TORTS* 174 (4th ed. 1971)). The court stated that common experience and reason confirms that more crimes occur at night because fewer people are around to interfere and the criminal's getaway is easier. *Id.* Thus, any business which is open 24-hours is a target for nighttime criminal activity. *Id.*

60. By transacting business in an empty bank parking lot, the ATM customer becomes a prime target for criminals. See Yelnosky, *supra* note 13, at 886-87, 904. Parking lots create "unique opportunities for crime." *Id.* at 886-87. The lots are usually remote and poorly lit and "present little danger of discovery." *Id.* Security experts recognize that parking lots pose substantial risks for business customers who are in possession of money or purchased goods, and that these areas cannot be considered secure, particularly after dark. *Id.* at 887 n.17 (quoting D. HUGHES & P. BOWLER, *THE SECURITY SURVEY* 118 (1982)); *Cohen v. Southland*, 203 Cal. Rptr. at 578 (stating that parking lots create a temptation and opportunity for crime (citing *Gomez v. Ticor*, 193 Cal. Rptr. 600 (Cal. Ct. App. 1983)); accord *Isaacs v. Huntington Memorial Hosp.*, 695 P.2d 653, 660 (Cal. 1985). See also *Stalzer v. European Am. Bank*, 448 N.Y.S.2d 631, 635 (N.Y. Civ. Ct. 1982) (stating that it is the very nature of the business conducted at a bank which makes a bank a target for robbery and a risk to the public at large).

61. See Bruce C. Smith, *High-Profile Cases Heighten Public Concern About Robberies at ATMs*, *INDIANAPOLIS STAR*, May 22, 1994, at 1 (stating that newspaper and television reports of ATM crime have "heightened a rising tide of public fear about the safety of using ATMs").

62. In 1987, it was reported that the most common crimes at ATMS were robberies that occurred after cash had been withdrawn. BAI, *supra* note 10, at 38 (stating that the types of ATM crimes include simple assaults, assaults with weapons, sexual assault, and abductions). In two-thirds of the crimes, the customers were accosted by a single perpetrator using a handgun, knife, or blunt weapon. Jeffrey Kutler, *ATM Crimes Don't Fit the Stereotype; Survey Finds Robberies of*

from robberies resulting in murders,⁶³ to armed robbery where the victims are assaulted and threatened.⁶⁴ Though the frequency of ATM crimes has decreased slightly in recent years,⁶⁵ the continued occurrence and public recognition of criminal activity⁶⁶ illustrates that the problem remains an important concern.⁶⁷

Customers Are Rare Occurrences, AM. BANKER, May 5, 1987, at 2.

63. One such example is that of a 22-year-old woman who was shot in the head during the robbery of a Chicago ATM. Martinez, *supra* note 8, at 6. The woman and her fiance were using a Citibank ATM when they were robbed at gunpoint by a third party. *Id.* The third party shot the woman when she tried to escape. *Id.* The murderer was caught the following week and charged with first-degree murder and armed robbery. *Id.* See also Smith, *supra* note 61, at 1 (relating the murder of a Detroit woman shot and killed by a 14-year-old for \$80 she had just withdrawn from an ATM).

64. See, e.g., Page v. American Nat'l Bank & Trust Co., 850 S.W.2d 133 (Tenn. Ct. App. 1991) (involving a woman who was held up and struck in the face by a group of young males after withdrawing money from an ATM); Dyer v. Norstar Bank, N.A. 588 N.Y.S.2d 499 (N.Y. Sup. Ct. 1992), cert. denied, 610 N.E.2d 390 (N.Y. 1993) (involving a man who was robbed of \$200 at gunpoint by an assailant while the man was using an ATM); Williams v. First Ala. Bank, 545 So. 2d 26 (Ala. 1989) (involving a woman who, while sitting in her car at a drive-up ATM, was held up at gunpoint and robbed of the money she had just withdrawn); Smith, *supra* note 61, at 1 (relating the case of an Indianapolis man who was robbed and held captive for four hours by gunmen who approached him while he was withdrawing cash from an ATM late at night).

65. See Perez-Pena, *supra* note 8, at A1 (stating that in New York City there were 378 ATM robberies in 1990, 380 in 1991, 278 in 1992, 304 in 1993, and 110 in the first half of 1994).

Despite the decreases emphasized by the banking associations, ATM crimes are remarkably prevalent. Recent crime statistics showed that more than 200 holdups or attempted crimes have occurred each year at ATMs since 1992. Randazzo, *supra* note 50, at 17. The Chicago police reported that there were 47 ATM crimes from June 1992 to June 1993, which was a decrease of 17% from the previous year. Telephone Interview with Sonia Barbara, Public Relations Director, American Bankers Association, Washington D.C. (Sept. 7, 1994). The Los Angeles Police Department reported 152 incidents of ATM crime in 1992. *Id.* The New York City Police Department reported 743 robberies at ATMs between January 1990 and December 1991, accounting for less than one-half of one percent of crime in the city. *Id.* Also, the California Bankers Association found that, in 1992, there were 499 ATM crimes reported out of 599 million ATM transactions in the state. *Id.*

66. One recent crime brought to the public's attention was the third party attack on an elderly man who was knifed several times while withdrawing money from a New York ATM at 6:30 in the morning. See Perez-Pena, *supra* note 8, at A1. In this crime, bystanders saw the commotion and responded to the elderly man's call for help. *Id.* The bystanders trapped the assailant in the ATM lobby until police arrived. *Id.* This case also raises the question of whether a bank would be liable for injury to third persons who try to prevent an ATM crime. Whether or not a bank's liability extends this far is beyond the scope of this note, but the concept of such liability is worth noting and may be a consideration when determining the limits of a bank's duty to protect patrons.

67. ATM Safety Act, N.Y. Assembly Bill 11808, 215th Gen. Assembly, 2d Sess. § 37 (1994) (legislative intent) (stating that the New York Legislature found that eliminating the risk was of "utmost importance"); Sullivan, *supra* note 8, at 4 (stating that a recent wave of ATM crimes "punctuates the urgency of proposed state legislation" to require banks to improve security at ATMs). See generally Robert Davis, *Burke Backs ATMs for Police Stations*, CHI. TRIB., July 22, 1993, Chicagoand §, at 2 (reporting that because elderly people perceive that they are not safe withdrawing money from ATMs, Chicago officials suggested that ATMs be placed in fire stations

The concern regarding risk of robbery and other crimes at ATMs has prompted several legislative attempts to regulate ATM security.⁶⁸ For example, Congress enacted the Electronic Funds Transfer Act (EFTA) to deal with unauthorized transfers and fraud problems related to electronic money transfer services such as ATMs.⁶⁹ While the EFTA does address the basic

and police stations); See Randazzo, *supra* note 50, at 17. Randazzo quotes a state official to say that ATMs are "a fact of daily life. Residents, visitors, commuters -- anyone who uses them -- are challenged by the risk of robbery and other criminal activities. Nighttime hours, from sunset to sunrise, are particularly dangerous when you are alone." *Id.* (quoting Andrew A. Albanese, head of the Public Safety and Criminal Justice Committee and Board Majority leader for Eastchester County, New York, who sponsored the law in Eastchester which required additional safeguards at ATMs).

In addition, customers have expressed their fears and concerns. Clarence Johnson, *S.F. Voters to Decide on ATM Loitering: Supervisors Reject Proposal for Invisible Security Bubble*, S. F. CHRON., Mar. 22, 1994, at A1. See also Thomas Huang, *supra* note 8, at C7 (quoting a bank customer as saying that he "will not go to an ATM at night anymore" due to the reports of criminal attacks); John T. McQuiston, *Nassau County Board Approves Tough Security Law for A.T.M.'s*, N.Y. TIMES, Aug. 16, 1994, at B2 (reporting that a lawyer for the New York State Banker's Association stated that the banking industry is aware of customers' fear of ATM crime). The American Banker's Association has recognized that ATM crime is a serious problem, though it maintains that the public should not panic. Matt Barthel, *ABA: Banks Can Benefit from Safety Measures at ATMs*, AM. BANKER, Aug. 11, 1994, at 10.

68. See McQuiston, *supra* note 67, at B2 (reporting that New York City's regulations were enacted after several well-publicized ATM robberies, including the holdup of a councilwoman); James C. McKinley, Jr., *Tough Cash-Machine Bill Is Approved*, N.Y. TIMES, July 30, 1992, at B3 (reporting that a New York City bill was pending for a year before it gained momentum due to a discovery by council members that a "pervasive fear about crime at the machines" existed); Randazzo, *supra* note 50, at 17 (reporting that New York's Westchester County Board of Legislators ordered banks to install safeguards because bank customers face the risk of robbery and other crime every time they use an ATM).

69. 15 U.S.C. § 1693 (1982). The Electronic Funds Transfer Act (EFTA) establishes the basic rights of both the consumers who use electronic money transfer services and of the institutions that offer the service. *Id.* § 1693(b). The EFTA states:

(a) The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic fund transfers undefined.

(b) It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems

.....

Id.

The Federal Reserve Board subsequently enacted Regulation E, 12 C.F.R. § 205 (1995), which implements the EFTA and protects consumers who use EFT systems by imposing certain duties and liabilities on financial institutions. *Id.* § 205.1(b).

The EFTA defines electronic fund transfers as "any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account." 12 C.F.R. § 205.2(g) (1995). For additional information regarding various electronic banking services, see Horan, *Outlook for EFT Technology*

rights and liabilities of a bank for fraudulent transfers, it does not address a bank's liability for crimes by third parties.⁷⁰ Successful regulations have also been enacted in California,⁷¹ Georgia,⁷² Oregon,⁷³ Washington,⁷⁴

in COMPUTER AND BANKING: ELECTRONIC FUNDS TRANSFER SYSTEMS AND PUBLIC POLICY 21 (K. Colton and K. Kraemer eds., 1980).

The EFTA sets limits on consumers' recovery for unauthorized transfers from their accounts, including transfers which are initiated by a person other than the consumer and without actual authority to initiate such transfer, transfers from which the consumer receives no benefit, and transfers which the consumer did not voluntarily give out any means of access to their bank account. 15 U.S.C. § 1693a(11) (1982). An amendment to Regulation E adds two examples of unauthorized transfers: where there has been a fraudulent transfer by an employee of a financial institution and where a withdrawal is conducted by using an access device stolen or fraudulently obtained from the consumer. 12 C.F.R. § 205.2 (1) (1995).

The limits set forth by the Act require that for a bank to avoid liability, the bank must provide the consumer with a means for identification, such as a personal identification code, and with written information disclosing potential consumer liability, the procedure to be followed in the event that an access card is lost or stolen, and the bank's business hours. *Id.* If the bank fails to meet these requirements, the consumer will not incur any liability. *Id.* § 205.6(a). If the bank meets these requirements, a consumer who reports an unauthorized electronic transfer within two days after learning of the theft incurs a liability of \$50 or the amount of the unauthorized withdrawal, whichever is the lesser amount. *Id.* § 205.6(b)(1). If the consumer does not report the loss within two days after discovering the loss, the consumer's liability may rise to a maximum of \$500. *Id.* § 205.6(b)(1). If the consumer fails to report the loss within 60 days of an unauthorized transfer appearing on his or her bank statement, the consumer will be subject to unlimited liability. *Id.* § 205.6(b)(2). The consumer's liability may include the amount of the unauthorized transfer plus the amount of any subsequent unauthorized transfers which the financial institution can establish would not have occurred but for the consumer's failure to notify the institution. *Id.* The consumer may also incur unlimited liability if the bank can establish that the transfer was authorized. 15 U.S.C. § 1693g(a)-(b) (1982). In addition, the Act places the burden of going forward to show an unauthorized transfer from his account on the consumer and places the burden of proof of any consumer liability for the transfer upon the bank. *Id.*

Several cases have been litigated which invoke the EFTA. *See, e.g.,* In re New York v. Citibank, N.A., 537 F. Supp. 1192 (S.D.N.Y. 1982); Ognibene v. Citibank, N.A., 446 N.Y.S.2d 845 (N.Y. Civ. Ct. 1981); Feldman v. Citibank, 443 N.Y.S.2d 43 (N.Y. Civ. Ct. 1981); Judd v. Citibank, 435 N.Y.S.2d 210 (N.Y. Civ. Ct. 1980); *see also* Charles G. Daley, *What's Your Answer?*, AM. BANKER, April 21, 1982, at 4 (describing how the EFTA Act would be applied to an unauthorized withdrawal).

70. Miles, *supra* note 7, at 186. *See generally* 15 U.S.C. § 1693 (1982).

The EFTA is primarily aimed at combatting fraud and unauthorized transfers. While fraud is major source of criminal activity occurring at ATMs, and is a strong concern in the banking industry, an in-depth examination of the problem is beyond the scope of this note. For further discussion of the problems relating to ATM fraud, *see* Leckey, *supra* note 56, at 9; Michael Weinstein, *ATM User Safeguards Criticized*, AM. BANKER, April 10, 1985, at 1.

71. CAL. FIN. CODE §§ 13000-070 (West Supp. 1994). The California statute requires a bank to establish a procedure for evaluating the safety of each ATM which evaluates the lighting and landscape surrounding the ATM as well as the crime rate of the surrounding neighborhood. *Id.* § 13030. The statute also requires that each ATM meet minimum lighting requirements. *Id.* § 13041. The bank must also provide each ATM customer or household with notices of basic safety precautions which customers should follow while using an ATM. *Id.* § 13050. The regulations do not apply to ATMs located inside a building, unless the building is freestanding and provides an

enclosure solely for the ATM or unless a transaction can be conducted from outside the building. *Id.* § 13060(1)-(2). The regulations also exempt ATMs "located in any access area, building, enclosed space, or parking area which is not controlled by the operator." *Id.* § 13060(3).

72. GA. CODE ANN. §§ 7-8-1 to 8-8 (Supp. 1994). The Georgia ATM regulations focus on ATMs in remote locations, and requires banks to adopt procedures for evaluating the safety of all remote service terminals. *Id.* § 7-8-2. These procedures must include consideration of the lighting and the landscaping of the remote terminal, as well as consideration of the incidence of violence in the neighborhood of the site as recorded by local law enforcement. *Id.* The Georgia statute also requires banks to provide customers with notices of basic safety precautions to be employed while using a remote service terminal. *Id.* § 7-8-4.

Under the Georgia statute, the operator of the ATM bears the burden of compliance with the regulatory provisions, however, this burden can be shifted to an individual who leases space to an ATM operator if that individual controls the access area or defined parking area. *Id.* § 7-8-3. Thus, under Georgia law, liability for injuries occurring at off-site ATMs, such as those leased to a bank by a mall or grocer, may fall on the lessor. *Id.* § 7-8-5(3) (stating that the provisions do not apply to "any area, including any access area, building, enclosed space, or parking area, which is not controlled by the operator"). The statute exempts from liability any person whose function is to provide for exchange, transfer, or dissemination of electronic fund transfer data and is not otherwise a financial depository institution or an operator. *Id.* § 7-8-7. In addition, the regulations do not apply to any remote ATM which is inside a building, unless the building is designed for the "sole purpose of providing an enclosure" for the remote ATM or except to the extent a transaction can be conducted from outside the building. *Id.* § 7-8-5.

73. OR. REV. STAT. §§ 714.280-.315 (Supp. 1993). The legislative intent of the statute is to "enhance the safety of consumers using ATMs." *Id.* § 714.280(1). The statute was not meant to discourage the siting of ATMs or "to impose a duty to relocate or modify ATMs upon the occurrence of any particular events or circumstances." *Id.* § 714.280(2). The legislation is also aimed at providing a uniform, objective standard of safety applicable to all ATMs and night depositories. *Id.*

The Oregon regulations mandate that banks establish procedures for evaluating the safety of ATMs or night safety deposit facilities, as well as comply with minimum lighting requirements. *Id.* §§ 714.285-.295. The regulations also require the bank to issue safety information to customers. *Id.* § 714.300. The statute exempts from its application any ATMs located within a building, unless the building's sole purpose is to provide an enclosure for ATM use or if a transaction can be conducted from outside the building. *Id.* § 714.305. Also exempted are ATMs or night deposit facilities that are located in areas not controlled by the operator. *Id.* § 714.305(3). Thus, a bank would be relieved of liability for a violation of the statute when a lessor controls the lighting or landscape surrounding the ATM. *Id.* § 714.200(6) (defining control of an access area as the "means . . . to determine how, when and by whom the access area or defined parking area is to be used and how it is to be maintained, lighted and landscaped").

74. WASH. REV. CODE ANN. § 19.174 (Supp. 1994). The Washington regulations apply to both ATMs and night deposit facilities and were intended to "enhance the safety of consumers using automated teller machines and night deposit facilities in Washington without discouraging the siting of automated teller machines and night deposit facilities in locations convenient to consumers' homes and workplaces." *Id.* §§ 19.174.010. Due to the inherent subjectivity of decisions concerning the safety of ATMs, the legislature hoped to set forth an objective standard of safety for operators of ATMs and night deposit facilities to implement. *Id.*

The regulations require banks to adopt procedures for evaluating the safety of the ATM or night deposit facility, including evaluation of the lighting for the ATM, of the landscaping or vegetation surrounding the ATM, the access area, and the parking area, and the incidence of crime in the locale surrounding the ATM, according to the records of the local law enforcement agencies. *Id.* § 19.174.030. The statute specifies the minimum lighting requirements needed at the ATM and

Maryland,⁷⁵ Florida,⁷⁶ New York,⁷⁷ New Jersey,⁷⁸ Illinois,⁷⁹ and

in the surrounding area. *Id.* The statute requires banks to furnish each customer or household with a notice informing the customer of basic safety precautions to be employed while using the ATM. *Id.* § 19.174.060.

The regulations exempt from application ATMs located inside buildings unless the building is a freestanding installation provided solely to enclose the ATM or ATMs inside a building from which a transaction may still be conducted from outside the building. *Id.* § 19.174.070(1)-(2). Also exempt are ATMs in a location which is not controlled by the bank such that the bank is not responsible for maintenance, lighting, or landscaping the area. *Id.* § 19.174.020(6), 19.174.070(3). Thus, banks which lease the ATM site or do maintain the surrounding area would be relieved of liability for failure to comply with the statutory regulations.

75. MD. CODE ANN., FIN. INST. § 1-207 (1994). See Sullivan, *supra* note 8, at 4 (describing the reasoning behind the Maryland legislation). The Maryland law exempts from its application any ATM located inside a building which is not designed solely to enclose the ATM or ATMs located inside a building except those which are still accessible from the outside and those ATMs located in areas not controlled by the operator. *Id.* § 1-207(b).

The law requires banks to adopt procedures for evaluating the safety of an ATM site before the ATM is installed. *Id.* § 1-207(c). The state does not impose a duty to relocate or modify the landscape of an ATM prior to the date of enactment of the statute. *Id.*

The statute sets forth the minimum lighting requirements for the ATM one-half hour before sunrise and one-half hour after sunset. *Id.* § 1-207(e). The statute also requires that the bank deliver a notice of basic safety precautions to each customer or household. *Id.* The precautions must include notice to the customer to be aware of his surroundings, to consider using the ATM accompanied by someone, to pocket the cash upon receipt and not to display the cash, to consider leaving the ATM if the customer notices anything suspicious, to consider cancelling the transaction upon noticing anything suspicious, and to report all crimes to the bank and to local law enforcement officials. *Id.*

76. FLA. STAT. ANN. §§ 655.960-65 (West Supp. 1995). The Florida statute sets forth the basic requirements for the lighting and landscape surrounding the ATM. *Id.* § 655.962. The bank must also provide each customer receiving an access device with information regarding the exercise of proper safety precautions while using the ATM. *Id.* § 655.963.

The statute exempts from its application any ATMs located inside a building, unless the building is freestanding and designed to provide an enclosure for the ATM or if it is still possible to conduct a transaction from outside the building. *Id.* § 655.964. Furthermore, the statute exempts ATMs located in areas which not controlled by the operator. *Id.* The statute also exempts any person whose function is to provide for "the exchange, transfer, or dissemination of electronic funds transfer data and is not otherwise a financial institution." *Id.* § 655.964(2). Finally, the statute also provides that a violation does not constitute negligence per se. *Id.* § 655.961.

77. ATM Safety Act, N.Y. Assembly Bill 11808, 215th N.Y. Gen. Assembly, 2d Sess. (1994). See McQuiston, *supra* note 67, at B2. The New York statute is the strictest of the current state statutes and requires video cameras and entry doors equipped with locking devices as part of the minimum safety standards required at each ATM. *Id.* § 37-B.

Unlike other statutes, the New York law provides a civil penalty for violation of one of the provisions. *Id.* § 37-E. The provisions are enforceable by application to the attorney general and an injunction against the defendant may be issued if it appears to the satisfaction of the court that a violation does exist without requiring proof of injury. *Id.* Upon finding a violation has occurred, a civil penalty of not more than five hundred dollars may be imposed. *Id.*

The New York City council has enacted even stricter regulations than the state regulations. The Administrative Code of New York City requires banks to install either locking entry doors, permitting entry only by an ATM card, or by requiring banks to post a security guard. N.Y. ADMIN. CODE, tit. 10, § 10-160 (Supp. 1994).

Nevada,⁸⁰ all dealing specifically with security measures aimed at preventing third party criminal attacks. The majority of the regulations deal only with the

78. N.J. Assembly Bill 1828, N.J. 206th Legis., 1st Sess. (1994). The intent of the New Jersey legislature in enacting the regulations is to establish a "standard of good faith" for the evaluation of ATMs rather than to impose a duty to close, relocate, or modify ATMs upon the occurrence of any specific events or circumstances. *Id.* § 2(b).

The New Jersey ATM regulations require banks to evaluate the safety of ATMs including the lighting and landscape surrounding the ATM. *Id.* § 2(1)-(2). Every ATM is required to have a video camera to record all persons entering the facility, *id.* § 3, and must meet the minimum statutory lighting requirements. *Id.* § 4. The minimum lighting includes lighting sufficient "to permit a sighted person entering the facility to readily and easily see all persons occupying the facility, and to permit a sighted person inside the facility to readily and easily see all persons entering the facility." *Id.* § 4(d). Under the New Jersey statute, banks must provide each customer with a notice of basic safety precautions which warn customers to be alert to their surroundings, to stop a transaction if circumstances cause them to be uneasy as to their safety, to close the door to an ATM equipped with a door, to secure cash upon the person before leaving the ATM, and to report complaints to the operator or to the Department of Banking. *Id.* § 5(b). The notice must also include the telephone number of the operator and the Department of Banking. *Id.* The bank must also post a sign clearly visible in the vicinity of the ATM containing the basic precautions. *Id.* § 5(c).

The statute does not apply to ATMs located inside a building, unless the building is freestanding, existing for the sole purpose of providing an enclosure for the ATM. *Id.* § 8. In addition, the statute states that a bank found to have violated any of the provisions shall have five days to correct such violation. *Id.* § 6(b). If the violation is not corrected, a civil penalty of not more than \$250 shall be collected. *Id.*

79. ILL. MUNICIPAL CODE § 4-305 (1994). The Code regulations apply to Chicago ATMs. The regulations set minimum lighting requirements for both the parking lot and the adjacent building. *Id.* § 4-305-40(c). The banks or owners of the ATM are required to issue basic safety precautions to all customers. *Id.* § 4-305-60. The regulations also provide that violations of the provisions do not constitute negligence per se and that substantial compliance with the provisions will serve as prima facie evidence that the bank provided adequate security. *Id.* § 4-305-20.

80. NEV. REV. STAT. ANN. §§ 660.115-.235 (Supp. 1992). The Nevada statute requires the operator of the ATM to adopt a procedure for evaluating the safety of an ATM location before the ATM is installed, however, the statute does not impose a duty to relocate or modify ATMs installed before the effective date of the statute, October 1, 1991. *Id.* § 660.195. The statute sets forth minimum requirements for illumination one-half hour after sunset and one-half hour before sunrise. *Id.* § 660.205. The statute further requires that the issuer of an access device for an ATM must deliver a notice of basic safety precautions to each customer or household. *Id.* § 660.215. The precautions must include notice to the customer to be aware of his surroundings, to consider using the ATM accompanied by someone, to pocket the cash upon receipt and not to display the cash, to consider leaving the ATM if the customer notices anything suspicious, to consider cancelling the transaction upon noticing anything suspicious, and to report all crimes to the bank and local law enforcement officials. *Id.*

The statutory provisions do not apply to ATMs located inside buildings or ATMs located in areas which are not controlled by the operator, such that the operator does not have the authority to maintain, light, or landscape the area of access or parking area. *Id.* §§ 660.225, 660.145. The Nevada statute specifically states that "substantial compliance with these sections is conclusive evidence that the operator of an automated teller has provided adequate measures for the safety of his customers." *Id.* § 660.235(2). Thus, under Nevada law, compliance with the statutory provisions may relieve an operator from liability for injury to an ATM customer.

minimum lighting requirements surrounding ATMs, the height of landscaping near ATMs, and the use of reflective mirrors around ATMs.⁸¹ Further, the

81. The Washington statute is an example of the typical lighting requirements set forth by the statutes.

The operator, owner, or other person responsible for an automated teller machine or night deposit facility shall provide lighting during hours of darkness with respect to an open and operating automated teller machine or night deposit facility and a defined parking area, access area, and the exterior of an enclosed automated teller machine or night deposit facility installation according to the following standards:

(1) There must be a minimum of ten candle-foot power at the face of the automated teller machine or night deposit facility and extending in an unobstructed direction outward five feet;

(2) There must be a minimum of two candle-foot power within fifty feet from all unobstructed directions from the face of the automated teller machine or night deposit facility. In the event the automated teller machine or night deposit facility is located within ten feet of the corner of the building and the automated teller machine or night deposit facility is generally accessible from the adjacent side, there must be a minimum of two candle-foot power along the first forty unobstructed feet of the adjacent side of the building; and

(3) There must be a minimum of two candle-foot power in that portion of the defined parking area within fifty feet of the automated teller machine or night deposit facility.

WASH. REV. CODE § 19.174.050 (Supp. 1994). For other statutory provisions requiring similar lighting provisions, see GA. CODE ANN. § 7-8-3 (Supp. 1994); CAL. FIN. CODE § 13041 (West Supp. 1994); NEV. REV. STAT. ANN. § 660.205 (Supp. 1992); FLA. STAT. ANN. § 655.962 (West Supp. 1995); MD. CODE ANN., FIN. INST. § 1-207(d) (1994); OR. REV. STAT. § 714.295 (Supp. 1993); N.J. Assembly Bill 1828, 206th Legis., 1st Sess. § 4 (1994), ATM Safety Act, N.Y. Assembly Bill 11808, 215th N.Y. Gen. Assembly, 2d Sess. § 37-C (1994).

The majority of the statutes require banks to incorporate an assessment of the landscape surrounding an ATM in a safety evaluation. For example, Florida requires that:

each operator, or other person . . . for an automated teller machine, shall ensure that the height of any landscaping, vegetation, or other physical obstructions in the area required to be lighted . . . shall not exceed three feet, except that trees trimmed to a height of ten feet and whose diameters are less than two feet and manmade physical obstructions required by statute, law, code, ordinance, or other governmental regulation shall not be affected by this subsection.

FLA. STAT. ANN. §§ 655.961-.962 (West Supp. 1995). Additional provisions regulating landscaping are found in Washington, WASH. REV. CODE § 19.174.030; Nevada, NEV. REV. STAT. ANN. § 660.195(b); California, CAL. FIN. CODE § 13030; Maryland, MD. CODE ANN., FIN. INST. § 1-207(c)(2)(ii); Oregon, OR. REV. STAT. § 714.285; Georgia, GA. CODE ANN. § 7-8-2; and NEW JERSEY, N.J. Assembly Bill 1828 § 2(2).

Some of the states also require the use of reflective mirrors. *E.g.*, FLA. STAT. ANN. § 655.962 (West Supp. 1995) (requiring reflective mirrors or surfaces at each ATM so as to provide the ATM customer with a view behind him or her while the customer uses the ATM); N.Y. Assembly Bill 11808 § 37-D (requiring a reflective mirror placed to permit a customer to "completely view" all areas of the facility). New York and New Jersey both require that a video camera be installed near the ATM. N.J. Assembly Bill 1828 § 3; N.Y. Assembly Bill 11808 § 37-B(D).

statutes only regulate newly installed ATMs and do not apply to existing ATMs.⁸²

While these statutes take active steps toward making ATMs safer for patrons, the regulations fail to provide the courts with clear guidance in assessing the liability of banks for third party crimes. These acts set forth safety requirements but, with the exception of New York, do not clearly state how their violation affects bank liability for third party acts, or to what extent these factors should be included in considering a bank's duty of care.⁸³ However, the fact that legislation is being passed should send a clear message to the courts that legislatures feel the need to place more responsibility on banks for the safety of ATM customers. To assist the courts in determining a bank's responsibility for the safety of ATM customers, the extent to which other business invitores have been liable for third party crimes against invitees provides a starting model.

III. CURRENT APPROACHES TO A BUSINESS INVITOR'S LIABILITY IN ANALOGOUS CASES

The relationship existing between a bank and an ATM patron is classified as that of a premises owner and visitor, and more specifically, that of a business invitor and business invitee.⁸⁴ Thus, the determination of a bank's liability to

82. GA. Code Ann. § 7-8-2(b) (Supp. 1994). The Georgia statute states the intent of the statute is not to impose a duty to relocate or modify existing terminals upon the occurrence of any particular events or circumstance, but rather to establish a good faith standard for evaluating ATMs. *Id.* See WASH. REV. CODE § 19.174.010 (Supp. 1994); CAL. FIN. CODE § 13031 (Supp. 1994); MD. CODE ANN., FIN. INST. § 1-207(c)(3)(iii) (1994); OR. REV. STAT. § 714.280 (Supp. 1993); N.J.A.B. 1828, 206th Legis., 1st Sess. § 2(b) (1994). *But see* FLA. STAT. ANN. § 655.961(2) (West Supp. 1995) (requiring the regulations to be implemented on all ATMs within one year of enactment).

83. Some of the statutes state that a violation is not negligence *per se* and impose fines for infractions. FLA. STAT. ANN. § 655.961(2) (West Supp. 1995); N.Y.A.B. 11808, 215th N.Y. Gen. Assem., 2d Sess., § 37-E (1995) (stating that not more than 500 hundred dollars may be imposed for each violation).

84. See RESTATEMENT, *supra* note 13, § 332(1). An invitee is classified in one of two categories, a public invitee and a business invitee. *Id.* The classification of public invitee designates those invitees who are members of the public who are invited onto the invitor's premises for a public purpose. *Id.* In contrast, the classification of business invitee designates those who are invited onto the invitor's premises for a purpose directly or indirectly connected with business dealings which the invitee has with the possessor of the land. *Id.* The Restatement defines an invitation as "any words or conduct which lead or encourage the visitor to believe that his entry [onto the land] is desired." *Id.* § 332 cmt. b.

Banks have been recognized as business invitores and their customers as business invitees. *Nigido v. First Nat'l Bank of Baltimore*, 288 A.2d 127, 128 (Md. 1972); PROSSER, *supra* note 16, at 419 (stating that a bank is a typical example of a business invitor) (citing *Sinn v. Farmers' Deposit Sav. Bank*, 150 A. 163 (Pa. 1930) and *Howlett v. Dorchester Trust Co.*, 152 N.E. 895 (Mass. 1926)). Moreover, an ATM customer, to whom the bank has specifically invited by giving a personalized ATM access card, has been encouraged to enter the bank's premises specifically for bank business and therefore is a business invitee. See *Popp v. Cash Station, Inc.*, 613 N.E.2d 1150,

the ATM customer is properly examined under the traditional negligence theories of premises owner liability as they apply to the business owner-intervenor relationship. Generally, a premises owner has a duty only to exercise reasonable care to make the premises safe for visitors⁸⁵ and does not have a duty to protect the visitor from the intentional criminal acts of a third person.⁸⁶ Traditionally, courts have been reluctant to make exceptions to this general rule.⁸⁷ Numerous policy reasons have been given to justify adherence to this view.⁸⁸ In the past, this principle has been applied to the business owner invitee relationship as well.⁸⁹ However, developments in tort law have enabled tort victims to pursue claims against premises owners for injuries caused

1152-53 (Ill. App. Ct. 1992) (recognizing that the bank-ATM patron relationship was a business invitor-intervenor relationship).

85. PROSSER, *supra* note 16, at 425. The principles of the law of negligence are well settled that an occupier of land is not an insurer of safety. *Id.* An occupier of land only has a duty to exercise reasonable care for the protection of invitees who enter upon the occupier's land. *Id.*; *Treadway v. Ebert Motor Co.*, 436 A.2d 994, 997-98 (Pa. 1981). This duty entails only a responsibility on the landowner to protect the invitee from that which creates an unreasonable risk of harm. PROSSER, *supra* note 16, at 425. It also places a duty on the occupier to use reasonable care not to injure the invitee by allowing or engaging in unreasonably dangerous or negligent activities. *Id.* However, this responsibility also includes a measure of foreseeability, which places on the premises owner the affirmative duty to inspect the premises in order to discover unreasonably dangerous conditions. *Id.* at 425-26; *Treadway*, 436 A.2d at 998 (citing Annot., *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party As Invitee, Licensee, or Trespasser*, 32 A.L.R.3d 508 (1970)). Further, the premises owner's duty to an invitee extends to all areas of the premises open to the invitee including protection for a safe entrance to the property and for a safe exit from the premises as well as all parts of the premises which the invitee might be expected to use. PROSSER, *supra* note 16, at 424. When invitees enter areas which they have not been encouraged or invited to use, the invitees become licensees with respect to conditions in such area and may be entitled to less protection. *Id.* at 425.

86. RESTATEMENT, *supra* note 13, § 315 (1986); *Nappier v. Kincade*, 666 S.W.2d 858, 860 (Mo. Ct. App. 1984); PROSSER, *supra* note 16, at 427. Foreseeability is the key factor in determining the duty of a premises owner. *See supra* note 17.

87. *Nappier*, 666 S.W.2d at 860; *Yelnosky*, *supra* note 13, at 888-89; *Young v. Huntsville Hosp.*, 595 So. 2d 1386, 1389 (Ala. 1992); *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381 (Mich. 1988).

88. *Nappier*, 666 S.W.2d at 860. Policy reasons for not imposing a duty upon business owners to protect invitees against third party attacks include:

judicial reluctance to tamper with a traditional common law; the notion that the deliberate criminal act of a third person is an intervening cause of harm to another; the difficulty that often exists in determining the foreseeability of criminal acts; the vagueness of the standard the owner must meet; the economic consequences of the imposition of such a duty; and conflict with the public policy that protecting citizens is the government's duty rather than a duty of the private sector.

Id. (citing *Cornpropt v. Sloan*, 528 S.W.2d 188, 195 (Tenn. 1975)).

89. *Id.*

by third parties which occur on the owner's premises.⁹⁰

The victimization of business invitees by third parties is not a problem unique to ATMs, but is a problem in analogous business invitor situations including shopping malls, grocery stores, convenience stores, and civic arenas.⁹¹ The existing case law in these analogous situations has been used by courts analyzing the liability of banks in negligence claims brought by injured

90. One such development was the attempt to remedy the problem of judgment-proof criminals. N. Jean Schendel, Note, *Patients as Victims—Hospital Liability for Third-Party Crime*, 28 VAL. U. L. REV. 419, 429-30 (1993). While tort victims were allowed to sue tortfeasors directly for remedies to intentional torts, many of the tortfeasors were judgment-proof or unable to pay a judgment against him or her. *Id.* at 430. To remedy this problem, courts expanded theories of liability to find premises owners liable on theories of negligence. *Id.* at 430 n.80 (citing Virginia Cope, *Third-Party Liability*, TRIAL, Oct. 1988, at 85.) In these actions, the victims were allowed to file claims against the premises owners for breaches of a duty to protect invitees from the dangerous conduct of third parties. *Id.*

Another development involves the changes in judicial attitudes toward the tort liabilities and which have caused courts to abandon traditional negligence doctrines. *Id.* at 430-31. A variety of theories have been suggested explaining the move away from traditional negligence doctrines. *Id.* One theory is that courts are becoming more sympathetic to the plight of victims and responding to the increasingly creative efforts of attorneys to secure recovery for tort victims. *Id.* at 430 n.88 (citing Linda S. Calvert Hanson & Charles W. Thomas, *Third Party Tort Remedies for Crime Victims—Searching for the “Deep Pocket” and a Risk Free Society*, 18 STETSON L. REV. 1 (1988)). Another theory proposes that the imposition of a duty on premises owners is an attempt by the courts to address the nation's increasing crime rate. *Id.* at 430 n.89 and accompanying text. An additional theory is that courts hope premises owners will respond to the duty by creating safer environments for invitees. *Id.* at 430. Finally, some believe that the reasons for moving away from traditional theories is the result of the changing attitude toward the goals of the negligence system. *Id.* at 431. Those adhering to this belief advocate that the traditional concepts of negligence are inequitable because plaintiffs are often left without recovery. *Id.* at 431 n.91 and accompanying text (citing James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 483 (1976)). As a result of these developments, third party tort crime has flourished. *Id.* at 431.

91. *E.g.*, *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993) (reviewing a rape victim's negligence claim against a shopping center for failing to provide adequate security to protect the plaintiff from an unreasonable risk of harm); *McNeal v. Henry*, 266 N.W.2d 469 (Mich. Ct. App. 1978) (relating a negligence suit against a food store for the store's failure to prevent the plaintiff from being shot while in the defendant's store); *Butler v. Acme Mkts., Inc.*, 445 A.2d 1141 (N.J. 1982) (hearing a negligence claim brought by a customer against a store for injuries occurring to the customer in the store parking lot); *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572 (Cal. Ct. App.) (reviewing a negligence cause-of-action against a 7-Eleven store brought by a plaintiff shot while in the store); *Comastro v. Village of Rosemont*, 461 N.E.2d 616 (Ill. App. Ct. 1984) (reviewing a negligence action brought by the plaintiff against the defendant for the plaintiff's injuries allegedly caused by the defendant's failure to provide adequate security at a civic arena during a rock concert); *Shaner v. Tuscon Airport Auth., Inc.*, 573 P.2d 518 (Ariz. Ct. App. 1977) (hearing a negligence claim brought by a plaintiff against an airport for the death of the plaintiff's wife by a third person in the airport parking lot); *Davenport v. Nixon* 434 So. 2d 1203 (La. Ct. App. 1983) (hearing a claim against a motel brought by a plaintiff who was robbed on the motel premises).

ATM customers.⁹² For this reason, analysis of the approaches used by courts in these situations will illustrate the basis for the courts' current reasoning and provide a basis for the proposed model reasoning. In analogous situations, some courts have adopted the traditional no-duty approach to a business invitor's duty.⁹³ However, the current trend is to expand this approach and to recognize a potential duty on business inviters to protect invitees.⁹⁴

A. The No-Duty Approach

Courts which hold that premises owners do not have a duty to protect invitees from harm by third parties rely on traditional policy reasons.⁹⁵ For instance, courts adhering to the no-duty approach argue that requiring premises owners to bear the responsibility for the security of their invitees would be too great a burden.⁹⁶ Other courts cite the prevalence of crime as a basis for relieving business inviters of a duty to protect.⁹⁷ These courts state that requiring business inviters to protect against third party crime based on the fact that it may have been foreseeable, imposes a limitless burden on the invitor, because crime is foreseeable virtually anywhere at anytime.⁹⁸ Courts adhering

92. See generally, Miles, *supra* note 7, at 174-86 (describing the general principles of landowner liability which underlie the courts' analyses in hearing ATM cases). See also *supra* note 20.

93. See *infra* text accompanying notes 95-112.

94. Young v. Huntsville Hosp., 595 So. 2d 1386, 1388 (Ala. 1992) (stating that the growing national trend in the law is toward expanding the recognition of premises owners' liability and to recognize more exceptions to the traditional no duty rule); Yelnosky, *supra* note 13, at 883. See also *supra* note 23 and accompanying text.

95. See *supra* note 90 (listing the traditional policy reasons for not imposing a duty to protect on business inviters); Cornpropst v. Sloan, 528 S.W.2d 188, 195 (Tenn. Ct. App. 1975).

96. Cornpropst, 528 S.W.2d at 195. The court in *Cornpropst* stated that the proposed duty to protect invitees was too vague and uncertain to impose on the business invitor. *Id.* at 193-94. The court said that imposing such a duty to protect against the intentional acts of third parties would be requiring more of the business invitor than is required of the community police. *Id.*; accord *Genovay v. Fox*, 143 A.2d 229 (N.J. Super. Ct. App. Div. 1958); *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963 (Okla. 1976); *McNeal v. Henry*, 266 N.W.2d 469 (Mich. Ct. App. 1978); *Maksinczak v. Salliotte*, 364 N.W.2d 737 (Mich. Ct. App. 1985); *Berdeaux v. City Nat'l Bank of Birmingham*, 424 So. 2d 594 (Ala. 1982); *Pound v. Augusta Nat'l, Inc.*, 279 S.E.2d 342 (Ga. Ct. App. 1981).

97. *Goldberg v. Housing Auth. of Newark*, 186 A.2d 291, 296-97 (N.J. 1962) (stating that the uncertainty involved in calculating what measures would be sufficient to protect the invitee is too large a task, thus refusing to require premises owners to assume such a duty); *Cook v. Safeway*, 354 A.2d 507, 509-10 (D.C. 1976) (refusing to hold a supermarket owner to a duty to protect shoppers against third party crime due to the prevalence of crime); accord *Williams v. Cunningham Drugs*, 418 N.W.2d 381 (Mich. 1988); *Radloff v. National Food Stores, Inc.*, 121 N.W.2d 865 (Wis. 1963).

98. *Goldberg*, 186 A.2d at 297 (N.J. 1962) (stating that "everyone can foresee the commission of crime virtually anywhere and at any time"); *Williams*, 418 N.W.2d at 384 (Mich. 1988) (stating that "[t]oday a crime may be committed anywhere and at any time").

to the no-duty view claim that protecting against foreseeable crime would require every business to assume the unrealistic duty to provide private security to patrol the premises twenty-four hours a day.⁹⁹

One court stated that the no-duty position prevents limitless liability. In *Goldberg v. Housing Authority of Newark*,¹⁰⁰ the New Jersey Supreme Court found that the premises owner did not have a duty to protect an invitee against third party criminal attack.¹⁰¹ Although both the jury and the appellate court found that the premises owner did have a duty, the court found that such a requirement would impose the limitless duty of preventing all crime.¹⁰² The court found that it would be impossible for a premises owner to be aware of measures that would protect against all thugs, drug addicts, degenerates, psychopaths, and psychotics; thus, the court did not require the premises owner to make such an attempt.¹⁰³ Although the court said that third party crime was foreseeable, to impose such a duty on premises owners would be unfair.¹⁰⁴

99. *Goldberg*, 186 A.2d at 297; *Williams*, 418 N.W.2d at 384.

100. 186 A.2d 291 (N.J. 1962). The Michigan Supreme Court relied on similar policy justifications in adopting a no-duty approach in *Williams v. Cunningham Drug Stores, Inc.* 418 N.W.2d 381, 384 (Mich. 1988) (stating that "[a defendant] cannot control the incidence of crime in the community. Today a crime may be committed anywhere and at any time"). In *Williams*, the court held in favor of the defendant-store owner, determining that the defendant did not have a duty to provide a security guard to protect customers from third party criminal acts. *Id.* at 385. The plaintiff, who was shot and robbed while in the defendant's store, alleged that reasonable care in a high crime district of Detroit, required the presence of an armed security guard. *Id.* at 382. Although the court recognized that both the Restatement of Torts and case law supported placing a duty on a business invitor to protect invitees, the court refused to follow these authorities and dismissed the plaintiff's claim. *Id.* at 384 (citing RESTATEMENT (SECOND) OF TORTS § 344, at 223-24 (1986) and *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987)).

Interestingly, the defendant's store was located in a high crime area of Detroit, a factor that neither the court nor the plaintiff utilized to evaluate the foreseeability of the plaintiff's injury. *Id.* at 382. Also, although the store had previously maintained a plain-clothes security guard who was not working on the day in question, the court did not address the issue of whether, by providing security, the defendant had a duty to maintain adequate security. *Id.*

101. *Goldberg*, 186 A.2d at 297. In *Goldberg*, the plaintiff was beaten and robbed while making a delivery to the defendant's premises. *Id.* at 291.

102. *Goldberg v. Housing Auth. of Newark*, 186 A.2d 291, 296-97 (N.J. 1962).

103. *Id.* at 297 (stating that a duty to protect against third parties would impose the limitless duty to protect against all crime).

104. *Id.* at 291, 293 (stating that if foreseeability gave rise to a duty to protect, then store owners would unfairly have to provide "private arms" to protect invitees).

Other courts explain the no-duty position in terms of unforeseeability.¹⁰⁵ For example, in *Cook v. Safeway Stores, Incorporated*,¹⁰⁶ the District of Columbia Supreme Court found that a store owner did not have a duty to protect an invitee against third party crimes. Despite the plaintiff's evidence that similar crimes had occurred both on the premises and around the premises, the court ruled that this evidence did not make the plaintiff's injury foreseeable.¹⁰⁷ In addition, in *Iannelli v. Powers*,¹⁰⁸ a New York court overturned a jury verdict and held that an office building owner did not have a duty to protect a tenant against being shot and killed by robbers.¹⁰⁹ Although the plaintiff alleged that the owner knew that the robbers had previously entered the premises unlawfully, the court found that the plaintiff's injury was unforeseeable and dismissed the complaint.¹¹⁰ The court acknowledged that other New York cases had recognized a duty and conceded that a duty might exist if the plaintiff could sufficiently prove foreseeability.¹¹¹ The court's concession coincides with the

105. Yelnosky, *supra* note 13, at 889 (reporting that courts are reluctant to impose a duty on business inviters due to the difficulty in foreseeing the criminal acts of others). See *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963 (Okla. 1976). In *Davis*, the Supreme Court of Oklahoma found that a defendant supermarket was not under a duty to protect a customer from being assaulted on the store's premises. *Id.* at 964. Despite the evidence of the high crime rate in the surrounding neighborhood and inadequate lighting at the store, the court found that the third party attack was unforeseeable. *Id.* at 964-65.

The lack of foreseeability has often relieved premises owners of liability for injuries caused to invitees by the intentional, criminal actions of third parties. *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 38 (N.C. 1981). The criminal acts have been considered to insulate the business invitor from liability. *Id.* However, a number of courts have recognized that intervening causes do not compel relieving a premises owner of a duty to protect invitees against third party attacks. These courts find that in instances where the invitor had reason to know that a likelihood of danger existed, the invitor has a duty to protect invitees from the third party crime. See *id.* at 38; *Daily v. K-Mart Corp.*, 458 N.E.2d 471, 475 (Ohio Ct. C.P. 1981) (quoting *Marguardt v. Cernocky*, 151 N.E.2d 109 (Ill. App. 1958) (stating that all intervening causes do not relieve a premise owner of liability for harm occurring to invitees)); *accord Peterson v. San Francisco Comm. College Dist.*, 685 P.2d 1193 (Cal. 1984).

106. 354 A.2d 507 (D.C. 1976).

107. *Id.* at 508, 510.

108. 498 N.Y.S.2d 377 (N.Y. Sup. Ct. 1986).

109. *Id.* at 381-82.

110. *Id.* at 379, 381.

111. *Id.* at 380-81. The court distinguished prior New York cases which had recognized a duty on a business invitor, by stating that in the prior cases, there was evidence of previous criminal acts. *Id.* (citing *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451 (N.Y. 1980)); *Miller v. State*, 467 N.E.2d 493 (N.Y. 1984); *Loeser v. Nathan Hale Gardens*, 73 A.D.2d 187, 189 (N.Y. App. Div. 1980); and *Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134, 136 (N.Y. App. Div. 1975)). Although, there was evidence of prior criminal activity on the premises in *Iannelli*, the court stated that the evidence did not make the instant crime foreseeable. *Iannelli*, 498 N.Y.S.2d at 381. The court also stated that the jury must have speculated in their findings, because the plaintiff had failed to present testimony from a qualified expert regarding the adequacy of the defendant's security measures. *Id.* at 382. *But see Butler v. Acme Mkts., Inc.*, 445 A.2d 1141, 1147 (N.J. 1982) (stating that an expert witness is not necessary for the jury's determination of the adequacy of a

trend toward broadening the approach to a business invitor's duty to protect invitees against third party conduct.¹¹²

B. Recognition of a Potential Duty on Premises Owners

While some courts have adhered to the traditional no-duty approach, the majority of courts recognize exceptions in which business inviters have a duty to protect invitees.¹¹³ These courts focus on the foreseeability of the crime. They hold that inviters have a duty when they know or have reason to know that the future crime may occur.¹¹⁴ However, these courts differ in their approach to foreseeability.¹¹⁵ Three different approaches are used: (1) an approach that requires evidence of special circumstances;¹¹⁶ (2) an approach that looks at the totality of the circumstances;¹¹⁷ and (3) an approach that considers evidence of prior criminal incidents on or near the premises.¹¹⁸ While all three of the approaches diverge from the no-duty theory, this Note argues that the last approach, which considers evidence of prior related incidents to establish foreseeability, should be used to determine a bank's duty for third party crimes at ATMs.

1. Duty Dependent Upon Special Circumstances that Establish Foreseeability

Some courts have recognized an exception to the no-duty rule and have found that a business invitor may have a duty to protect invitees under special

defendant's security measures).

112. See *supra* notes 14, 23 and accompanying text.

113. See *supra* notes 14, 23, and *infra* note 119 and accompanying text.

114. RESTATEMENT, *supra* note 13, § 344 cmt. f. Comment f establishes the invitor's duty to police the premises:

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

Id.

115. See *Nappier v. Kincade*, 666 S.W.2d 858, 861 (Mo. Ct. App. 1984) (stating that the courts are split as to what circumstances are necessary to create foreseeability).

116. See *infra* notes 119-40 and accompanying text.

117. See *infra* notes 141-49 and accompanying text.

118. See *infra* notes 150-74 and accompanying text.

circumstances.¹¹⁹ These courts hold that a duty may be imposed if special circumstances made the instant crime foreseeable.¹²⁰ For example, some courts have required evidence that the invitor knew the particular assailant or the particular plaintiff in order to find the present crime foreseeable.¹²¹ Conditioning foreseeability upon special circumstances increases the chances that a plaintiff's claim will be dismissed, because no duty will be imposed unless the plaintiff can prove that the business invitor knew the assailant's identity and could predict the assailant's conduct.¹²²

A Missouri court used this high standard of foreseeability in *Kelly v. Retzer & Retzer, Incorporated*.¹²³ In *Kelly*, the court required proof that the business invitor had specific notice that the plaintiff would be the victim of a

119. *Nappier v. Kincade*, 666 S.W.2d 858 (Mo. Ct. App. 1984); *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718 (Mo. Ct. App. 1983); *McCoy v. Gay*, 302 S.E.2d 130 (Ga. Ct. App. 1983); *Gray v. McDonald's Corp.*, 874 S.W.2d 44 (Tenn. Ct. App. 1993); *Savannah College of Art & Design, Inc. v. Roe*, 409 S.E.2d 848 (Ga. 1991); *Matt v. Days Inns of Am., Inc.*, 443 S.E.2d 290 (Ga. Ct. App. 1994); *Reichenbach v. Days Inn of Am., Inc.*, 401 So. 2d 1366 (Fla. Dist. Ct. App. 1981); *Kelly v. Retzer & Retzer, Inc.*, 417 So. 2d 556 (Miss. 1982); *Munn v. Hardee's Food Sys.*, 266 S.E.2d 414, 415 (S.C. 1980).

120. *Yelnosky*, *supra* note 13, at 891.

121. *Meadows*, 655 S.W.2d at 721-22 (finding that a store owner did not have notice since the attacker had never before been on the owner's premises); *Reichenbach*, 401 So. 2d at 1368 (finding that innkeeper did not have the prior notice that the specific plaintiff might be attacked or that the specific attacker might commit such act); *Kelly*, 417 So. 2d at 560-61 (finding that the owner was not on notice that the specific victim would be shot); *Munn*, 266 S.E.2d at 415 (finding that the store owner did not know that the victim of a spontaneous shooting would be the plaintiff's decedent and thus was not liable); *Nappier*, 666 S.W.2d at 862 (finding that a store owner must be aware of specific crimes on the premises, aware of the identity of the dangerous individual, or aware of the potential for the danger such that the owner had sufficient time to notify the police); *Gray*, 874 S.W.2d at 46 (finding that a premises owner is only liable when special circumstances exist such that a plaintiff can show that a owner was on notice of the imminent probability of the act (citing *Corbitt v. Ringley-Crockett, Inc.*, 496 S.W.2d 914 (Tenn. Ct. App. 1973))).

122. *Yelnosky*, *supra* note 13, at 894-96 (stating that the special circumstances limited approach to foreseeability gives "the trial judge a significant amount of power to deny the plaintiff's claim as a matter of law"). Before the court will impose a duty, the judge must find that the time span between the occurrence of the event and the notice of the event gave the defendant adequate time to prevent the event. *Id.* In cases where the time span between the notice and the event is relatively short, the plaintiff's claim will always be dismissed. *Id.*

E.g., *Meadows*, 655 S.W.2d at 721. In *Meadows*, the plaintiff was assaulted and shot on the defendant-store owner's premises. *Id.* at 720. The court found the store owner did not have a duty and dismissed the complaint. *Id.* at 722. The court stated that the store owner did not have a duty to protect the invitee against third party crimes unless such person was under the control of the invitor, unless the owner knew the assailant's identity, or unless the invitor had sufficient time to avert the attack. *Id.* at 721. Although the plaintiff presented evidence of a history of past incidents on the premises, the court stated that more specific evidence was needed, such as evidence that the attacker had previously been on the defendant's premises. *Id.* at 722.

123. 417 So. 2d 556 (Miss. 1982).

shooting.¹²⁴ The court did not recognize the plaintiff's evidence of sixteen thefts, three incidents of vandalism, three assaults, one attempted fraud, and two armed robberies, all of which occurred on the owner's premises in the three years preceding the shooting, as sufficient to make the crime foreseeable.¹²⁵ Thus, the court did not impose a duty.¹²⁶ Under this approach, a judge made the factual determination of whether the prior incidents establish foreseeability. When judges create high standards of foreseeability as in *Kelly*, foreseeability will rarely be found, and the jury will never evaluate the facts surrounding the crime.¹²⁷

Other courts utilizing the special circumstances approach claim that foreseeability is established when a plaintiff presents evidence of prior criminal incidents on the premises. However, these courts stipulate that the prior incidents must be 'substantially similar' to the plaintiff's incident to establish foreseeability.¹²⁸ For example, in *McCoy v. Gay*,¹²⁹ a Georgia court held that the foreseeability necessary to impose a duty on an innkeeper to protect the plaintiff was not established, because the innkeeper did not have notice of the

124. *Id.* at 560.

125. *Id.* at 559-60.

126. *Id.*

127. Yelnosky, *supra* note 13, at 896-97 (stating that under the requirements of the special circumstances approach plaintiffs will rarely be able to withstand summary judgment). Plaintiffs with evidence of general crime in the area or with evidence of prior incidents which are substantially different from the plaintiff's incident will not be able to survive motions for dismissal or summary judgment and will thus be prevented from presenting the issue of negligence to the jury. *Id.* at 894, 896-97. See *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721-22 (Mo. Ct. App. 1983) (stating that evidence that the premises were in a "high crime" area was not enough to establish foreseeability); *Nappier v. Kincade*, 666 S.W.2d 858, 862 (Mo. Ct. App. 1984) (requiring that plaintiffs present evidence of specific crimes rather than evidence of general crime in the area); *Brown v. Nat'l Supermarkets*, 679 S.W.2d 307, 309 (Mo. Ct. App. 1984) (requiring the plaintiff to show evidence of specific crimes on the premises); *McClendon v. Citizens & S. Nat'l Bank*, 272 S.E.2d 592, 593 (Ga. Ct. App. 1980) (directing a verdict for the bank over plaintiff's evidence that the police had responded to ten prior alarms at the defendant's bank).

128. *McCoy v. Gay*, 302 S.E.2d 130, 131-32 (Ga. Ct. App. 1983) (holding that the prior incidents must be substantially similar to the incident in question in order to show that the premises owner had knowledge of the dangerous condition which resulted in the plaintiff's incident); *Savannah College of Art & Design, Inc. v. Roe*, 409 S.E.2d 848, 849 (Ga. 1991) (finding that there had been no prior incidents of sexual assault on the premises of a college thus the defendant did not have a duty to protect patrons against the risk of sexual assault); *Matt v. Days Inns of Am., Inc.*, 443 S.E.2d 290, 294-95 (Ga. Ct. App. 1994) (Andrews, J., dissenting) (arguing that prior substantially similar incidents requires that the incident be the same crime and that the inflicting injury be identical). Cf. *Murphy v. Penn Fruit*, 418 A.2d 480, 484 (Pa. Supp. Ct. 1980) (finding that the occurrence of crimes anywhere on a business invitor's property might be sufficient to impose a duty on the invitor to protect the invitee anywhere on the property).

129. 302 S.E.2d 130 (Ga. Ct. App. 1983).

"sudden, unprovoked and unexpected criminal attack."¹³⁰ The plaintiff presented evidence of a prior purse snatching and robbery on the innkeeper's premises.¹³¹ The court found that the prior incidents were not substantially similar to the plaintiff's, because the prior incidents occurred in close proximity to the inn, whereas the plaintiff's assault occurred on the far edge of the parking lot, some distance from the building.¹³² Therefore, foreseeability was not established, and the defendant had no duty to protect the plaintiff.¹³³

The result in *Atamian v. Supermarkets General Corporation*,¹³⁴ further demonstrates the inconsistencies that result from this strict approach to foreseeability. In *Atamian*, a New Jersey court, in contrast to the Missouri court's decision in *Kelly*, found that the plaintiff's evidence of only five prior incidents on the defendants' premises was sufficient to establish foreseeability, which thus created a duty on the business invitor to protect the plaintiff from third party harm.¹³⁵ Further, the *Atamian* court applied the substantial similarity standard used by the *McCoy* court, but found that the incidents of prior assault in the same parking lot as the plaintiff's rape were sufficiently similar to satisfy the standard.¹³⁶ Consequently, the New Jersey court, applying the same analysis as *Kelly* and *McCoy*, concluded that the plaintiff's evidence established foreseeability and found that the defendants had a duty to protect invitees.¹³⁷

The inconsistent holdings of these three cases result from the significant discretion given to trial judges under the special circumstances approach.¹³⁸ Under this approach, judges have taken on the function of the jury by determining foreseeability. The factual determinations of what constitutes

130. *Id.* at 133. In *McCoy*, the plaintiff was attacked and robbed in the parking lot of an inn after dining at the inn's lounge. *Id.* at 130.

131. *Id.* at 131.

132. *Id.* at 131-32 (finding that the two prior incidents did not meet the "similarity" requirement so as to constitute a sufficient showing of knowledge on the inkeeper's part). *Cf. Murphy*, 418 A.2d at 483-84 (stating that if enough muggings and purse snatchings occurred in a parking lot, it was inevitable that someone would be hurt in the future, thus the premises owner would have reason to know of the likelihood of the conduct of a third person).

133. *Murphy v. Penn Fruit*, 418 A.2d 480, 483-84 (Pa. Super. Ct. 1980) (stating that without a showing of substantial similarity, the evidence was irrelevant and the defendant was entitled to a directed verdict).

134. 369 A.2d 38 (N.J. Super. Ct. Law Div. 1976).

135. *Id.* at 43.

136. *Id.* at 40.

137. *Id.* at 40, 43. The court stated that "since additional criminal attacks should have been anticipated, it is not unreasonable to infer that a reasonable security measure would have served as a deterrent and that defendants' failure to take such measure constituted a substantial factor in the assault on plaintiff." *Id.* at 43.

138. Yelnosky, *supra* note 13, at 894-96.

“substantially similar” and what length of time qualifies as “prior to the present incident” have been solely within the discretion of the trial judge.¹³⁹ Although cases such as *McCoy* and *Kelly* do broaden the foreseeability requirement from the no-duty rule by recognizing that prior acts may give rise to a duty to protect, the courts’ narrow interpretation of these requirements still prevents most cases from reaching the jury.¹⁴⁰ Contrary to the narrow view of foreseeability under the special circumstances approach, other courts have overexpanded the interpretation of foreseeability. These courts have found that not only does the duty to protect require foreseeability, but that it also requires a number of additional factors.

2. Duty Dependent on the Totality of the Circumstances

An approach used primarily by the California courts takes an expansive view of notice and the business invitor’s duty to protect invitees against third party crimes.¹⁴¹ The courts applying this approach find that while the foreseeability of future harm is important to establish the element of duty, it is not the only factor considered in analyzing a business invitor’s duty.¹⁴² These courts expand the analysis of a business invitor’s duty to include a number of factors in addition to foreseeability, such as: the degree of certainty that the invitee was injured, the connection between the business invitor’s conduct and the invitee’s injury, the moral blame of the invitor’s actions, the social policy of preventing future harm, the burden to the invitor, the consequences of the duty to the community, and the availability and cost of insurance for the risk involved.¹⁴³

While the special circumstances approach interprets foreseeability too narrowly, the totality of the circumstances approach interprets foreseeability too

139. *Id.* (providing examples of instances in which the court used its discretion to find that the defendant did not have a duty to the plaintiff despite prior violent acts). *See also supra* notes 123-37 and accompanying text.

140. *See supra* note 127 and accompanying text.

141. *See Isaacs v. Huntington Mem. Hosp.*, 695 P.2d 653, 659 (Cal. 1985) (stating that courts which require evidence of similar prior incidents improperly remove too many cases from the jury’s rightful consideration of foreseeability). The courts applying this approach have been mainly California courts. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); *Peterson v. San Francisco Comm. College Dist.*, 685 P.2d 1193 (Cal. 1984); *Isaacs v. Huntington Mem. Hosp.*, 695 P.2d 653 (Cal. 1985); *Southland Corp. v. Superior Court of Los Angeles*, 250 Cal. Rptr. 57 (Cal. Ct. App. 1988); *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572 (Cal. Ct. App. 1984). However, South Dakota and Idaho have also used this approach. *See Sharp v. W.H. Moore, Inc.*, 796 P.2d 506 (Idaho 1990); *Small v. McKennan Hosp.*, 403 N.W.2d 410 (S.D. 1987); *see generally Collins, supra* note 14, at 104-11 (discussing South Dakota’s adoption of the totality of the circumstances approach).

142. *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572, 576 (Cal. Ct. App. 1984).

143. *Id.* at 576 (quoting *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)).

broadly. This approach infringes on the jury's function. A number of the factors used by the court to assess a business invitor's duty overlap with the jury's subsequent determination of negligence.¹⁴⁴ For example, "the closeness of connection between the defendant's conduct and the injury suffered" is part of the jury's evaluation of proximate cause.¹⁴⁵ Also, allowing the judge to decide "the degree of certainty that the plaintiff suffered injury" infringes on the jury's determination of the plaintiff's actual loss or resulting damage.¹⁴⁶ Also, the "moral blame attached to the defendant's conduct" overlaps with the jury's assessment of the particular standard of conduct required, since the jury considers the moral accountability of the defendant's conduct in assessing what standard of conduct the community requires of the defendant.¹⁴⁷

The totality of the circumstances approach does allow plaintiffs to avoid the strict limits on foreseeability under the special circumstances approach. However, the courts using the totality of the circumstances approach overextend the concept of notice by accepting general evidence of crime as sufficient to establish foreseeability. For example, in *Cohen v. Southland Corporation*,¹⁴⁸ a California court allowed the plaintiff to present evidence of crime statistics of a nationwide convenience store to establish that the owner of a convenience store had notice of the possibility of future crime at his store.¹⁴⁹ The court's acceptance of crime statistics which occurred neither on nor near the store owner's premises expands the duty of a business invitor too far. Such an

144. See *supra* note 29 (discussing the factors required to establish negligence).

145. *Marshall v. Nugent*, 222 F.2d 604, 611 (1st Cir. 1955) (stating that the jury decides "whether the causal relation between the negligent act and the plaintiff's harm . . . is sufficiently close to make it just and expedient to hold the defendant" liable); *Watson v. Kentucky & Ind. Bridge & Ry.*, 126 S.W. 146, 150 (Ky. 1910) (stating that it is for the jury to decide if the connection of cause and effect is established); PROSSER, *supra* note 16, at 263 (stating that the "connection between the act and omission of the defendant and the damage which the plaintiff has suffered . . . is called 'proximate cause' or 'legal cause'").

146. RESTATEMENT, *supra* note 13, § 328C (stating that in a negligence action the jury determines "the amount of compensation for legally compensable harm" to the plaintiff).

147. See PROSSER, *supra* note 16, at 237 (stating that the jury judges the defendant's conduct by what the community requires). The determination of the defendant's moral blame is encompassed in the jury's determination of whether the defendant breached his duty. Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 111-13 (1923) (stating that the jury determines how the defendant ought to have acted).

148. 203 Cal. Rptr. 572 (Cal. Ct. App. 1984).

149. In *Cohen*, the defendant argued that the plaintiff's injury was unforeseeable because no armed robberies resulting in injury had occurred at that particular store. *Id.* at 576-77. However, the court found that the armed robbery was statistically foreseeable based on a study which showed that there was one robbery or more per store per year and that 80% of 7-Eleven stores were the subject of armed robberies. *Id.* at 577. In addition, the California court further expanded the analysis of notice from mere foreseeability to include "whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." *Id.* at 578 (quoting *Gomez v. Ticor*, 145 Cal. App. 3d 622, 629 (1983)).

expansion requires business inviters to foresee crime not only on their own premises, but also nationwide. As a result, the totality of the circumstances approach would require business inviters in rural, low crime areas to foresee crimes occurring in urban, high crime areas.

However, an alternative to the totality of the circumstances approach is available. A third approach to duty strikes a balance between the broad view of foreseeability, under the totality of the circumstances approach, and the narrow view, under the special circumstances approach. Courts adhering to the third view have broadened the requirements for foreseeability, by recognizing that evidence other than special circumstances may establish foreseeability. This approach recognizes that prior criminal incidents on or around the business invitor's premises may constitute foreseeability. Unlike the totality of the circumstances, this approach avoids infringing on the jury's subsequent analysis of negligence because the duty analysis considers the sole factor of foreseeability.

3. Duty Dependent on Related Prior Incidents Establishing Foreseeability

The trend among the courts is in favor of a broader approach to duty which does not limit foreseeability to special circumstances.¹⁵⁰ Under this view, courts hold that evidence of prior incidents which are related to the business invitor's premises, (incidents which occur on or near the premises,) creates a jury question as to the foreseeability of the future crime.¹⁵¹ When the jury finds that the evidence sufficiently establishes foreseeability, the court will rule

150. There is a growing trend in the law to expand the recognition of foreseeability and a business invitor's duty. *E.g.*, *Young v. Huntsville Hosp.*, 595 So. 2d 1386, 1388 (Ala. 1992); *Comastro v. Village of Rosemont*, 461 N.E.2d 616 (Ill. App. Ct. 1984); *Murphy v. Penn Fruit Co.*, 418 A.2d 480 (Pa. Super. Ct. 1980); *Morgan v. Bucks Assocs.*, 428 F. Supp. 546 (E.D. Pa. 1977); *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36 (N.C. 1981); *Atamian v. Supermarkets Gen. Corp.*, 369 A.2d 38, (N.J. Sup. Ct. Law Div. 1976); *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451 (N.Y. 1980); *Daily v. K-Mart Corp.*, 458 N.E.2d 471 (Ohio Ct. C.P. 1981); *Butler v. Acme Mkts., Inc.*, 445 A.2d 1141 (N.J. 1982); *Rowe v. State Bank of Lombard*, 531 N.E.2d 1358 (Ill. 1988); *Kenny v. Southeastern Penn. Transp.*, 581 F.2d 351 (3d Cir.), *cert. denied*, 439 U.S. 1073 (1978); *Alonge v. Rodriguez*, 279 N.W.2d 207 (Wis. 1979); *Whelchel v. Strangways*, 550 P.2d 1228 (Or. 1981); *Walkoviak v. Hilton Hotels Corp.*, 580 S.W.2d 623 (Tex. Ct. App. 1979); *Parslow v. Pilgrim Parking, Inc.*, 362 N.E.2d 933 (Mass. App. Ct. 1977); *see Yelnosky, supra* note 13, at 897 (stating that more jurisdictions are accepting a broader interpretation of foreseeability which considers occurrences other than prior similar incidents and fewer jurisdictions are taking the narrow approaches which keep the case from the jury).

151. *Murphy v. Penn Fruit Co.*, 418 A.2d 480, 483 (Pa. Super. Ct. 1980) (holding that evidence of crimes in the immediate surrounding area could be enough for a jury to conclude that the premises owner had a duty to take precautions against criminal attacks by third parties); *Young v. Huntsville Hosp.*, 595 So. 2d 1386, 1389 (Ala. 1992) (stating that the risk of future crime was reasonably foreseeable because "the resulting crime was one the general risk of which was foreseeable," and that the foreseeability issue should be presented to the jury).

that the business invitor had a duty to protect the invitee.¹⁵² As a result, more cases will survive summary judgment, and will ultimately go to the jury for an evaluation of liability.¹⁵³

To support their expansion from the narrower approaches, these courts rely on the Restatement of Torts. The duty imposed by section 315 of the Restatement exists in special relationships, rather than in special circumstances.¹⁵⁴ The relationship between a business invitor and business invitee qualifies as a special relationship under section 314A of the Restatement.¹⁵⁵ Section 344 expands the potential duty of the business invitor to include protecting invitees from the intentional acts of third parties.¹⁵⁶ According to comment f of section 344, this duty exists in situations where the likelihood of future criminal activity is foreseeable.¹⁵⁷ This analysis of

152. See *infra* notes 161-72 and accompanying text.

153. See *infra* notes 171-72 and accompanying text.

154. RESTATEMENT, *supra* note 13, § 315. Under § 315, the finding of a special relationship may be sufficient to create a duty to protect against the intentional acts of third parties.

There is no duty so 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 a right to protection.

Id.

155. RESTATEMENT, *supra* note 13, § 314A. Section 314 states that "a possessor of land who holds it open to the public is under a . . . duty to members of the public who enter in response to his invitation" to protect those individuals against unreasonable risks of harm. *Id.*

156. *Id.* at § 344. Section 344 establishes that an invitor has a duty to invitees to protect them against an unreasonable risk of physical harm:

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 persons or animals, and by the failure of the possessor to exercise reasonable care to

- (a) discover that such acts are being done or are likely to be done, or
- (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. PROSSER, *supra* note 16, at 201-02 (stating that the relationship between a business invitor and business invitee generates a special responsibility upon the defendant for the protection of the plaintiff against the misconduct of others); RESTATEMENT, *supra* note 13, § 314A (listing the business invitor-business invitee as a special relationship giving rise to a duty); HENDERSON, *supra* note 14, at 449 (stating that the general duty of reasonable care may be raised because of the existence of a special relationship between the parties).

157. Yelnosky, *supra* note 13, at 898; RESTATEMENT, *supra* note 13, § 344. Comment f sets out a business owner's duty to police the premises:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason

foreseeability increases the number of situations in which a business invitor may have a duty to protect an invitee. For example, comment f does not limit an invitor's duty to incidents where the identity of a particular individual is foreseeable, but rather requires only that the business invitor foresee the potential for future criminal conduct in light of past *general* criminal activity.¹⁵⁸

Relying on section 344, courts applying this approach to foreseeability do not require the invitor to predict the exact location or exact type of crime.¹⁵⁹ Unlike the special circumstances approach,¹⁶⁰ this approach acknowledges that prior incidents related to the invitor's premises may establish foreseeability and ultimately duty.¹⁶¹ For example, in *Nallan v. Helmsley-Spear, Incorporated*,¹⁶² the New York Supreme Court reinstated the plaintiff's claim against the owner of an office building based on the evidence of 107 previously reported crimes in the building in the twenty-one months preceding the plaintiff's shooting.¹⁶³ Although the plaintiff was shot in the lobby, the court found that a history of crime anywhere in the building may have made crime

to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id.

158. RESTATEMENT, *supra* note 13, § 344 cmt. f; *supra* note 157.

159. *Morgan v. Bucks*, 428 F. Supp. 546, 550 (E.D. Pa. 1977); *Murphy v. Penn Fruit Co.*, 418 A.2d 480, 483 (Pa. Super. Ct. 1980).

160. *See supra* notes 123-33 (discussing cases in which the court denied that the defendant had a duty despite evidence of prior incidents).

161. RESTATEMENT, *supra* note 13, § 344; *supra* note 157. *E.g.*, *Morgan*, 428 F. Supp. at 550 (stating that "it is not necessary for [business inviters] to be specifically aware of the exact location on their premises where patrons might be injured by the tortious acts of third persons" and that a showing that the invitor had constructive notice was enough to establish a jury question as to foreseeability); *Murphy*, 418 A.2d at 483. The plaintiff in *Murphy* did not present evidence of any violent crimes on the defendant's premises but did present evidence of car thefts, muggings, purse snatches, drug use, disturbances, and panhandling in the neighborhood. *Id.* Despite the defendant's protest to the evidence, the court held that under § 344 of the Restatement of Torts, the "exact locale of prior crimes is immaterial insofar as appellant's . . . duties are concerned." *Id.* *See Comastro v. Village of Rosemont*, 461 N.E.2d 616, 620 (Ill. App. Ct. 1984) (imposing a duty on the owners of a civic arena to protect concert attendees due to the owner's knowledge of the trouble encountered at other arenas where the rock group had performed).

162. 407 N.E.2d 451 (N.Y. 1980).

163. *Id.* at 458.

anywhere in the building foreseeable.¹⁶⁴

A Pennsylvania court in *Murphy v. Penn Fruit Company*¹⁶⁵ also considered prior related incidents. The court in *Murphy* upheld a jury verdict for a plaintiff who was accosted and stabbed by two youths in the parking lot of the defendant's grocery store.¹⁶⁶ Although no evidence of prior violent crimes on the defendant's premises was presented, the court found that the evidence of prior purse snatchings and muggings around the defendant's premises created a jury question as to foreseeability.¹⁶⁷ Moreover, the court stated that if the jury found that the incidents occurring in the immediate vicinity established foreseeability, a duty would be imposed on the invitor to protect invitees.¹⁶⁸

Under the prior related incidents approach, the plaintiff need not prove that the business invitor foresaw the plaintiff's exact injury and how it would occur,¹⁶⁹ or that the invitor knew the identity of the third party assailant.¹⁷⁰ Rather, the plaintiff need only show evidence of prior related criminal incidents to avoid summary judgment and generate a jury question as to foreseeability.¹⁷¹ Whether the business owner should have foreseen the

164. *Id.* The court stated that if the jury found that the building owner knew of or should have known of the prior criminal incidents in his building, then it would be reasonable for the jury to find that the defendant should have anticipated the risk of future harm and taken precautionary measures to avoid such risk. *Id.*

165. 418 A.2d 480 (Pa. Super. Ct. 1980).

166. *Id.*

167. *Id.* at 484. The *Murphy* court held that in light of the past criminal acts on neighboring premises, a jury could reasonably conclude that the instant crime was reasonably foreseeable. *Id.* at 483-84. Likewise, the court in *Lau's Corp., Inc. v. Haskins*, 405 S.E.2d 474 (Ga. 1991), concluded that the plaintiff's evidence that the defendant's business was in a "high crime" area created a triable issue of fact as to whether the defendant had a duty to protect the plaintiff. *Id.* at 477. The court said that the particular standard of care and the determination of whether the defendant had breached this standard were both questions for the jury to resolve. *Id.*

168. *Murphy*, 418 A.2d at 483-84. The court stated that "if enough purse snatches occurred in and around the store, it was inevitable that someone would be hurt," thus the defendant would have a duty to prevent such occurrence or to at least post a warning. *Id.* at 484. The court said that the premises owner may "know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of a visitor." *Id.* (quoting *Morgan v. Bucks Assoc.*, 428 F. Supp. 546 (E.D. Pa. 1977)).

169. *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 40 (N.C. 1981); *Murphy v. Penn Fruit Co.*, 418 A.2d 480, 483 (Pa. Super. Ct. 1980); see also *Crume v. State Bank of Lombard*, 531 N.E.2d 1358, 1369 (Ill. 1988) (stating that a lack of prior crimes would not relieve the business invitor of his duty when the invitor was aware of the potential of a third party attack on the plaintiff).

170. *Morgan v. Bucks Assocs.*, 428 F. Supp. 546, 550 (E.D. Pa. 1977).

171. See *Daily v. K-Mart Corp.*, 458 N.E.2d 471, 476 (Ohio Ct. C.P. 1981).

plaintiff's injury in light of the evidence will then be determined by the jury.¹⁷²

In summary, the preceding approaches play a significant role in assessing the duty of a bank to victims of ATM crime. Due to the shortage of case law dealing with ATM crime and the unique features of the bank-ATM patron relationship,¹⁷³ courts hearing ATM cases have little guidance in ascertaining a bank's duty to protect ATM patrons against third party crimes. Of these approaches, the best approach to a business invitor's duty is one that strikes a balance between expanding the scope of foreseeability and overextending the standard. Many courts have found that the approach which conditions foreseeability upon a showing of prior related incidents of criminal activity best strikes this balance.¹⁷⁴ This Note proposes that courts should use an approach like the prior related incidents approach to analyze ATM crime cases.

Under this Note's proposed approach, courts hearing ATM cases should find that evidence of prior related incidents may satisfy the threshold level of evidence required to establish a jury question as to the foreseeability of an ATM crime. This approach would prevent unduly burdening business invitors with the duty to foresee nationwide crime, because in order to generate a jury question as to foreseeability, plaintiffs would have to present evidence of prior incidents on or near the business invitor's premises. If the jury found that the foreseeability threshold was met, the business invitor would have a duty to protect patrons from criminal attacks while using the bank's ATM. The question of whether this duty was breached would then be determined by the jury before liability would be imposed. Under the proposed approach, liability would ultimately arise from the results of a flexible balancing test employed by the jury. This balance would allow the jury to use a cost-benefit analysis to determine liability. Currently, courts hearing ATM crime cases do not use such an approach. These courts have used approaches similar to the special circumstances approach and have interpreted foreseeability narrowly.

IV. CURRENT JUDICIAL TREATMENT OF ATM CASES

Despite the trend in other business invitor cases to expand the limits of foreseeability,¹⁷⁵ the courts assessing a bank's duty to protect ATM patrons

172. *Foster*, 281 S.E.2d at 40 (stating that evidence showing that the defendant should have foreseen that "consequences of a generally injurious nature might have been expected" was sufficient to allow the plaintiff to present her case to the jury).

173. See discussion *supra* notes 57-67. *Infra* notes 263-69 and accompanying text.

174. See *supra* note 150 (citing courts which have used this approach).

175. See *supra* notes 14, 23, 150 and accompanying text.

have taken a narrow approach to foreseeability.¹⁷⁶ As a result of the courts' current view of foreseeability, with the exception of two lower courts,¹⁷⁷ the majority of the courts have held that banks do not have a duty to protect ATM customers against third party crime.¹⁷⁸ The majority of plaintiffs in ATM crime cases have not been able to defeat motions for dismissal or summary judgment because of the courts' limited requirements for foreseeability.¹⁷⁹ The courts hearing ATM crime cases either condition foreseeability on limited special circumstances or create a high threshold of foreseeability.

Similar to the special circumstances approach,¹⁸⁰ courts that have assessed a bank's duty to protect patrons against ATM crimes have placed strict qualifications on the type of evidence which establishes notice of the ATM crime.¹⁸¹ For example, in *Page v. American National Bank & Trust*

176. See *infra* notes 180-209 and accompanying text (discussing the restrictions courts have placed on foreseeability in deciding ATM cases).

177. See *infra* notes 201-09 and accompanying text.

178. *Williams v. First Ala. Bank*, 545 So. 2d 26, 27 (Ala. 1989) (dismissing the plaintiff-ATM patron's negligence claim against the defendant-bank for armed robbery at the bank's ATM); *Dyer v. Norstar Bank, N.A.*, 588 N.Y.S.2d 499, 499 (N.Y. App. Div. 1992), *cert. denied*, 610 N.E.2d 390 (N.Y. 1993) (dismissing a plaintiff's negligence claim against a bank for liability for the armed robbery of the plaintiff at the bank's ATM); *Popp v. Cash Station, Inc.*, 613 N.E.2d 1150, 1151 (Ill. App. Ct. 1992) (dismissing a class action seeking to enjoin the operation of the defendant's ATMs after numerous third-party criminal attacks); *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133, 140 (Tenn. Ct. App. 1991) (granting a judgment notwithstanding the verdict in favor of a defendant-bank on a claim against the bank for the injuries caused to the plaintiff by a third party while using the bank's ATM); *Fuga v. Comerica Bank of Detroit*, 509 N.W.2d 778, 780 (Mich. Ct. App. 1993) (granting summary judgment in favor of a bank on a claim against the bank for a plaintiff's injuries caused by a third party attack at the bank's ATM); *Faulkner v. Sun Bank of S. Fla.*, 532 So. 2d 1293, 1294 (Fla. Dist. Ct. App. 1988) (affirming a summary judgment motion in favor of the defendant-bank for a suit filed by a plaintiff after being robbed at gunpoint at the bank's ATM).

But see *Gillen v. Delaware Trust Co.*, 1993 Del. Super. LEXIS 332 (Del. Super. Ct. 1993), in which the court denied the defendant's summary judgment motion based on the plaintiff's evidence of prior incidents at the bank and nationwide crime statistics. *Id.* at 334. Although the court found that the prior related incidents created a jury question as to foreseeability, the court considered this evidence solely to rule on the bank's motion for partial summary judgment on punitive damages. *Id.* at 336.

179. See *supra* note 178.

180. See *supra* section III.B.1.

181. *Williams v. First Ala. Bank*, 545 So. 2d 26 (Ala. 1989). In *Williams*, the Alabama Supreme Court recognized that inviters may have a duty to protect invitees but limited this duty to exceptional circumstances. *Id.* at 27. The plaintiff was assaulted on the bank's premises after withdrawing money from the bank's drive-up ATM. *Id.* at 26. The criminal approached the plaintiff's car, pointed a gun at her through her window, and grabbed her money. *Id.* Despite the evidence of robberies at that ATM, the court found that foreseeability was not established. *Id.* at 27. The court based its finding on a previous case in which it had refused to adopt a "special duty" on the part of the banking industry. *Id.* In addition, the court stated that it never found a case which fit the special circumstances necessary to establish foreseeability and impose a duty to protect

Company,¹⁸² a Tennessee court held that the evidence of prior criminal incidents on the premises would not establish foreseeability unless the evidence proved that the bank could have foreseen the identity of the assailant.¹⁸³ The court found that the identity of the assailant was not foreseeable and dismissed the plaintiff's complaint.¹⁸⁴ A Michigan court placed a similar qualification on foreseeability in *Fuga v. Comerica Bank*.¹⁸⁵ In *Fuga*, the court narrowed foreseeability further by requiring not only evidence that the bank had notice of the assailant's identity, but also evidence that the bank failed to end a crime which occurred in the presence of its employees.¹⁸⁶ Under the approaches of *Page* and *Fuga*, a plaintiff would only be able to establish foreseeability when the bank knew the third party prior to the attack, or when the criminal attack occurred when bank personnel were present to stop the crime.

Similar to the special circumstances approach, the approach utilized by another court led to the finding that evidence of crime on property surrounding the bank's premises did not establish foreseeability of ATM crime.¹⁸⁷ In *Popp v. Cash Station, Incorporated*,¹⁸⁸ an Illinois court held that to establish foreseeability the plaintiff must present evidence of prior criminal incidents

on a business inviters. *Id.* (stating that "we have not yet found the 'exceptional case' that warranted the imposition" of a duty on a business invitor to take reasonable precautions to protect invitees from criminal attack).

182. 850 S.W.2d 133 (Tenn. Ct. App. 1991).

183. *Id.* at 136-37 (citing to *Corrpropt v. Sloan*, 528 S.W.2d 188 (Tenn. Ct. App. 1975)). In *Page*, the plaintiff was using an ATM, accompanied by her son and two friends, when she was assaulted and robbed. *Id.* at 133. Although the plaintiff presented evidence of five prior robberies at that ATM, the court found that since there was no proof that the unknown assailants had been on the bank premises prior to the assault, foreseeability was not established. *Id.* at 139.

184. *Id.* at 138-39, 140 (stating that the bank did not have a duty to protect ATM patrons against unidentified offenders). The court did refer to Section 344 of Restatement of Torts and acknowledged that the section placed a duty on business owners to protect the invitees from third party criminal acts. *Id.* at 137. However, the court stated that the standard set forth by Section 344 was far from clear and that it would be unfair to impose this vague duty on banks. *Id.* This reasoning is similar to that taken by courts following the no-duty approach. See *supra* notes 96-104 and accompanying text (discussing the limits imposed on foreseeability under the no-duty approach); see also *infra* notes 197-200 and accompanying text (discussing additional reasoning used by the court in *Page*).

185. 509 N.W.2d 778 (Mich. Ct. App. 1993).

186. See *id.* at 779 (stating that in order to impose a duty on the bank, the criminal act must have occurred when employees were present to prevent such act). The court also stated that a duty may be imposed if the bank created or maintained the criminal activity. *Id.* Since the bank neither created nor maintained the activity, the court found that to hold the bank responsible for protecting invitees from the acts of third parties would "place upon the landowner a greater burden than that which is placed upon the community for the protection of its members." *Id.*

187. See *Popp v. Cash Station, Inc.*, 613 N.E.2d 1150 (Ill. App. Ct. 1992). See *supra* section III.B.1 for discussion regarding the limitations placed on foreseeability under the special circumstances approach.

188. 613 N.E.2d 1150 (Ill. App. Ct. 1992).

occurring on the bank's premises.¹⁸⁹ Seeking to enjoin the operation of a chain of ATMs, the plaintiff presented statistics of the 1500 to 5000 criminal attacks which occur annually at ATMs nationwide.¹⁹⁰ Contrary to what the totality of the circumstances approach would have yielded,¹⁹¹ the approach followed by the Illinois court led to the finding that evidence of general crime statistics was insufficient to establish foreseeability.¹⁹²

When evidence of prior incidents on the premises has been presented, courts have raised the threshold requirements of foreseeability.¹⁹³ For example, in *Williams v. First Alabama Bank*,¹⁹⁴ the Alabama Supreme Court recognized that a duty to protect may exist when the bank had notice that future criminal activity could endanger a customer.¹⁹⁵ However, despite the evidence of two previous similar robberies at that same ATM two months before the attack on the plaintiff, the court held that the plaintiff's injury was not foreseeable and found that the bank did not have a duty to protect the plaintiff.¹⁹⁶ While the Court in *Williams* found two prior incidents on the premises insufficient, the Tennessee Supreme Court required an even higher standard of foreseeability in *Page*.¹⁹⁷ In *Page*, the court found the ATM crime unforeseeable despite evidence that five prior crimes occurred at the same ATM, including that another customer was assaulted and shot, that the ATM was in a high-crime neighborhood, and that the Chattanooga Crime Prevention

189. See *Popp*, 613 N.E.2d at 1152-53. Cf. *McClendon v. Citizens & S. Nat'l Bank*, 272 S.E.2d 592, 593 (Ga. Ct. App. 1980) (holding that evidence of previous crimes in the same bank parking lot was required in order to prevent a directed verdict for the bank).

190. *Popp*, 613 N.E.2d at 1153. In *Popp*, the plaintiff was not a victim of ATM crime but was a concerned customer who, in light of the numerous past ATM crimes in Chicago, filed a class action against the ATM chain, seeking to improve current security measures at Chicago ATMs. *Id.* at 1151.

191. See *supra* notes 148-49 and accompanying text.

192. *Popp*, 613 N.E.2d at 1153.

193. The courts set such a high standard of foreseeability that even under the current approach, evidence of prior acts on the premises do not establish foreseeability, thus the banks have been found to have no duty to protect ATM customers from third party attacks and have been relieved of liability. See *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133, 138, 140 (Tenn. Ct. App. 1991) (dismissing the plaintiff's claim despite the plaintiff's evidence of five similar previous crimes at the same bank branch ATM); see *supra* text accompanying notes 182-83.

194. 545 So. 2d 26 (Ala. 1989).

195. *Williams*, 545 So. 2d at 27.

196. *Id.* (finding that a duty would only exist when the plaintiff could show an increase in the number and frequency of the crimes on the bank's premises).

197. *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133 (Tenn. Ct. App. 1991); see *supra* notes 182-83 and accompanying text (discussing additional findings made by the court in *Page*).

Bureau warned the bank that the area was particularly inviting to criminals.¹⁹⁸ Similar to the special circumstances approach, these courts have created a high standard of foreseeability which few plaintiffs can meet.¹⁹⁹ Furthermore, the courts have been making factual determinations of whether the evidence establishes foreseeability, which is a function normally delegated to the jury.²⁰⁰

Contrary to the majority view, two lower New York courts have recognized a duty on banks to protect patrons against ATM crime.²⁰¹ Although these courts use a broader approach to determine foreseeability and duty, like the courts using the totality of the circumstances approach, they overextend the analysis of duty. For example, in *Oppenheimer v. Chase Manhattan Bank of North America, Incorporated*,²⁰² a New York County Civil Court found that a bank had a duty to protect an elderly man who was robbed while using the bank's ATM.²⁰³ Although no evidence of prior criminal incidents had occurred on or around the defendant's premises, the court relied on the inherently dangerous nature of an ATM to conclude that foreseeability was established.²⁰⁴ Similarly, in *Stalzer v. European American Bank*,²⁰⁵ the New York Civil Court of Queens County found that a bank had a duty based on the bank's general knowledge of nationwide ATM crime.²⁰⁶ Like the courts' following the reasoning of the totality of the circumstances approach, these courts reasoning under the current approach encroaches on the jury's

198. *Page*, 850 S.W.2d at 138. Compare *McClendon v. Citizens & S. Nat'l Bank*, 272 S.E.2d 592, 593 (Ga. Ct. App. 1980). In *McClendon*, the plaintiff was attacked in a bank parking lot in mid-afternoon. *Id.* at 593. The Georgia court found that ten prior incidents at the bank which required police involvement were insufficient to establish notice on the part of the bank. *Id.*

199. See *supra* text accompanying notes 119-27.

200. See *infra* text accompanying notes 231-47.

201. *Oppenheimer v. Chase Manhattan Bank of N. Am.* (N.Y. Civ. Ct. 1984), quoted in Harry H. Lipsig, *Tort Trends: Duty of Banks to Safeguard Customers*, N.Y.L.J., Oct. 25, 1984, at 1; *Stalzer v. European Am. Bank*, 448 N.Y.S.2d 631 (N.Y. Civ. Ct. 1982).

202. Lipsig, *supra* note 201, at 1.

203. *Id.*

204. *Id.* (stating that "[t]he robbery of a person using the services of a bank, including an automatic money machine, is clearly foreseeable even if there were no prior robberies of a particular type at that branch").

205. 448 N.Y.S.2d 631, (N.Y. Civ. Ct. 1982).

206. *Id.* at 634-36. The court found that the bank's knowledge of the numerous ATM robberies recently covered by the media was sufficient to establish foreseeability. *Id.* The court stated that:

Given the very nature of a bank and the business it does in considering the many recent media-documented robbery attempts and completions, it seems reasonable to conclude that banking invites certain very real risks to the public at large. Whether the crime be one of random violence or a deliberate, planned attack, bank robberies seem to be a fact of everyday life, committed by persons of all ages and by amateurs and professionals alike.

Id. at 635.

determination of fact by deciding foreseeability.²⁰⁷ In addition, a more recent decision from a higher New York court weakens the weight of these decisions. In *Dyer v. Norstar Bank, N.A.*,²⁰⁸ a New York Appellate Court applied a traditional no-duty approach, establishing that New York currently takes a narrow approach to foreseeability and duty.²⁰⁹

In summary, the majority of the courts deciding ATM crime cases have applied a narrow approach to foreseeability and duty.²¹⁰ Under the current approach, courts have applied strict limits as well as placed high standards on foreseeability. This approach gives the trial judge the power to determine foreseeability, which should be determined by the jury.²¹¹ Resolving whether evidence of prior related incidents establishes foreseeability requires making findings of fact which is the function of the jury.²¹² Furthermore, under these high standards, ATM crime cases have been dismissed even when evidence or prior related incidents may have established foreseeability.²¹³ What is needed is a broader, more flexible analysis, in which courts recognize that evidence of prior related incidents should be evaluated by the jury to determine foreseeability.

Under the proposed model approach, general evidence of crime unrelated to the bank's premises such as nationwide crime statistics, would not be enough to establish foreseeability. Thus, when a plaintiff has only general evidence of crime, no duty should be imposed and the complaint should be dismissed. However, when a plaintiff presents evidence of crimes on or near the bank's premises, the evidence should be presented to the jury for a determination of foreseeability. A duty would only be imposed on a bank if the jury found that the prior related incidents were sufficient to make the instant ATM crime foreseeable. However, even if a duty was found, liability will not automatically follow. Whether a bank is liable should be determined by the jury through a flexible balancing test of the competing interests. Unlike the current approach, this approach to ATM crime cases takes a broader view of foreseeability and

207. See *supra* section III.B.2.

208. 588 N.Y.S.2d 499 (N.Y. App. Div. 1992), *cert. denied*, 610 N.E.2d 390 (N.Y. 1993).

209. *Id.* at 499. In *Dyer*, the court found that the defendant-bank did not have a duty to protect the ATM victim because "the fact that a person using an ATM might be subject to robbery is conceivable, but conceivability is not the equivalent of foreseeability." *Id.* The court dismissed the ATM victim's complaint and stated that to hold the bank liable for the injury caused to the plaintiff by a third party would stretch foreseeability "beyond acceptable limits." *Id.*

210. See *supra* note 178.

211. See *infra* notes 231-47 and accompanying text.

212. *Id.*

213. See *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133 (Tenn. Ct. App. 1991) and *Williams v. First Al. Bank*, 545 So. 2d 26 (Ala. 1989); see *supra* text accompanying notes 194-200.

duty. Currently, the judges hearing ATM cases are making determinations of fact and in so doing are construing foreseeability too narrowly. Such an approach contradicts basic tort policies as well as public policy.

V. THE CURRENT NARROW TREATMENT OF BANK LIABILITY CONTRADICTS TORT POLICIES AND PUBLIC POLICY

This Note argues that the current treatment of a bank's liability for ATM crimes is too narrow and a broader, more flexible approach should be used.²¹⁴ Instead of following a narrow no-duty or special circumstances approach,²¹⁵ the courts should broaden the current approach to recognize that evidence of prior related incidents may establish foreseeability. The court should allow the jury to determine if the prior related criminal incidents establish foreseeability. As a result, more instances of a duty to protect patrons against third party crime at ATMs may be imposed on banks.²¹⁶ However, this result would not necessitate more instances of liability. Whether the bank breached the duty would still need to be determined by the jury.²¹⁷ This would be done using a balancing test which would weigh the gravity of the ATM crime and the likelihood of occurrence against the burden imposed on the bank and the social utility of the service.²¹⁸ This prior related incidents approach would allow for each ATM crime case to be evaluated on a case-by-case basis.²¹⁹ Under courts' current narrow analysis, banks have been relieved of liability when evidence of prior related incidents may have made the ATM crime foreseeable.²²⁰ In addition, judges have made these decisions when they should have been made by the jury.²²¹ This has resulted in the construction of stricter standards of foreseeability than necessary.

214. See discussion *supra* section IV.

215. See *supra* section III.A and III.B.1.

216. By recognizing that prior incidents related to a bank's property should be presented to the jury, courts would not be able to grant summary judgment for the bank in the face of such evidence. See *infra* text accompanying notes 231-47. In cases such as *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133 (Tenn. Ct. App. 1991) and *Williams v. First Ala. Bank*, 545 So. 2d 26 (Ala. 1989), the courts would not have been able to rule no-duty as a matter of law, because evidence of prior related incidents was presented in both cases. See *supra* text accompanying notes 194-200.

217. See *infra* section VI.B.

218. See *infra* section VI.B.

219. See *generally* section VI.

220. See *supra* text accompanying notes 194-200.

221. See *infra* section VI.B.

A. The Current Approach Construes Foreseeability Too Narrowly

The current approaches used to determine a bank's duty should be rejected because these approaches construe the requirements of duty more narrowly than necessary. Whether an individual has a duty to protect another depends upon whether the relationship between the parties generates a legal obligation to protect the other.²²² In the relationship between a business invitor and a business invitee, the Restatement of Torts defines the legal obligation of a business owner to invitees.²²³ Section 344 clearly places an affirmative duty on a bank, as an occupier of a premises holding it open for business purposes, to take reasonable care to discover that the dangerous conduct of third persons is occurring or is likely to occur on the premises.²²⁴ Furthermore, section 344 requires that a bank take reasonable precautions to protect invitees from the conduct of third persons.²²⁵

The reasoning of the courts analyzing a bank's duty in ATM cases is similar to the reasoning used by courts following the no-duty and special circumstances approaches.²²⁶ However, the reasoning of these approaches incorrectly interprets section 344. These approaches rely on the belief that when special circumstances do not exist, future crime is not foreseeable, and therefore no duty exists.²²⁷ However, under these approaches, the courts create a higher

222. PROSSER, *supra* note 16, at 236.

223. RESTATEMENT, *supra* note 13, § 344; *see infra* note 224.

224. RESTATEMENT (SECOND) TORTS § 344. Section 344 states:

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 persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id.; *see also* *Butler v. Acme Mkts., Inc.*, 445 A.2d 1141, 1144 (N.J. 1982) (stating that “[o]wners and occupiers of land make up the largest single group upon whom the duty of affirmative conduct has been imposed”); *Daily v. K-Mart Corp.*, 458 N.E.2d 471, 473 (Ohio Ct. C.P. 1981) (stating that comment f to § 344 “imposes a duty on the possessor of land to police business premises to protect invitees, although no such duty previously existed under the common law”); *accord* *Murphy v. Penn Fruit Co.*, 418 A.2d 480, 482 (Pa. Super. Ct. 1980); *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 38 (N.C. 1981); *Morgan v. Bucks Assocs.*, 428 F. Supp. 546, 549 (E.D. Pa. 1977).

225. *See supra* note 224.

226. *See supra* notes 95-112, 119-40 and accompanying text.

227. *See supra* notes 121-22 and accompanying text (discussing that the special circumstances approach requires knowledge of the assailant's identity). *See* *Popp v. Cash Station, Inc.*, 613 N.E.2d 1150, 1153 (Ill. App. Ct. 1992) (holding that generally known ATM crime statistics did not make future criminal attacks at ATMs foreseeable for purposes of imposing a duty); *Williams v. First Ala. Bank*, 545 So. 2d 26, 27 (Ala. 1989) (holding that the criminal activity was not reasonably

threshold of foreseeability than is actually necessary. The foreseeability standard, under section 344, does not require the bank to know the identity of the third party or to anticipate the specific nature of the crime, as required by these courts.²²⁸ Rather, comment f to section 344 states that foreseeability may be based on a business invitor's past experience.²²⁹ Such past experience may require a bank to foresee future conduct by a third party even when an invitor has no reason to expect criminal action on the part of any particular third party.²³⁰ Based on a plain reading of comment f, evidence of prior criminal incidents on or near a bank's premises would constitute past experience and may establish foreseeability. Thus, this evidence should be presented to the jury to evaluate foreseeability, before the court rules on a bank's duty.

B. A Narrow Approach Encroaches on the Jury's Function of Assessing Notice

Using a narrow approach to assess a bank's duty fails to separate the functions of judge and jury. Though these functions often overlap,²³¹ this overlap should not serve as a justification for the judge to encroach on the

foreseeable until the number and frequency of crimes on the premises were greater than two at a minimum); *McClendon v. Citizens & S. Nat'l Bank*, 272 S.E.2d 592, 593 (Ga. Ct. App. 1980) (relieving a bank of liability because there were no special circumstances which would have made the criminal act foreseeable).

228. *Daily v. K-Mart Corp.*, 458 N.E.2d 471, 473 (Ohio Ct. C.P. 1981). In *Daily*, the court found that § 344 was not meant to limit the duty of business owners to only those acts of third persons which "are occurring or about to occur," but rather the business owner has a duty to protect against acts which are foreseeable in light of past criminal acts. *Id.* at 474.

229. RESTATEMENT, *supra* note 13, § 344 cmt. f. Comment f states a business invitor's duty to police the premises arises when,

he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id.

230. *Daily*, 458 N.E.2d at 475-76 (stating that the existence of prior criminal activity on the business invitor's premises makes it possible for the invitor to anticipate subsequent criminal attacks). Moreover, if the prior incidents are uniquely within the knowledge of the premises owner, such that the invitee would have no reason to know of the danger, the business owner's duty to the invitee will be greater.

231. See PROSSER, *supra* note 16, at 235 (discussing that determinations of liability are mixed questions of law and fact); RESTATEMENT, *supra* note 13, § 328B cmt. b (stating that the functions of the judge and the jury are interdependent); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924) (stating that although it is generally said that the judge and jury have separate functions, in reality, these functions overlap).

function of the jury. In a negligence action, the court determines the questions of law and the jury determines the questions of fact.²³² Usually, determining whether a duty exists is a question of law and is decided by the court.²³³ The court's determination of whether a bank had a duty to protect an ATM customer against the conduct of third persons will depend upon whether the bank could foresee or had notice of the potential conduct.²³⁴ The fact that the bank-ATM customer relationship qualifies as a special relationship²³⁵ places a minimal duty upon the bank to exercise reasonable care to protect the ATM customer against an unreasonable risk of harm.²³⁶ Whether this minimal duty includes protecting against third party crime will depend upon whether the surrounding circumstances made such crime foreseeable.²³⁷

232. See HENDERSON, *supra* note 14, at 342. Though the judge decides questions of law and the jury decides questions of fact, the law of negligence commingles the two functions. *Id.* Henderson states that the division of functions is "in no way dictated by the meaning inherent in the terms *law* and *fact*." *Id.* Rather, Henderson holds that a determination of negligence is not a question of law or fact but is an application of law to fact. *Id.* See also PROSSER, *supra* note 16, at 164-65, 235-37 (stating that the judge determines the legal issues and the jury the factual issues). However, Prosser notes that in reality, these determinations are not discretely separable because each determination may involve questions of law and fact thus overlapping the determinations of the other. *Id.*

233. PROSSER, *supra* note 16, at 236; HENDERSON, *supra* note 14, at 342. The determination of whether a duty exists is a role specifically designated to the judge. *Id.*; RESTATEMENT, *supra* note 13, § 328B(b) and cmt. c. In § 328B, the Restatement sets out the functions of the court as determining whether a dispute of fact exists based on the evidence presented, whether the facts presented create a legal duty on the part of the defendant, the general standard of conduct resulting from the legal duty, the rules of law applicable to the question of causation of the plaintiff's harm, and whether the plaintiff's harm is legally compensable. *Id.* § 328B.

234. See RESTATEMENT (SECOND) OF TORTS § 314A cmt. e (stating that a business invitor has a duty to exercise reasonable care to protect invitees against a sudden attack from a third person when he knows or should know of the unreasonable risk of the attack); *Stalzer v. European Am. Bank*, 113 Misc.2d 77, 83 (N.Y. Civ. Ct. 1982) (stating that "[i]t is now well established that the duty owed is one of reasonable care under the circumstances whereby foreseeability shall be a measure of liability"); see also *Butler v. Acme Mkts. Inc.*, 445 A.2d 1141, 1143 (N.J. 1982) (finding that foreseeability of the risk of criminal conduct is crucial in determining duty); *Brocks v. Watts Realty Co.*, 582 So. 2d 438, 440 (Ala. 1991) (stating that businesses are liable for criminal acts of third persons when such acts are reasonably foreseeable); *Comastro v. Village of Rosemont*, 461 N.E.2d 616, 620 (Ill. App. Ct. 1989) (stating the extent to which a business invitor must protect the invitee against harm depends upon whether the harm could be foreseen).

235. RESTATEMENT, *supra* note 13, § 314A (articulating special relationships which give rise to a duty to protect). The bank-ATM customer relationship is that of business invitor-invitee which is recognized by the Restatement as a special relationship. *Id.*

236. *Id.* § 314A. Comment e adds that "the duty in each case is only [a duty] to exercise reasonable care under the circumstances." *Id.* § 314A cmt. e.

237. *Id.* (stating that the invitor will not be liable to protect another if he does not know or have notice of the potential for harm to the invitee); *id.* § 314A cmt. f (stating that a defendant is not required to take any action to protect the plaintiff from harm by third parties until the defendant knows or has reason to know that the plaintiff is endangered). Comment f specifically states that the defendant's duty is determined by the circumstances of the situation. *Id.* See also *Balard v. Bassman Event Sec., Inc.*, 258 Cal. Rptr. 343, 344 (Cal. Ct. App. 1989) (stating that just because

When the circumstances establish that the likelihood of an ATM crime was foreseeable, the bank's minimal duty would include protecting ATM patrons against the actions of third parties.²³⁸ Likewise, when the ATM crime was not foreseeable, then the bank's minimal duty would not include protecting patrons against third parties. Determining whether the ATM crime was foreseeable requires evaluating the circumstances surrounding the crime.²³⁹ Evidence of a bank's past experience may establish that the bank had notice of the likelihood of future crime.²⁴⁰ Thus, evidence of prior criminal incidents on or near the bank's premises may establish notice.²⁴¹ The jury should determine whether evidence of prior related criminal incidents establishes notice, because this determination involves fact finding.²⁴² The jury should determine the factual questions such as whether the incidents were substantially similar, whether the prior incidents were close enough in proximity to the bank, or whether the frequency of past incidents was high enough to make the instant ATM crime

a duty may exist, the duty may not necessarily be imposed in all situations but rather should be determined on a case-by-case basis).

238. RESTATEMENT, *supra* note 13, § 314A cmt. e. Also, § 344 specifies that a business invitor is under a duty to exercise reasonable care to protect invitees when the potential for harm is known or when the business invitor should have known of the potential for harm. *Id.* § 344. Further, § 344 of the Restatement states that a business invitor is subject to liability for dangerous conditions to his invitees when he or she knows or by the exercise of reasonable care would discover such conditon, and should realize that it involves an unreasonable risk of harm to the invitee. *Id.* § 343.

239. *See Stalzer v. European Am. Bank*, 113 Misc. 2d 77, 84 (N.Y. Civ. Ct. 1982) (stating that a bank's duty to protect an invitee will depend upon the various circumstances and factors present).

240. RESTATEMENT, *supra* note 13, § 344 cmt. f; *see supra* note 224; *Daily v. K-Mart*, 458 N.E.2d 471, 475-76 (Ohio Ct. C.P. 1981). Furthermore, a business invitor has a duty to discover past criminal conduct on or near his surroundings. *See PROSSER, supra* note 16, at 182. Prosser states that a defendant's knowledge of his surroundings is critical to establishing notice and negligence. *Id.* The defendant is required to be aware of his surroundings and to discover that which a reasonable person in the same situation would consider necessary. *Id.* In addition, Prosser explains that as a result of the special relationship between a business invitor and a business invitee, the business invitor is under a duty to investigate or discover dangerous conditions and may be liable for remaining ignorant. *Id.* at 185.

See also RESTATEMENT, *supra* note 13, § 302B (stating that a failure to act may be negligence if the defendant knew or should have known that an unreasonable risk of harm to the plaintiff existed, even if the harm was criminal conduct caused by a third party).

241. *Daily v. K-Mart Corp.*, 458 N.E.2d 471, 475-76 (Ohio Ct. C.P. 1981) (stating that existence of prior criminal activity shows that future crime may be foreseeable and creates a question for the jury); *Morgan v. Bucks*, 428 F. Supp. 546, 550 (E.D. Pa. 1977) (stating that the evidence of prior occurrences of rowdiness on the premises were sufficient to establish a jury question as to notice); *Builer v. Acme Mkts., Inc.*, 445 A.2d 1141, 1146 (N.J. 1982) (finding that whether a history of repeated attacks on the premises was sufficient to require the premises owner to increase security was a question for the jury).

242. *Iannelli v. Powers*, 498 N.Y.S.2d 377, 381 (N.Y. Sup. Ct. 1986) (stating that "[t]he question of what safety precautions may reasonably be required of the possessor of realty is generally a question of fact to be determined by the jury").

foreseeable.²⁴³ These factual determinations will establish whether the ATM crime was or was not foreseeable and should be made before the judge rules on a bank's duty.²⁴⁴

For this reason, when courts grant summary judgment or motions to dismiss in favor of a bank, after evidence of prior related incidents has been presented, the court encroaches upon the jury's determination of foreseeability.²⁴⁵ Although in certain instances, the judge may find that the ATM crime was foreseeable. Such judicial discretion should only be exercised upon the determination that reasonable minds clearly could not differ on whether

243. *Morgan v. Bucks*, 428 F. Supp. 546, 549-50 (E.D. Pa. 1977) (stating that the prior acts committed by third persons on the business owner's premises were evidence enough for the jury to determine that the defendant knew or had reason to know of a likelihood of danger to the invitee).

244. RESTATEMENT, *supra* note 13, § 328B cmt. c. When the determination of an issue of law, such as duty, is dependant upon a particular issue of fact, "it is the function of the court to rule upon the particular issue, and to apply its ruling in the form of an instruction to the jury." *Id.* When a dispute of fact exists, the court must direct the jury accordingly as to the defendant's duty or absence of duty, depending upon the jury's resolution of the dispute of fact. *Id.* § 328B cmt. e. The jury does not decide the legal question of duty but rather decides the dispute of fact upon which the duty is contingent. *Id.*

245. *See Daily v. K-Mart Corp.*, 458 N.E.2d 471, 475 (Ohio Ct. C.P. 1981). In *Daily*, the court found that evidence of prior criminal incidents allowed the plaintiffs to avoid summary judgment and created a jury question as to whether the business owner acted reasonably. *Id.* at 475-76. The court stated that, in light of her knowledge of prior criminal incidents, the jury must determine whether the business owner took reasonable steps to secure the premises. *Id.* *See also* PROSSER, *supra* note 16, at 236 (stating that if reasonable persons may differ as to whether a fact such as notice exists, the conclusion must be drawn by the jury).

Thus, the narrow approaches err by holding that a bank, or business invitor, has no duty without allowing the jury to evaluate the affect of the prior incidents on the issue of notice. *E.g.*, *Gray v. McDonald's Corp.*, 874 S.W.2d 44, 45 (Tenn. Ct. App. 1993) (granting a restaurant owner's motion to dismiss despite evidence of prior criminal activity on and around the premises); *Nappier v. Kincade*, 666 S.W.2d 858, 859-60 (Mo. Ct. App. 1984) (finding that the trial court did not err in granting a restaurant owner's motion to dismiss despite evidence that the third party assailant had frequently generated dangerous conditions at the restaurant in the past); *McCoy v. Gay*, 302 S.E.2d 130 (Ga. Ct. App. 1983) (holding that a defendant-hotel owner did not have a duty to protect the plaintiff-invitee despite the plaintiff's evidence of prior similar incidents on the premises); *Brown v. National Supermarkets, Inc.*, 679 S.W.2d 307, 309 (Mo. Ct. App. 1984). In *Brown*, the trial court granted a summary judgment in favor of a store owner despite evidence of 16 prior robberies and seven prior strong arm robberies on the store's premises. *Id.*

Following the narrow approaches of other courts, the courts analyzing a bank's duty in ATM cases have encroached on the jury's role by not allowing the jury to consider evidence of prior incidents. *E.g.*, *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133, 134, 140 (Tenn. Ct. App. 1991) (dismissing the plaintiff's complaint despite evidence of prior similar incidents at banks near the defendant's, five prior incidents at the defendant's bank, complaints from another customer who was shot at the defendant's bank, and safety warnings from local authorities); *Williams v. First Ala. Bank*, 545 So. 2d 26, 27 (Ala. 1989) (granting summary judgment for the bank despite evidence of two prior robberies at the bank branch in the same year as the plaintiff's attack).

the evidence did or did not make future crime foreseeable.²⁴⁶ In all other instances, the jury should make this determination.²⁴⁷ By ruling that a bank had no duty to protect the ATM patron when there is evidence of prior related criminal incidents, the judge improperly decides as a matter of law the questions of fact which are designated for the jury's consideration. In addition to conflicting with these basic tort principles, the narrower approaches also conflict with basic principles of social policy.

C. *The Narrow Approaches are Contrary to Public Policy*

A narrow analysis of foreseeability and duty contradicts public policy.²⁴⁸ First, a narrow interpretation of foreseeability permits each bank to escape liability for the first ATM crime which occurs.²⁴⁹ Refusing to allow the first plaintiff to recover due to the lack of prior similar crimes,²⁵⁰ or due to the absence of an extensive history of prior incidents at the exact location,²⁵¹ results in an unjust system of compensation. Under this view of foreseeability, the first victim always loses, while subsequent victims may recover. Broadening the current approach to recognize that prior criminal activity near the bank's premises may establish foreseeability and, ultimately, duty, will encourage banks

246. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 436-48 (1985); PROSSER, *supra* note 16, at 236 (stating that "if the evidence is such that no reasonably intelligent person would accept it as sufficient to establish the existence of a fact essential to negligence, it becomes the duty of the court to remove the issue from the jury" and grant a judgment as a matter of law).

247. See FRIEDENTHAL, *supra* note 246, at 439-40 (1985). A motion for summary judgment is appropriate when the court finds that no genuine dispute of material fact exists. *Id.* at 439. The party moving for summary judgment has the burden to present all information bearing upon that issue and clearly establish that no factual dispute exists regarding that matter. *Id.* All inferences and conclusions regarding the existence of a fact, such as whether the facts establish lack of knowledge, should be resolved against the party seeking summary judgment and the issue should be decided by the jury. *Id.* at 439-40. Thus, when a dispute of fact exists, the motion for summary judgment should be denied. *Id.* See also *Daily*, 458 N.E.2d at 476. In *Daily*, the court was considering a motion for summary judgment and held that the plaintiffs' presentation of prior criminal incidents allowed the plaintiffs to avoid the business owner's summary judgment motion. *Id.* The court reasoned that when considering the summary judgment motion, the evidence of prior criminal incidents was enough for the court to find that reasonable minds could differ as to what was reasonably foreseeable and thus a question of fact for the jury existed. *Id.* The court reasoned that the evidence of prior criminal incidents must be presented to the jury for a determination of the reasonableness of the business owner's security at the time the plaintiffs were attacked. *Id.*

248. *Isaacs v. Huntington Mem. Hosp.*, 695 P.2d 653 (Cal. 1985) (finding that the approach to duty which only recognizes a duty when prior crimes fit the substantial similarity requirements is contrary to public policy).

249. *Id.* at 658 (stating that "a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property"); *Shea v. Preservation Chicago, Inc.*, 565 N.E.2d 20, 25 (Ill. App. Ct. 1990). See also *Yelnosky*, *supra* note 13, at 905 (criticizing the strict views of prior incidents for denial of compensation to the first victim).

250. See *supra* notes 128-33, 182-86 and accompanying text.

251. See *supra* notes 119-27, 193-200 and accompanying text.

to improve their security measures before the first ATM patron becomes a victim of crime.

However, broadening the approach too far, like the totality of the circumstances approach, would place liability on banks based on nationwide crime statistics. An approach which recognizes that prior related incidents may establish foreseeability strikes the best balance between the narrow view of foreseeability under the no-duty and special circumstances approaches versus the overexpansive view under the totality of the circumstances approach. By allowing the jury to consider prior related incidents, the first ATM victim would be able to withstand summary judgment when there was evidence of criminal incidents on surrounding property or at nearby banks. However, by limiting the evidence to related incidents, plaintiffs would not be able to bring claims based solely on general ATM crime statistics.

In addition, a narrow approach to foreseeability and duty frustrates the public policy of preventing future harm.²⁵² If banks are allowed to wait until the frequency of criminal attacks increases before a duty is recognized, banks will have no incentive to provide adequate security measures, even when a bank knows dangerous conditions exist.²⁵³ Moreover, when there is a history of criminal activity on the premises, the bank, rather than the ATM patron, is in

252. *Isaacs v. Huntington Mem. Hosp.*, 695 P.2d at 658. A narrow view of a business owner's duty, which does not require business owners to prevent criminal attacks on their premises, has the effect of relieving business owners of their role in reducing the crime in society in general. See generally *Baylzer*, *supra* note 13, at 730, 750. In order for society to reduce crime, business owners must take steps to prevent crime. *Id.* The National Advisory Commission on Criminal Justice Standards and Goals, Community Crime Prevention Committee has concluded that in order for law enforcement to achieve its goal of crime reduction, citizens must care enough to get involved in the fight against crime. *Id.* at 730 n.14, 750 n.151. *Baylzer* argues that in order for the goal of reducing crime to materialize, private businesses must get involved since they hold the economic power in our nation. *Id.* at 750 n.151. By involving those citizens with the greatest amount of economic power and influence, the greatest reduction in crime will be produced. *Id.*

253. *Butler v. Acme Mkts., Inc.*, 445 A.2d 1141 (N.J. 1982) ("The proprietor of premises to which the public is invited for business purposes of the proprietor . . . owes a duty of reasonable care to those who enter the premises upon that invitation to provide a reasonably safe place to do that which is within the scope of the invitation."); Kevin J. O'Donnell, Comment, *Landlord Liability for Crime to Florida Tenants - The New Duty to Protect From Foreseeable Attack*, 11 FLA. ST. U. L. REV. 979, 985 (1984) (discussing that by imposing liability, courts would provide an economic incentive for landowners to upgrade security); see also *Yelnosky*, *supra* note 13, at 904-05 (discussing that a duty limited to special circumstances discourages property owners from investigating potential dangers and from implementing security measures because under the narrow theory of duty, the premise owner will escape liability as long as he or she remains ignorant of criminal activity).

the best position to protect against future crime.²⁵⁴ It is not unfair to require banks, who invite the public onto the premises for the bank's benefit, to ensure that the areas of invitation are safe, particularly when a history of persistent attacks exists.²⁵⁵ Typically, occurrence of prior criminal incidents is information uniquely within the premises owner's knowledge.²⁵⁶ Therefore, when a bank has the ability to control the security of the premises, the duty should fall on the bank to protect the unsuspecting ATM customer.²⁵⁷

Furthermore, requiring plaintiffs to meet an unattainably high standard of foreseeability, such as requiring prior criminal incidents to be exactly like the present crime or requiring proof that the bank knew the identity of the assailant and the location of the crime, creates such high standards that plaintiffs cannot withstand a bank's motion for summary judgment.²⁵⁸ This obstacle for ATM plaintiffs directly conflicts with the policy notions of corrective justice that underlie tort principles.²⁵⁹ The current narrow approach to foreseeability

254. *Butler*, 445 A.2d at 1147 (N.J. 1982) (holding that "the business invitor is in the best position to provide either warnings or adequate protection for its patrons when the risk of injury is prevalent under certain conditions, and because the public interest lies in providing a reasonably safe place for a patron to shop"); *Winn v. Holmes*, 299 P.2d 994, 995 (Cal. Ct. App. 1956) (stating that a premises owner's duty to protect invitees from harm is justified based on the fact that the owner usually has superior knowledge of an existing danger of which his invitees are unaware).

255. *Butler*, 445 A.2d at 1143 (referring to the appellate court's opinion of the case at 426 A.2d 521 (citations omitted)); *Socha v. Passino*, 306 N.W.2d 316-18 (Mich. Ct. App. 1981) (stating that a business invitee confers a benefit upon the invitor, thus a rigorous duty is placed on the invitor in exchange for the benefit conferred); PROSSER, *supra* note 16, at 420 (stating that an invitor may have an affirmative duty of care as a result of the economic benefit the invitor derives from the invitee).

256. *See Zacharias*, *supra* note 18, at 702-03 (stating that business invitores, rather than the invitees, have superior knowledge of specific dangers on or near their premises).

257. *See Yelnosky*, *supra* note 13, at 901-02, 910 (suggesting a number of options which premises owners could implement to reduce or prevent criminal activity on their property); *see generally* Kulwicki, *supra* note 13, at 262-65 (discussing the policy reasons in favor of placing the burden of providing adequate security to protect invitees).

258. *See Williams v. First Ala. Bank*, 545 So.2d 26 (Ala. 1989) (granting the defendant bank's summary judgment motion when the plaintiff presented evidence of two prior criminal acts on the premises); *Page v. American Nat'l Bank & Trust Co.*, 850 S.W.2d 133, 140 (Tenn. Ct. App. 1991) (dismissing the ATM crime victim's complaint finding the bank had no duty when the assailant could not be identified before the act); *Dyer v. Norstar Bank, N.A.*, 588 N.Y.S.2d 499 (N.Y. App. Div. 1992), *cert. denied*, 610 N.E.2d 390 (N.Y. 1993) (granting the bank's summary judgment motion because the court held that the bank had no duty to protect the plaintiff); *Popp v. Cash Station, Inc.*, 613 N.E.2d 1150, 1159 (Ill. App. Ct. 1992) (dismissing the plaintiff's complaint on the theory that the bank must be able to "identify precisely when or where such an attack may occur"); *see supra* notes 175-209 and accompanying text.

259. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 17 (1994) (stating that the basis for compensatory damages in tort cases is the traditional corrective justice argument that a plaintiff should be restored to his rightful position); *see Ernest J. Weinrib, The Care One Owes One's Neighbors: Corrective Justice*, 77 IOWA L. REV. 403, 409 (1992) (stating that tort victims should be restored because the wrongdoer is unjustly enriched and has gained what the victim has lost). The notion that tort victims deserve compensation stems back to early legal scholars such as

thwarts the policy that tort victims should not be left uncompensated for injuries caused by the wrongs of others.²⁶⁰

The purpose of tort law is to compensate individuals injured by another's wrongful conduct.²⁶¹ By compensating plaintiffs, society returns injured plaintiffs to their rightful position, from which they have been removed by the defendants' failure to meet the required standard of care.²⁶² Thus, basic tort principles support using a broader approach to assess a bank's duty in ATM crime cases. The prior related incidents approach would provide an attainable standard of foreseeability to ATM crime victims. Since a duty on banks to provide adequate protection against ATM crimes would be more readily recognized, banks would be encouraged to maintain adequate security.

Finally, the unique characteristics of the bank-ATM customer relationship justifies placing a higher degree of responsibility on the banking industry. The

Aristotle. *Id.* at 403. Based on Aristotle's account, corrective justice achieves fairness and equality by correcting the disturbance of natural equality caused by the defendant's wrongful infringement of the plaintiff's rights. *Id.* at 404. In addition, the need to compensate tort victims is supported by economists such as Richard Posner. LAYCOCK, *supra*, at 17. Posner advocates that by compensating victims, society encourages profitable activity by forcing law violators to take account of the harm they inflict, thereby as the liability increases the number of potential defendants will decrease. *Id.* (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.10 at 191 (4th ed. 1992)).

260. LAYCOCK, *supra* note 259, at 17.

261. PROSSER, *supra* note 16, at 6 (citing Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMPBELL L. REV. 238 (1944)). Prosser states that "the common thread woven into all torts is the idea of unreasonable interference with the interests of others" thus society seeks to compensate the victim as well as to discourage the socially harmful activity. *Id.* at 6-7; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 30 (1972) (stating that "the . . . purpose of civil liability for negligence is to compensate the victim . . .").

Compare George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 550 (1972). Fletcher presents a helpful analysis of a tort victims right to recovery. *Id.* Fletcher assesses the defendant's liability according to a fairness principle. *Id.* Under this analysis, the plaintiff should recover when the defendant's conduct subjects the plaintiff to more than his or her fair share of "background risks." *Id.* Fletcher states that background risks are the risks which each individual in society must bear without compensation. *Id.*; see generally Vern R. Walker, *The Concept of Baseline Risk in Tort Litigation*, 80 KY. L.J. 631, 633-34 (1992) (discussing how "normal risks," those inherent in everyday life, should be determined). However, Fletcher argues that when one individual suffers harm from risk over and above the background risks, the person is entitled to compensation. Fletcher, *supra*, at 550. Fletcher argues that each person in society has the right to security from the risk of harm. *Id.* Using John Rawls' principle of justice, Fletcher finds that each person has a right to an equal portion of this security and that within this amount, each individual deserves the maximum amount of security from the risk. *Id.* Therefore, tort victims are entitled to compensation when there is a disproportionate distribution of the risk of harm such that the victim has been subjected to a greater portion of risk than the rest of society. *Id.* at 550-51.

262. LAYCOCK, *supra* note 259, at 17; see PROSSER, *supra* note 16, at 236-37 (discussing the standard of care).

public's unique perception of banks justifies requiring banks to exercise a greater degree of care than that of ordinary business inviters.²⁶³ Due to the purpose and character of a bank, overseeing the public's transactions of money and providing for the safekeeping of the public's money, the public has a perception of trust and respect for a bank which differs from any other store or commercial premises.²⁶⁴ Therefore, bank customers, including ATM customers, generally assume that when they are on bank premises to transact business they are present in a safe and secure environment.²⁶⁵

In addition, the circumstances surrounding an ATM transaction often make crime particularly foreseeable.²⁶⁶ The function of the ATM itself, to serve bank customers after hours, exposes ATM customers to an increased risk of criminal attack.²⁶⁷ The fact that ATM crimes occur after normal banking hours when no other individuals are present, increases the likelihood that ATM patrons will be the victim of a third party crime.²⁶⁸

These unique circumstances generate a need to encourage banks to increase security measures to protect ATM patrons. Broadening the current approach to a bank's duty would give banks the needed incentive to improve precautionary measures at ATMs, before ATM crimes become more frequent.²⁶⁹ Recognizing that prior incidents on or near a bank's premises may result in a duty to protect patrons from third party attacks would encourage prophylactic measures as well as provide tort victims with the potential to redress their

263. *Stalzer v. European American Bank*, 448 N.Y.S.2d 631, 634-35 (N.Y. Civ. Ct. 1982) (finding that a bank's relationship with the public is different than the public's relationship with ordinary businesses, thus the bank is subject to a higher standard than that applied to ordinary commercial affairs).

264. *Id.* at 634 (stating that as a result of a bank's trustworthy public image, a bank should be held to a standard in compliance with this image).

265. *Id.* See also PROSSER, *supra* note 16, at 422. Placing a higher duty on a bank is also justified because of the implied representation of safety that exists. *Id.* Prosser discusses that placing a duty to protect on business inviters is justified based on a theory of implied representation. *Id.* When a business invitor, such as a bank, encourages others to enter the premises for the invitor's benefit, an implied assurance exists that the invitor has prepared the premises so that it is safe for those who enter for business purposes. *Id.* (citing to *Treadway v. Ebert Motor Co.*, 436 A.2d 994 (Pa. Super. Ct. 1981)).

The fact that the premises are held open to an invitee offers assurance to the invitee that the premises have been secured for his or her reception. RESTATEMENT, *supra* note 13, § 343A cmt. g.

266. See *supra* notes 57-67 (discussing the features of an ATM and parking lot which are attractive to crime).

267. See *supra* notes 59-60 and accompanying text.

268. BAI, *supra* note 10, at 38 (stating that the majority of ATM crimes occur between the evening hours of seven and midnight).

269. See Posner, *supra* note 261, at 40 (stating that increasing the liability of defendants as a class will encourage the class to take more safety precautions than if the class is never liable).

losses. In addition, a broader approach, under which the jury evaluates evidence of prior related incidents, would properly allocate the functions of judge and jury.

Under the proposed approach, a bank's duty would depend upon the foreseeability of the ATM crime. When the jury finds that the crime was not foreseeable, the bank would not have a duty to protect ATM patrons from third party crime. However, when foreseeability is established, a duty to protect is imposed. Even when a duty is found, liability would not be imposed until the jury assesses the individual interests involved through a balancing test. The balancing test would allow each ATM crime to be weighed according to its unique circumstances.

VI. PROPOSED TREATMENT OF ATM CRIME CASES

This Note advocates that courts should broaden the current approach used to analyze ATM crime cases. Rather than finding that banks have no-duty or only have a duty under special circumstances, courts should recognize that evidence of prior incidents related to the bank's premises may establish foreseeability of the present crime. The court should allow the jury to determine if the prior incidents establish foreseeability before the court determines the bank's duty. If the jury finds that the facts establish notice, the court should rule that a duty exists.

If a duty is found, the bank will not automatically be liable. Liability will depend upon the jury's determination of negligence. To evaluate a bank's liability, the jury should use a flexible balancing test which will balance the competing interest and take into account the unique facts of the case, thus allowing for a bank's ultimate liability for ATM crimes to be determined on a case-by-case basis. The following model demonstrates how a court and a jury should analyze an ATM case under a prior related incidents approach.

A. *Determining a Bank's Duty*

Based on the Restatement of Torts and existing case authority,²⁷⁰ a court should find that a bank has a duty to protect an ATM customer against criminal attack by third parties when such an attack is foreseeable.²⁷¹ When evidence of prior related criminal activity exists, whether the bank had notice becomes a

270. See *supra* notes 151, 222-30 and accompanying text.

271. See generally *supra* section III.B.3.

factual issue for the jury to resolve before the court rules on a bank's duty.²⁷² Through proper limiting instructions or through a special interrogatory, the court should direct the jury to evaluate the effect of the prior related incidents on the bank's ability to foresee ATM crime. The jury should be instructed to determine all factual questions bearing on foreseeability such as whether the prior incidents were close enough to the bank's premises to establish foreseeability or whether the nature of the prior incidents made the present crime foreseeable. If the jury finds that the prior related incidents did not make the present ATM crime foreseeable, the bank would not have a duty to protect the ATM patron against third party attack. In the alternative, if the jury determines that the incidents made the present ATM crime foreseeable, the bank would have a duty to protect the ATM patron.

B. Determining a Bank's Liability

If a duty is found to exist, the jury should continue its analysis and determine whether the bank was negligent.²⁷³ The court should instruct the jury that the general standard of conduct has been established as a matter of law, and that the jury should define the particular standard.²⁷⁴ In a negligence action, the general standard of care is the care which a reasonable person would exercise under like circumstances.²⁷⁵ The jury should then define what constitutes reasonable care under the particular circumstances and whether the bank's conduct met this standard.²⁷⁶ The court should explain to the jury that

272. The jury will determine the sufficiency of the evidence such as how close in proximity the crimes need to be to the bank or how many prior incidents are necessary to create notice. See generally *infra* section VI.B.

273. See *supra* note 29. The Restatement of Torts articulates negligence as

- (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or
- (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

RESTATEMENT, *supra* note 13, § 284.

274. Prosser, *supra* note 16, at 235-37 (stating that after the judge determines that a duty exists, the jury then fills in the details of the duty by defining what particular conduct is required to meet the duty).

275. Posner, *supra* note 261, at 38 (stating that the standard of care used to judge a defendant's conduct in a negligence action is that of an ordinary prudent man); RESTATEMENT, *supra* note 13, § 344 cmt. d (stating that "[a] possessor of land who holds it open to the public for entry for his business purposes" has a duty to exercise reasonable care to protect such visitors).

276. PROSSER, *supra* note 16, at 236; RESTATEMENT, *supra* note 13, § 328C. The Restatement articulates the functions of the jury. *Id.* The judge first declares the general standard of the defendant's legal duty to the jury in the form of an instruction. *Id.* § 328C cmt. b. The jury then fills in the broad general standard with the details of the particular standard. *Id.* Thus, in a negligence case, the judge articulates the general standard of conduct to be that of a reasonable man under like circumstances. *Id.* The jury then determines what the general standard of conduct requires in the case at hand, so as "to set a particular standard of its own within the general one."

the bank's conduct should be evaluated by balancing the potential burden of imposing a duty on the bank against the likelihood of the occurrence of an ATM crime and the gravity of the resulting harm.²⁷⁷ The judge should instruct the

Id. The jury's determination is said to be a determination of fact rather than of law, meaning that the determination is not a set rule, so that the outcome will be determined on a unique case-by-case basis. *Id.* See *Cohen v. Southland Corp.*, 203 Cal. Rptr. 572, 580 (Cal. Ct. App. 1984) (holding that the adequacy of a business invitor's security measures to protect invitees from assault or threatening behavior by third parties is a question of fact for the jury to determine).

In most instances, the standard set by the judge is a very general standard. HENDERSON, *supra* note 14, at 342. As a result, notwithstanding the court's limiting instructions, the jury has great freedom in assessing the negligence issue. *Id.* Henderson proposes that "it is only a slight exaggeration to assert that negligence in most cases is whatever the jury says it is." *Id.* The jury's findings of fact will determine whether the defendant failed to meet the standard of care set by the judge, that is, whether the defendant was negligent. *Id.* Negligence is labeled a question of fact, because "it is believed to be appropriate for the jury to play an important role in applying law to fact in these cases." *Id.*

A benefit of having a jury, rather than a judge, consider factual issues such as the sufficiency of safety measures, is that the jury brings their broad experiences and judgment as representatives of the community. Posner, *supra* note 261, at 51. Posner finds that in many situations, the jury will have a better understanding of the facts than a judge. *Id.* Posner states that the juries are more representative of tortfeasors and tort victims than judges and thus have a "better feel for the facts." *Id.* Entrusting the jurors with a large portion of the lawmaking function is necessary, because evaluating whether the facts constitute negligence requires a lay judgment. *Id.* at 52. Posner argues that the judgment required in negligence cases is that of individuals familiar with the various experiences of everyday life. *Id.* See also PROSSER, *supra* note 16, at 237 (stating that the jury is representative of the public and assesses the defendant's conduct according to what the community would require under the circumstances). Thus, the jury determines what type of warnings and precautions would have been sufficient to assure the safety of the injured plaintiff in the circumstances of the case. Posner, *supra* note 261, at 52.

277. *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (articulating Judge Learned Hand's analysis of a person's duty to prevent injuries which balances the three factors of gravity of the harm, the likelihood of the occurrence, and the burden on the defendant); *Iannelli v. Powers*, 498 N.Y.S.2d 377, 381-82 (N.Y. App. Div. 1986) (stating that a jury determines reasonableness by "taking into account such factors as, . . . the seriousness of the risk, the severity of potential injuries and the cost or burden imposed on the possessor by reason of each such precautionary measure."). Judge Hand states that a person's duty should be balanced in a formula using: (1) the probability that a certain conduct will occur; (2) the gravity of the resulting harm, if the conduct does occur; and (3) the burden of implementing adequate precautions to prevent the conduct. *Carroll Towing*, 159 F.2d at 173. Negligence is established when the burden of adequate precautions, "B," is less than or equal to the gravity of the harm, "L," multiplied by the probability, "P": $B < P \times L$. *Id.*; Posner, *supra* note 261, at 32 (supporting that Judge Learned Hand's balancing of the costs and benefits is essential for analysis of the liability involved in a negligence claim). Posner states that the jury applies Hand's formula to the facts within the limits of the judge's instructions. *Id.*

Judge Hand's formula is consistently used to support the argument that "the purpose of tort law is to maximize social utility: where the costs of accidents exceeds the costs of preventing them, the law will impose liability." *Fruit v. Allied Chem. Corp.*, 523 F. Supp. 975, 978 (E.D. Va. 1981) (stating that "scholars in the field [of torts] rely on Judge Learned Hand's classic statement of negligence . . ."); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 958 (7th Cir. 1982) (stating that "[t]he amount of care that a person ought to take is a function of the probability and magnitude

jury to evaluate each one of these factors based on the specific facts of the situation. The following model demonstrates how the circumstances weigh into the balance.

On one side of the balancing test, the gravity of the harm and the likelihood of its occurrence should be evaluated. To evaluate the gravity of the harm, the seriousness of the ATM victim's injury as well as the seriousness of prior incidents on or near the bank's premises will be significant. The gravity of the harm involved in ATM crimes will vary in the degree of seriousness, ranging from minor stabbings and assaults to murders and kidnappings.²⁷⁸ The more serious the ATM victim's injury, the heavier this factor should weigh. When a victim is the subject of a crime such as Douglas Lane's tragic killing,²⁷⁹ or the stabbing of the elderly man in New York,²⁸⁰ the gravity of the harm will weigh heavily in the balancing test. Likewise, as the seriousness of prior incidents on a bank's premises increases, so should the weight given to the gravity of the harm in the overall balancing test. In addition, the gravity of prior incidents near the bank's premises or in the community should be included, since crimes on neighboring property may put the bank on notice as to the possibility of criminal conduct on the bank's premises.²⁸¹ However, any general evidence, such as evidence of ATM crimes in another state, should be given little weight in the balancing test.²⁸² This limit would be necessary to avoid holding banks in low crime areas to the same standard as banks in high crime areas.²⁸³

of the harm that may occur if he does not take care."). The court reasoned that the probability and magnitude of the harm correspond to the foreseeability factor which limits a defendant's liability in negligence cases. *Id.* A defendant's assessment of the probability and magnitude of the potential harm will determine the amount of care he exercises. *Id.* Thus, balancing the probability and magnitude of the harm on a case-by-case basis is essential to evaluating a defendant's duty. *Id.*; PROSSER, *supra* note 16, at 170-71 (discussing the balancing test between the risk of harm and the likelihood of occurrence versus the utility of the conduct); *see also* Fletcher, *supra* note 261, at 542 (presenting a formula for assessing a defendant's liability in a negligence case which resembles Hand's balance).

278. *See supra* notes 62-65 and accompanying text.

279. *See supra* notes 1-6 and accompanying text.

280. *See supra* note 66 and accompanying text.

281. *See supra* notes 150-72, 214-30 and accompanying text (stating that evidence regarding the surrounding community is enough to create a jury question as to the defendant's notice).

282. General evidence, which is unrelated to the bank's premises, should not by itself be sufficient to establish foreseeability. However, if a plaintiff also had evidence of prior incidents related to the bank's premises, then the jury may consider the general evidence, since such evidence could provide background knowledge to the jury. The judge should instruct the jury that alone, this evidence is insufficient to support a finding of foreseeability.

283. For example, a bank in Wheatfield, Indiana would not be required to account for the crime occurring at an ATM in Chicago, but would be accountable for crime at another ATM in Wheatfield.

In assessing the likelihood of ATM crime, the unique features of each ATM location should be considered.²⁸⁴ Evaluation of the likelihood of occurrence will be a critical part of the balancing test, since crime is often a function of location.²⁸⁵ ATMs located in empty parking lots or remote areas could increase the likelihood of a criminal occurrence. Moreover, the surrounding neighborhood and geographic location of the ATM should be evaluated in the balancing test. A bank customer would be more likely to be the victim of an ATM crime in Chicago than in Wheatfield, Indiana.²⁸⁶ Also, all evidence of prior criminal incidents on the bank's premises would increase the likelihood of future crime and should be given more weight in the balancing test.²⁸⁷ A history of misconduct may lead a jury to conclude that a reasonable person should exercise care to protect invitees against the actions of third parties.²⁸⁸

The volume of transactions at an ATM should also be considered in the balancing test. The general likelihood of an ATM crime occurring has been estimated to be one crime per 3.5 million ATM transactions.²⁸⁹ While this number may appear relatively low, an ATM network which reports 300 million transactions a year would report an average of eighty-six crimes a year.²⁹⁰ As

284. See *supra* notes 41-60 and accompanying text.

285. See *supra* notes 57-60 and accompanying text (discussing the attractiveness of parking lots to criminals); Lipman, *supra* note 8, at 24 (reporting that an ATM "provides an electronic environment that is potentially fertile for criminal abuse"). Lipman states that the location of the ATM in the parking lots exposes customers to a "heightened risk of theft." *Id.*

286. For example, Los Angeles police report that there are six ATM robberies each day. Gilbert H. Deitch, *ATM Liability: Fast Cash, Fast Crime, Uncertain Law*, Trial, Oct. 1994, 34, 36 (citing Josh Meyer, *Safety Measures Questioned as ATM Robberies Increase*, L.A. TIMES, Nov. 18, 1991, at A1). Whereas Robert Gierman reported that there have been no criminal incidents at the ATM or on property near NBD's bank in Crown Point, Indiana. Gierman Interview, *supra* note 50.

287. See *Cohen v. Southland*, 203 Cal. Rptr. 572, 576-77 (Cal. Ct. App. 1984) (determining that future robberies were more likely in light of the history of prior robberies on the defendant's premises). The jury should consider the nature of these prior incidents as well. For instance, if the plaintiff was the victim of an armed robbery at an ATM, prior armed robberies may make the plaintiff's incident more likely than would a prior incident of loitering.

288. See RESTATEMENT, *supra* note 13, § 344 cmt. f (stating that past incidents may put an invitor on notice as to the potential of future harm); see *supra* note 225 and accompanying text.

289. Deitch, *supra* note 286, at 36 (citing Barry Schreiber, *The Future of ATM Security, SECURITY MGMT.*, Mar. 1994, at 18A); Rob Wright, *ATM have been Heralded for Easy Delivery of Services; Unfortunately, Thieves Find Them Just as Convenient*, AM. BANKER, Dec. 12, 1988, at 11; Barthel, *supra* note 67, at 10 (quoting an ATM expert to say that "a person's chances of being robbed after or during an ATM transaction are small"). But see Jeffrey Kutler, *BAI Survey Finds ATM Crimes Don't Fit the Stereotype*, AM. BANKER, May 11, 1987, at 19 (stating that in studying corporate crimes, "researchers must also be wary of under-reporting by organizations fearful of besmirching their public image").

290. Fioravante, *supra* note 52, at 17. Fioravante reported that in 1986, one network had 38 machines each averaging 67,000 transactions. *Id.* Thus, that network would have a total of 1.9 million transactions a year.

ATM customers increase their use of ATMs, the opportunities for them to become victims of an ATM crime increase proportionally. Thus, evidence that a bank had vigorously advertised, implemented unique features, offered customer bonuses, or used other techniques to spur customers to use an ATM should increase the weight given to the likelihood of occurrence.²⁹¹

The gravity of the harm and the likelihood of occurrence should be weighed against the bank's burden of increasing security measures to protect ATM patrons.²⁹² The burden will vary among banks since each ATM crime will be different. For this reason, expert testimony on available security would provide the jury with knowledge of the types of security measures²⁹³ and their effectiveness in the circumstances.²⁹⁴ In addition, evidence showing the costs of implementing security measures will be essential to a jury's evaluation of a bank's burden.²⁹⁵ The jury should consider the cost and feasibility of implementing minimal security measures such as additional lighting, reflective

291. PROSSER, *supra* note 16, at 419-20 (stating that advertising and encouraging customers to come serves to generate a duty on a business inventor); *see also supra* notes 47-56 and accompanying text.

292. At present, protective measures are installed primarily to protect the bank itself from ATM theft, rather than to protect the ATM customer. Gierman Interview, *supra* note 50 (stating that when a new ATM is installed, the bank's main concern is securing the ATM from theft rather than providing security for the ATM customer). *See also* BAI, *supra* note 10, at 41 (reporting that historically, ATM site selection was primarily "a marketing decision"). BAI reports that in the past, banks typically chose sites which increased market penetration, customer convenience, customer use, and banking services. *Id.* However, state statutes now place regulations on the sites of new ATMs. *See supra* notes 71-80.

293. *See* BAI, *supra* note 10, at 37. BAI reported in 1988 that the available security measures used by banks and their rate of use included: locked cash canisters, written ATM security standards, law enforcement liaison regarding ATM-related crimes, transaction cameras, security enclosures at off-premises ATMs, surveillance cameras, periodic customer ATM security education, and customer activated emergency alarms. *Id.* *See also* Zacharias, *supra* note 18, at 747 n.256 (stating that the range of security measures includes warnings to customers, providing surveillance cameras, installing bullet proof glass, providing emergency phones, and hiring security guards).

294. *See* Yelnosky, *supra* note 13, at 902 (stating that "court[s] should recognize, or at least admit evidence tending to show, that security measures, if properly implemented, can reduce criminal activity by eliminating criminal opportunity"); Zacharias, *supra* note 18, at 747 n.256 (stating that security cameras deter robbers).

295. *But see* Miles, *supra* note 7, at 208-09, reporting that in the past, servicing fees were thought to be the result of requiring banks to assume a burden to implement security at ATMs. However, the fact that banks are levying various transaction fees as a means of increasing revenues weakens this argument. *See* Barthel, *supra* note 53, at 1 (discussing the use of fees in the banking industry); Heady, *supra* note 56, at 11. Furthermore, even if banks did pass on the burden to the customer in the form of raised fees, customers would likely be willing to pay a few cents more for added security. *See* Cohen v. Southland, 203 Cal. Rptr. 572, 579 (Cal. Ct. App. 1984).

mirrors, and video cameras.²⁹⁶ In some circumstances, the jury may find that security devices other than these minimal measures are necessary, such as in downtown Chicago, where additional measures such as glass enclosures or locking devices on ATM entrances may be needed to adequately protect ATM customers.²⁹⁷ Though locking devices on doors are inexpensive,²⁹⁸ glass enclosures are expensive and may overburden smaller banks.²⁹⁹ However, in spite of the expense, the jury may find that the burden of implementing a glass enclosure is outweighed by the gravity of the harm and likelihood of occurrence.

In evaluating the potential burden to a bank, the jury should also consider the off-setting benefits which the bank derives from the ATM. The benefits a bank derives will affect the potential burden on a bank as well as reflect upon the bank's willingness to bear the burden.³⁰⁰ Much of the derived benefits are economic in nature.³⁰¹ For example, banks profit from service fees charged

296. Gierman reports that these minimal security measures are inexpensive to implement. Gierman Interview, *supra* note 50. A number of these minimal security measures are now mandated by state statute. See *supra* notes 71-80.

In addition to measures which physically secure the ATM, the jury should consider the burden of alternative precautionary measures such as warnings. The burden of requiring banks to mail safety precautions, such as a one time safety instruction to the ATM user, would weigh little because banks already mail monthly statements and additional information to their customers. Gierman Interview, *supra*.

297. See *supra* note 77 (showing that the requirements of the New York Administrative Code require enclosed ATMs and locking devices on the enclosures at all New York City ATMs). However, failure to have such security measures is not negligence per se and only results in a fine to the bank. *Id.*

298. Gierman Interview, *supra* note 50.

299. Enclosing a free standing ATM can cost a bank as much as 50,000 to 70,000 dollars. *Id.*

300. The profit a bank derives from an ATM will affect the extent of the burden to the bank, because the the cost of implementing security measures will be related to the benefit derived from the ATM. Theoretically, implementing costly security devices would be a greater burden to a bank which derives a meager income from the ATM than to a bank which derives a substantial income from an ATM. If a bank profited \$500,000 a year from ATM business, asking the bank to implement \$15,000 in safety measures would not pose the same burden as requiring a bank which profits only \$50,000 a year from an ATM to bear the same cost. Thus, banks gaining a large profit from ATMs should be better suited financially to bear the cost of protecting the patrons from whom the benefit is derived.

301. The banking industry is deriving considerable profit from ATMs. See Miles, *supra* note 7, at 171 n.2. Past statistics show that in 1981, the cost of transacting an electronic deposit was seven cents as compared to 59 cents for a check deposited by mail. *Id.*

A human teller can handle up to 200 transactions a day, works 30 hours a week, gets a salary anywhere from \$8,900 to \$20,000 a year, plus fringe benefits, gets coffee breaks, a vacation and sick time.

In contrast, an automated teller machine can handle 2,000 transactions a day, works 168 hours a week, costs about \$22,000 a year to run, and does not take coffee breaks or vacations. Except for occasional breakdowns, it does not get sick. *Id.* (quoting N.Y. TIMES, Apr. 21, 1983, at D6). ATMs draw additional customers and depositors to banks thereby increasing the bank's profits. *Id.* Miles reports that after Citicorp installed an ATM, its profits increased due to the fact that Citicorp's

for a customer's use of another bank's ATM or for overdrafts.³⁰² The amount of income derived and benefit gained from an ATM will vary among banks,³⁰³ therefore varying the resulting burden on each bank. Banks also benefit by being able to conduct business twenty-four hours a day without the expense of remaining open.³⁰⁴ Thus, the burden and off-setting benefits of each case should be evaluated in the balancing test.

In assessing the burden to banks, the social utility of the ATM should also be evaluated.³⁰⁵ A concern of imposing a duty to protect against third party crime is whether the resulting burden will cause the demise of socially useful or necessary conduct.³⁰⁶ When an activity is of great social value, society will tolerate a greater risk of harm in order to retain the benefits of the activity.³⁰⁷ The social benefit of the ATM service is mainly convenience to bank customers.³⁰⁸ The jury may find that mere convenience is not enough to

share of deposits in the New York metropolitan area rose from 4.4% in 1977 to 9.6% in June, 1982. *Id.* See also PROSSER, *supra* note 16, at 420 (stating that a pecuniary benefit to the possessor of land serves to generate a duty on a possessor of land).

302. Gierman Interview, *supra* note 50. Mr. Gierman stated that the profit from a branch site was generally less than from an off-site ATM. The large number of foreign customers using off-site ATMs generates large profits for the bank due to transaction fees. *Id.* However, this profit is reduced due to dataline costs and servicing costs of paying a third party to maintain the ATM. *Id.*

303. See *supra* notes 54-56 and accompanying text.

304. Fioravante, *supra* note 52, at 17 (stating that ATMs may not be as profitable for banks which run off a mainframe and require a third party to service). *But see* Gierman Interview, *supra* note 50 (stating that the expected economic benefit of decreasing bank personnel has not materialized for NBD's banks). Mr. Gierman also stated that the primary benefits of ATMs in smaller, rural towns were derived by the customer in convenience, rather than by the bank. *Id.*

305. PROSSER, *supra* note 16, at 170-71 (stating that the social value of the conduct in question is a key factor in the balancing test). Negligence is established when the defendant's actions create an unreasonable risk of harm that society is unwilling to tolerate in light of the benefits gained from the activity. HENDERSON, *supra* note 14, at 319.

306. PROSSER, *supra* note 16, at 170-71.

307. *Id.* at 171. Prosser explains that society will tolerate certain dangerous conduct if the social value of the conduct is great. *Id.* When the public interest in the defendant's conduct is very low, there will be little justification for permitting dangerous conduct. *Id.* Customers as well as banks are showing that they can afford to go without the convenience of twenty-four hour banking. See Huang, *supra* note 8, at 7 (quoting one ATM customer as saying that he would not go to an ATM anymore due to the reports of robberies and assaults); see also Karen Gullo, *Banks Limiting Hours at ATMs*, citing POST-TRIB., Oct. 29, 1994, at B4 (reporting that in light of safety considerations, some banks have started restricting hours; however, the number of these banks doing so is less than 1% of the country's 95,000 ATMs); See Wright, *supra* note 289, at 11 (reporting that some banks are closing ATMs in high crime districts at night).

308. Gierman Interview, *supra* note 50. See also Deitch, *supra* note 286, at 34 (stating that bank customers want the instant gratification of twenty-four hour access to bank accounts); Lipman, *supra* note 8, at 24 (reporting that banks hope to increase the convenience of ATMs by selling theater tickets and lottery tickets); Miles, *supra* note 7, at 171 (stating that ATMs have brought considerable convenience to bank customers).

Included in the convenience of the ATMs are the accessible locations in which they are placed.

justify the risk of ATM crime and may require the bank to bear the burden of implementing reasonable security measures.

After completing the balancing test, the jury should be instructed that, if it finds that the burden on the bank and the social utility of the ATM service outweigh the likelihood and the gravity of the harm, then it should find that the defendant's actions were reasonable. Therefore, the bank would not have breached its duty to protect the plaintiff. In the alternative, if the jury concludes that the likelihood and the gravity of the harm outweigh the burden on the bank and the social utility, then it should find that the bank breached its duty to the ATM user. Therefore, the bank would be liable.

Although the proposed approach entrusts the jury with a great deal of discretion, courts retain the power to remedy any potential abuse of discretion. Should the court find that a jury abused its discretion, the court may direct a verdict in favor of the bank, order a judgment notwithstanding the verdict,³⁰⁹ or order a new trial.³¹⁰ In addition, if the court finds that the bank failed to comply with its duty to the ATM user, but finds that the jury's assessment of damages is excessive, the court may reduce the plaintiff's award.³¹¹

Imposing a duty on banks to implement and improve safety measures at ATMs will have a positive outcome for banks. Voluntarily installing security measures should serve as a mitigating factor or as prima facie evidence that the ATM operator provided adequate security measures.³¹² Thus, the bank could avoid costly litigation. Further, banks that install security measures will benefit by gaining customer support for showing an interest in their welfare, and creating a positive image which could prove to be a useful marketing device for the bank.³¹³

Fioravante, *supra* note 52, at 17 (quoting a director of First National Bank of Commerce who states that the ATM provides the customer with the convenience of twenty-four hour access and useful locations); Lipman, *supra* note 8, at 24 (reporting that the parking lot location provides customers with easy access).

309. See generally FRIEDENTHAL, *supra* note 246, at 540-52 (discussing the judges' ability to use directed verdicts and judgments notwithstanding the verdict to control the jury).

310. *Id.* at 552-60 (discussing that a new trial motion gives a judge the opportunity to correct errors).

311. Remittitur is the procedure by which trial and appellate judges may reduce a jury verdict. LAYCOCK, *supra* note 259, at 187.

312. See ILL. MUNICIPAL CODE § 4-305-20 (1994), *supra* note 79.

313. See Barthel, *supra* note 67, at 10.

VII. CONCLUSION

In the past, courts have adopted a narrow approach to assess a bank's duty in ATM crime cases. Under this narrow approach, courts have set rigid limits on foreseeability. Courts have conditioned foreseeability upon special circumstances and have created high standards of foreseeability. The current approach also improperly limits foreseeability. This approach has allowed judges to set the standards for foreseeability. As a result, the judge has encroached on the function of the jury. This result contradicts both public policy and basic tort principles. Courts should broaden the current approach to recognize that in some situations ATM crimes may be foreseeable and that in these situations banks should have a duty to protect ATM patrons.

Courts should use an approach which recognizes that evidence of prior incidents related to the bank's premises may establish foreseeability and ultimately duty. Under the approach suggested by this Note, the sufficiency of prior related incidents to establish foreseeability of the present crime will be determined by the jury. Before the judge rules on the issue of duty, the jury will evaluate the prior incidents and make the factual findings necessary to determine foreseeability. A duty will be imposed only when the jury finds that the bank should have foreseen the ATM crime. Even if a duty is found, however, liability will not automatically follow. The jury will then determine whether the bank is liable by using a flexible balancing test which evaluates the unique circumstances of the crime and the competing interests involved. The proposed approach will allow courts to prevent banks from being unduly burdened while still encouraging safety at ATMs.

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