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Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises

B. A. Glesner

LANDLORDS AS COPS: TORT, NUISANCE & FORFEITURE STANDARDS IMPOSING LIABILITY ON LANDLORDS FOR CRIME ON THE PREMISES

B. A. Glesner[*]

The author undertakes an exhaustive review of landlord liability and the trend toward broadening landlord liability for criminal activity on rental property. In particular, she reviews laws penalizing landlords through forfeiture of such property. Professor Glesner also considers the philosophical shift that has accompanied these legal developments. She concludes that the penalties imposed on landlords are an inappropriate and ineffective response to crime control, and she highlights alternatives to this emerging practice which forces landlords to act like cops.

INTRODUCTION

In the United States, fear has reached epidemic proportions. Crime rates continue to rise.[1] Reports of random violence in-

* Assoc. Prof. of Law, Univ. of Missouri, Kansas City. My thanks to Carolyn Rowe for her outstanding research and editorial assistance; James Leslie and Nancy Anderson for their research assistance in the early stages of the article; and Nancy Levit for her thoughtful comments on the tort analysis. Errors are nobody's fault but my own.

1. John McCormick & Bill Turque, *Big Crimes, Small Cities*, NEWSWEEK, June 10, 1991, at 16 (noting a 16 percent rise in violent crimes in cities with populations of 500,000 to 1 million in 1990); Tom Morganthau et al., *The War at Home: How to Battle Crime*, NEWSWEEK, Mar. 25, 1991, at 35 ("At least 19 U.S. cities eclipsed their previous

creasingly dominate the daily news.[2] A war has been declared against crime in general and drugs in particular.[3] Congress has considered and passed various pieces of legislation aimed at controlling this criminal epidemic[4] and the Supreme Court has pronounced new standards of criminal justice designed to increase the efficiency of law enforcement.[5] As a result, more people are incar-

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records for homicide last year, and Senate experts estimate that 23,200 Americans—a bleak new high for the nation as a whole — were murdered in 1990."); Gary Spencer, *Community Courts, Lay Judges Urged, OCA Administrator's Strategy to Fight Crime*, N.Y.L.J., Sept. 27, 1990, at 1 (confirming that " the reported crime rate continues to rise, as do arrest rates, indictment rates, and jail and prison populations in many places").

But see Gene Koretz, *Crime May Not be as Bad as the Numbers Make it Look*, BUSINESS WEEK, Mar. 18, 1991, at 20 (citing Bureau of Justice statistics based on public reports of crime showing "no clear trend in violent crimes from 1973 to 1981, an actual decline in crime rates during most of the 1980s, and an apparent pickup in recent years but with violence still below the levels recorded in the 1970s").

2. *See, e.g.*, Sonsyrea Tate & Michael Cromwell, *Drive-by Shooting Wounds 5 Pupils*, THE WASHINGTON TIMES, Dec. 21, 1990, at A1 (four adolescents and a six year old injured in drive-by shooting on their way home from school); Judith Gaines, *Shots at Houses Hit Neighborhood's Gut*, BOSTON GLOBE, Dec. 12, 1990 at 36 ("nine drive-by shootings have not injured anyone yet in a neighborhood area that has seen a rash of 'house shootings'"); McCormick & Turque, *supra* note 1, at 16 ("'The level of cruelty in street crime is definitely rising — and so is the level of apathy, says Minneapolis Police Lt. Robert Collins. 'People just want this to go away.'").

Especially disturbing is the increasing violence among young people. "We have growing numbers of kids settling trivial disputes with deadly force [In Jacksonville, Florida, a] sheriff's department that arrested two or three juvenile killers each year captured 12 in 1989 — and 26 in 1990." McCormick & Turque, *supra* note 1, at 18-19.

3. *See* Morganthau, *supra* note 1.

4. *See, e.g.*, Gwen Infil, *Broad, Tough Anti-Crime Measure Is Easily Approved by the Senate*, N.Y. TIMES, July 12, 1991, at A1 (describing a crime bill which allows the states to impose the death penalty for a broad range of federal offenses, limits the process of legal appeals for death row inmates and introduces "good-faith" exceptions to current restrictions on the use of evidence by police and prosecutors); Tom Watson, *Obscure Provisions in Bush's Crime Bill Stir Debate*, N.J.L.J., June 13, 1991, at 4 (exploring defense attorneys' and civil libertarians' concerns over a bill which broadens access to juvenile records); Garry Sturgess, *Mandatory Minimum Sentences Under Attack*, N.J.L.J., June 13, 1991, at 11 (describing Congress' serious consideration of a layer of mandatory minimum sentences for violations of federal drug laws).

5. *See, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546 (1991) (holding that inmate lost the ability to bring a federal habeas corpus petition by failing to appeal in state court); Florida v. Bostick, 111 S. Ct. 2382 (1991) (holding that police officers' request to search a bus passenger's luggage was not inherently coercive but must be viewed under the "totality of circumstances" test); County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (permitting persons arrested without a warrant to be imprisoned for up to 48 hours before a hearing to determine whether the arrest was proper); California v. Hodari D., 111 S. Ct. 1547 (1991) (holding drugs or evidence discarded by a fleeing suspect admissible even though police may not have had reasonable suspicion to initiate the chase); McClesky v. Zant, 111 S. Ct. 1454 (1991) (limiting the availability of successive habeas corpus petitions); Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (holding that the use of

cerated in the United States than in any other industrialized nation.[6] Moreover, while most employment sectors are languishing in the current recession, positions in the law enforcement and security industries are growing.[7]

Notwithstanding the devotion of time and resources to the problem of urban crime, the statistics continue to worsen and the fear continues to grow One response has been to distribute the burden of fighting crime among the citizenry From drug testing in the work place[8] to "America's Most Wanted" on television,[9] American citizens have become an integral part of the process of investigating and apprehending criminals.[10]

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a coerced confession in a criminal trial does not automatically warrant reversal).

6. *U.S. Has Highest Rate of Imprisonment in World*, N.Y. TIMES, Jan. 7, 1991, at A14 (specifically noting that the United States' incarceration rate was higher than those of both South Africa and Soviet Union throughout the last decade); Morganthau, *supra* note 1, at 36 (reporting that 1.1 million Americans are currently imprisoned, a national incarceration rate of 426 inmates per 100,000 persons, and claiming that "America is on a punishment binge"); Koretz, *supra* note 1, at 20 (noting that, since 1980, the American prison population has doubled to more than 1 million and the bill for correctional systems has tripled to well over $22 billion).

7. Private security and private investigation services are currently "one of the country's true growth industries." Herb Robinson, *Growing Need to Regulate 'Rent-A-Cops'*, SEATTLE TIMES, Mar. 9, 1990, at A10; *see also* Caryn E. Wiener, *Small Business Hired Guns; Merchants Turning to Private Security*, NEWSDAY, Mar. 18, 1990, at 3 (business opportunities for private security services increasing); Tom Locke, *Alarm Industry Called Cable TV Biz of the '90s*, 41 DENVER BUS. J., Sept. 10, 1990, § 1, at 1 (number of households with alarm systems growing from 10.5 million in 1988 to an expected 17.5 million by 1992); Wes Smith, *Jeepers Peepers*, CHICAGO TRIB., July 17, 1989, at 1 (describing growth of industries specializing in the installation or detection of secret monitoring equipment).

8. *See* Steven O. Todd, *Employee Drug Testing — Issues Facing Private Sector Employers*, 65 N.C. L. REV. 832, 832 (1987) (noting that more than 25% of American Fortune 500 companies have implemented drug testing programs); Philip Shenon, *Some G.I.'s in Gulf Vanquish an Old Foe: Drink or Drugs*, N.Y. TIMES, Feb. 18, 1991, at A1 (stating that "[t]he Defense Department requires troops to undergo routine drug tests"); *For New Year, New Laws and Taxes*, N.Y. TIMES, Jan. 1, 1991, at A10 (reporting a new Maryland law which permits vocational licensing boards to suspend licensees convicted of drug violations and to condition retention of business licenses on the implementation of drug testing or treatment programs).

9. Both the Fox network ("Fox") and the National Broadcast Company ("NBC") air programs that reenact unsolved crimes and ask viewers to call with information regarding the crimes. A glitzier television version of post office FBI posters, the Fox program, "America's Most Wanted," attracts about 14.8 million viewers each week. *See* Kyle Chadwick, *Schlock that Works; America's Most Wanted*, AM. LAW., July/Aug. 1990, at 83-84. The Federal Bureau of Investigation, U.S. Marshals Service, Drug Enforcement Administration, U.S. Customs Service and state and local police agencies now routinely refer unsolved cases to these programs. *Id.* at 85.

10. *See, e.g.*, Melinda Beck et al., *Video Vigilantes*, NEWSWEEK, July 22, 1991, at 42,

While many citizens participate because of their interest in public service or community involvement, some citizens' involvement is motivated by legal rules that provide strong incentives for policing others. For example, legal standards that place landlords at risk of being held liable for failing to adequately control criminal activity on leased property provide strong incentives for landlords to become actively involved in the war on crime. Landlords have been increasingly exposed to liability, both civil and criminal, for the criminal activities occurring on their properties.[11] This article will explore that liability under a variety of theories.

Section One discusses the development of tort standards that increase landlord responsibility for tenant safety These legal standards have evolved from narrow exceptions, to a general rule of immunity, to a broad duty of care. This evolution signifies a dramatic shift in the landlord's common law tort liability and provides the foundation for reconceptualizing the landlord's overall responsibility for criminal activities on leased premises.

Section Two explores three legal doctrines that impose a duty on the landlord not only to protect, but also to police tenants. First, the focus rests upon a landlord's common law tort duty to protect tenants from one another. Second, this section discusses the use of public nuisance statutes as devices for imposing private duties of crime control.[12] Unlike tort nuisance claims, these nuisance statutes may impose either criminal or civil liability on landlords for tenants' criminal activities. Enforcement of these standards may force the landlord to surrender control of their property to the state.

Third, this section addresses the controversial and increasing

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44 (discussing citizens' use of video cameras to apprehend criminals or to publicize criminal activities); Karen Freifeld, *Police, 200 Execs Join to Fight Drugs*, NEWSDAY, Feb. 27, 1991, at 46 (announcing the New York City Police Department's new public-private sector initiative to "increase communication and coordination between the corporate and police worlds").

11. Notably, public housing regulations have recently been altered to promote eviction of drug users and sellers from public housing. *See* Lisa Weil, Current Topics, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161 (1991) (describing recent problems in drug trafficking and abuse in public housing projects and criticizing past congressional efforts); David B. Bryson and Roberta L. Youmans, *Crime, Drugs and Subsidized Housing*, 24 CLEARINGHOUSE REV. 435 (1990) (surveying proposed strategies for combatting the drug problems in public housing projects). However, because these regulations apply only to government subsidized housing, they are not dealt with herein.

12. See *infra* text accompanying notes 190-246 (summarizing the differences between private and public nuisance actions in the context of landlord liability).

use of state and federal forfeiture statutes to hold landlords responsible for tenant conduct. This section focusses on the scienter requirements under which landlords may lose their property due to tenants' illegal conduct. Despite a great deal of scholarly debate about the constitutionality of these statutes, these provisions, along with their public nuisance law cousins, are enthusiastically embraced by state and local law enforcement agencies.

Section Three posits that these changes in landlord-tenant law represent a shift from individualist to communalist standards, reflecting inherent tensions between fault and responsibility, freedom and security This section explores the rhetoric of the courts and legislatures effectuating this ideological shift.

Finally, Section Four evaluates the current standards' probable effectiveness and overall social utility Specifically, this section questions the underlying assumption that landlords can be induced to control criminal activity on leased premises by the imposition of affirmative incentives.

In conclusion, this article rejects the assumption that increased liability standards provide incentives for increased control by landlords. The article finds this assumption to be legally and practically faulty for several reasons. First, from the landlord's perspective, the utility of these standards is doubtful. Practical enforcement methods would encourage landlords to violate other standards designed to protect tenants from discrimination, invasion of privacy and negligent maintenance. Further, the increased costs of heightened regulation is likely to reduce the availability of quality, affordable rental housing.

Second, from legal and societal perspectives, the assumption that these increased standards provide effective incentives entails costs in itself. While the new standards may increase the acceptability of hidden, private enforcement costs, little evidence suggests that they will actually decrease crime. Moreover, while these reactive standards create an image of effective crime control, they distract the community from more effective uses of tort, nuisance and criminal laws in the prevention of crime.[13] While these stan-

13. Some commentators argue that legal standards should be geared toward reinforcing other aspects of community life. For example, some commentators assert that "crime rates rise when social controls — the family, the church, the neighborhood, and all the invisible bonds of a coherent community — break down '[W]here you find transition, mobility, rapid social change and a more transient population you also find higher crime rates.'" Morganthau et al., *supra* note 1, at 36 (quoting Douglas McDonald, a senior social scientist at Abt Associates, a policy-research and consulting firm located in

dards seem to enhance important community involvement, the growth of community is an organic process which must be facilitated through nurturing, not intimidation or threats.[14]

I. THE DUTY TO PROTECT TENANTS

In the past thirty years, landlord tort liability has undergone a drastic metamorphosis.[15] Courts have expanded common law warranty and statutory standards in an effort to improve the quality of residential housing,[16] particularly low-income housing.[17] As a re-

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Cambridge, Massachusetts).

14. There is, of course, considerable disagreement as to whether the law is following or leading in this regard. On one hand, various courts and commentators reason that the law rightly follows the legal standards established by modern society. *See, e.g.*, Green v. Superior Court, 517 P.2d 1168, 1184 (Cal. 1974) (asserting that judges "do not exercise a novel prerogative, but merely follow the well-established duty of common law courts to reflect contemporary social values and ethics"); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L. REV. 775 (1991) (arguing that, in the context of landlord-tenant laws, courts are changing legal rules and shifting risks to conform to common-sense expectations based on community values).

On the other hand, some commentators reason that the law must affirmatively shape the appropriate community standards. For example, one scholar asserts that the "loss of social adhesive" and the "breakdown in sources of personal support once provided by tightly structured communities and extended families" must be recognized by the law. MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY 70 (1977). Specifically, where "vital personal interests" are involved, the imposition of "broadly defined duties" would help to counteract "[t]he dislocations of modern life." *Id.* at 69-72.

15. *See generally* Olin L. Browder, *The Taming of A Duty — The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982) (discussing recent changes in landlord-tenant law and advocating further extensions into tort law).

16. Since the courts' objective has been to improve the quality of available housing, the development of tort liability has primarily focused on the residential setting. The allocation of responsibility for maintaining rental property in a commercial setting often differs significantly from a residential setting. Based on the assumption that market forces are more suited to allocating burdens in a commercial setting, courts have been reluctant to interfere in commercial transactions. As a result, many courts apply a lower standard of security for commercial buildings. *See, e.g.*, Czech v. Aspen Indus. Ctr., 368 A.2d 938, 939 (N.J. Super. Ct. 1976), *cert. denied*, 372 A.2d 313 (N.J. 1977) (distinguishing commercial from residential premises in terms of fairness and public interest).

Nonetheless, some courts steadfastly apply standards similar to those imposed in the residential setting, without regard to the differences between residential and commercial leases. *See, e.g.*, Green Co. v. Divincenzo, 432 So. 2d 86 (Fla. Dist. Ct. App. 1983); Rowe v. State Bank of Lombard, 531 N.E.2d 1358 (Ill. 1988); Richmond Medical Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988).

17. Of particular importance to this development was the growth of the implied warranty of habitability doctrine. First developed in *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), this doctrine has been adopted by statute or common law in an overwhelming majority of states. See *Pugh v. Holmes*,

sult, in almost every jurisdiction, courts impose on landlords a duty of care relating to the condition of leased residential premises. Moreover, the scope of this duty has been expanded from its initial focus on the physical condition of the premises to its current concern with overall residential safety

Landlord tort liability for the condition of leased premises represents only a subset of a broader category of premises liability doctrines.[18] The current state of landlord liability is but one point in a slowly evolving area of law. Early common law bestowed immunity on landlords for the condition of their premises based on the rationale that the landlord-tenant relationship was considered to be one of strangers,[19] a relationship entailing no legal duty of protection.[20]

Initially, exceptions to this general rule of immunity derived from the landlord's superior knowledge of or ability to maintain the premises' structural integrity One exception provides landlord liability for injuries caused by defects in the common premises.[21]

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405 A.2d 897, 901 n.2 (Pa. 1979), for a comprehensive listing of cases and statutes from the 40 jurisdictions which have adopted the doctrine. See also UNIF. RESIDENTIAL LANDLORD AND TENANT ACT §§ 1-6.104, 7B U.L.A. 427-508 (1985), which has been adopted in a number of jurisdictions and which establishes criteria for placing and maintaining the premises in a habitable condition.

18. *See generally* JOSEPH A. PAGE, THE LAW OF PREMISES LIABILITY 193-253 (2d ed. 1988) (exploring the entire concept of premises liability and the narrower category of landlord liability).

19. In the words of the Michigan Supreme Court, "[a] tenant may rent tumble-down property if he wishes and if it does in fact tumble down during his occupancy, the landlord, without more, is not liable." Awad v. McColgan, 98 N.W.2d 571, 573 (Mich. 1959). *Accord* Friedman v. Le Noir, 241 P.2d 779 (Ariz. 1952) (noting "it to be generally the law that in the absence of an agreement to the contrary the lessor is not obligated to make repairs upon demised premises or to keep them in repair during the term of the lease"); Divines v. Dickinson, 174 N.W. 8 (Iowa 1919) (recognizing that "[t]he law is well settled that, in the absence of a covenant or agreement by the landlord to make repairs or maintain the leased premises in a safe and suitable condition, for the occupancy and use of the tenant, he is not bound to do so"); Irish v. Rosenbaum Co., 34 A.2d 486 (Pa. 1943) (stating that "[i]t is well settled in this Commonwealth that no implied covenant rises out of the relationship of landlord and tenant which requires the landlord to repair"); *see also* Lawrence H. Eldredge, *Landlord's Tort Liability for Disrepair*, 84 U. PA. L. REV. 467 (1936) (discussing the liability of a landlord for injuries caused by a pre-existing condition on the leased site where the landlord has not agreed to make repairs and where the condition was present at the time the tenant took possession); Raymond H. Harknder, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260 (1928) (explaining that landlord-tenant law in 1928 followed the general precepts of *caveat emptor*).

20. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 375 (5th ed. 1984) (noting the law's consistent refusal to impose a duty to rescue).

21. *See id.* at 440.

A second exception arises if the landlord knows of a latent defect in the premises but does not disclose or remedy that defect.[22] A third exception provides that if a landlord undertakes repairs on the premises, even within areas exclusively controlled by the tenant, the landlord may be liable for injuries resulting from negligence in making the repairs.[23]

In some jurisdictions, only these categorical exceptions remove landlord immunity.[24] Other jurisdictions take a broader approach, using general negligence doctrine to allocate risk. Under this approach, the landlord's liability is determined by balancing the foreseeability and reasonableness of the risk of injury against the ability of the landlord to reduce that risk.[25]

Tenants have offered a variety of theories to justify landlord liability in tort for third party criminal activities, including defenses based on constructive eviction[26] and implied warranty of habitabil-

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22. *See, e.g.*, Marsh v. Bliss Realty, Inc., 195 A.2d 331 (R.I. 1963) (reciting the well-settled rule that "the landlord is liable in tort where the proximate cause of the tenant's injury arises out of a latent defect which was known to the landlord at the time of the letting and was not made known by him to the tenant"); Perkins v. Marsh, 37 P.2d 689 (Wash. 1934) (holding that a landlord's failure to disclose that a basement had the tendency to flood constituted fraud and that the landlord had a duty to disclose concealed defects which are known to the landlord but cannot be discovered by a tenant's examination of the premises); ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 301-02 n.2 (1984) (noting that nondisclosure of "a known but 'latent' defect that creates an unreasonable risk of harm to the tenant might be deemed a species of 'fraud' that would justify the tenant in 'rescinding or setting aside the lease when he discovers the defect").

23. *See generally* KEETON et al., *supra* note 20, at 446 (lessor liable for injuries resulting from his failure to exercise reasonable care when making repairs).

24. *See, e.g.*, Hurt v. Pershing Mobile Home Sales, 404 N.E.2d 842, 844 (Ill. App. Ct. 1980); Broughton v. Maes, 378 N.W.2d 134, 136 (Minn. Ct. App. 1985); Bellemare v. Gateway Builders, 420 N.W.2d 733, 740-41 (N.D. 1988); Kobylinski v. Hipps, 519 A.2d 488, 491 (Pa. Super. Ct. 1986); Humbert v. Sellers, 677 P.2d 760, 761-62 (Or. Ct. App. 1984), *rev'd on other grounds*, 708 P.2d 344 (Or. 1985).

25. *See* Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973) (As a general rule, "landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk." (citations omitted)).

26. *See* Fidelity Mut. Life Ins. Co. v. Kaminsky, 768 S.W.2d 818, 823 (Tex. Ct. App. 1989) (upholding constructive eviction defense in an action for unpaid rent where landlord refused to assist physician-tenant in keeping anti-abortion protestors from blocking entrance to leased clinic); *but see* Fountas v. Ziegler, 305 So. 2d 864 (Fla. Dist. Ct. App. 1975) (holding that crimes of violence against a commercial lessee and other crimes in the neighborhood are beyond the landlord's control and do not constitute a constructive eviction); Creditthrift of America v. Sinclair, 430 So. 2d 822 (La. Ct. App. 1983) (leasing adjacent premises for operation of a "porno shop" did not warrant lessee's vacation of the premises prior to the lease's expiration); Sciascia v. Riverpark Apartments, 444 N.E.2d 40,

ity,[27] and claims based on contract[28] and misrepresentation.[29]

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42 (Ohio Ct. App. 1981) (no constructive eviction of tenant victimized by criminal activity where landlord provides reasonable security measures).

Although generally opposed to the extension of landlord liability for criminal activities on the premises, I find considerable merit in the constructive eviction defense. In this context, the tenant essentially argues that some condition over which the landlord retains control has so interfered with the tenant's use and enjoyment of the property that he is forced to leave. *See* CUNNINGHAM et al., *supra* note 22, at 296-97. "[B]ecause of some wrongful act or omission by the landlord, the premises [has] become uninhabitable ('untenantable') for the intended purposes. The tenant is not physically evicted or excluded — but he might as well be." *Id.* at 296.

This defense becomes critical where the untenable condition consists of a tenant's victimization on the leased premises. Recent studies indicate that victims of violent crime typically cope with their fear by changing environments. Criminal intrusions and attacks can produce symptoms akin to post-traumatic stress syndrome which commonly entail changes in residence. AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC STATISTICAL MANUAL OF MENTAL DISORDERS 248-49 (3d ed. 1987) (discussing the need to avoid environments and stimuli associated with the traumatic event). For example, most women suffering from rape trauma syndrome move from the premises at which they were raped. Ann W. Burgess and Lynda L. Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 983 (1974) (reporting that a change of residence "in order to ensure safety and to facilitate the victim's ability to function in a normal style, was very common").

A cost-benefit analysis bears out the reasonableness of permitting such a defense under these circumstances. In comparison to the substantial costs of tort liability, termination of tenant-victim leases results only in a loss of rental income, a relatively small cost, especially where the landlord could have prevented the loss by providing adequate locks and lighting. *See* Trice v. Chicago Hous. Auth., 302 N.E.2d 207, 211 (Ill. App. Ct. 1973) (Hayes, J., concurring) (commenting that the milder economic consequences of allowing defenses of implied warranty of habitability and constructive eviction make them preferable vehicles for extending landlord liability for criminal acts of third persons to tort actions on these grounds).

Moreover, the constructive eviction defense is consistent with equitable cost allocation. Even if the landlord were not at fault, the tenant may be able to terminate the lease simply because of the landlord's superior ability to bear the costs. This theory is consistent with the common law supporting a tenant's ability to terminate a lease for similar reasons, such as when the premises is substantially destroyed or when the tenant, as a member of the armed services, is forced to relocate. CUNNINGHAM et al., *supra* note 22, at 407-08 (1984).

27. *See generally* Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331, § 6(c) (Supp. 1991); *but see* Feld v. Merriam, 485 A.2d 742, 750 (Pa. 1984) (Zappala, J. concurring) (rejecting a tenant's assertion of an implied warranty of habitability because the provision of "security services" is not a "fundamental element[] in distinguishing an uninhabitable structure from a residence" and because "the remedies available thereunder are inconsistent with the remedies sought in a tort action such as this").

28. *See infra* note 88 and accompanying text.

29. *Compare* O'Hara v. Western Seven Trees Corp. Intercoast, 142 Cal. Rptr. 487, 491-92 (Cal. Ct. App. 1977) (stating valid claim for fraud when landlord knew of past rapes in apartment complex by an identified assailant but assured prospective tenant of the apartments' safety without disclosing the prior rapes) *with* Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1216 (D.S.C. 1990) (finding landlord's statement that the apart-

However, most theories developing the landlord's duty to protect tenants have arisen in the context of negligence actions.

These tort actions, alleging landlord liability for the criminal actions of third parties, present several inconsistencies beyond the obvious challenge to landlord immunity For example, such causes of action seem inconsistent with the common law doctrine that there is no duty to rescue or protect another.[30]

Moreover, acceptable theories of liability vary from jurisdiction to jurisdiction. As a South Carolina District Court noted, "[t]he wide range of approaches taken by courts in other jurisdictions establishes only that support can be found for practically any position."[31] Indeed, courts within a single jurisdiction may differ as to the appropriate basis for liability; even appellate courts have misinterpreted or ignored their own state supreme court's analysis of the issue.[32] Thus, depending on the court and the circumstances, liability has been both accepted and rejected based upon a landlord's failure to provide adequate lighting,[33] security services[34] and locks.[35]

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ment complex is "safe" a statement of opinion inadequate to support a claim for fraudulent misrepresentation).

30. *See* generally KEETON et al., *supra* note 20, at 307. Likewise, there is no privilege to defend another unless there is a legal duty to protect that person. *See* Gossett v. State, 51 S.E. 394 (Ga. 1905) (parent and child are justified to protect one another but may not act for the sake of revenge); Frew v. Teagarden, 205 P. 1023, 1025 (Kan. 1922) (self-defense principle applies where one forcefully resists an assault upon a servant); Sloan v. Pierce, 85 P 812, 813 (Kan. 1906) (one may use reasonable force to protect family member); State v. Douglas, 101 S.E. 648, 648 (S.C. 1919) (father and son have right to protect one another).

31. *Cooke*, 741 F Supp. at 1209 n.1 (considering a tenant's action against her landlord following an assault by an intruder).

32. For example, the Pennsylvania Supreme Court held that a landlord could be liable only if he/she undertook a "program of security" which was beyond the usual and normal precautions of a reasonable homeowner, such as hiring guards to patrol the premises. Feld v. Merriam, 485 A.2d 742, 746-47 (Pa. 1984). Three years later, a Pennsylvania superior court held that ordinary locks and lighting constituted such a program of security. Reider v. Martin, 519 A.2d 507, 510-11 (Pa. Super. 1987).

33. *Compare* Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1365 (Ill. 1988) (furnishing outside lighting not assumption of duty to protect) *with* Frances T. v. Village Green Owners Assoc., 229 Cal. Rptr. 456 (Cal. 1986) (failure to provide adequate lighting produces an actionable claim for negligence).

34. *Compare* Stelloh v. Cottage 83, 201 N.E.2d 672, 673 (Ill. App. Ct. 1964) (landlord's provision of private police force cannot be construed as insuring absolute protection of tenants from crime) *and* Goldberg v. Housing Auth. of Newark, 186 A.2d 291 (N.J. 1962) (no duty to provide security guard protection) *with* Sharp v. W.H. Moore, Inc., 796 P.2d 506, 508-09 (Idaho 1990) (provision of security guards signals that a duty of protection has been sufficiently undertaken to present a factual issue of adequacy and

In sum, a landlord's duty to protect tenants may arise in a variety of ways. First, some courts have simply extended the exceptions to landlord immunity to encompass liability for criminal activities on the premises. The landlord's control of the common premises or the landlord's voluntary assumption of a duty to provide security serves as the basis for the landlord's duty Second, other courts have applied general negligence standards to establish a duty deemed either inherent to the landlord-tenant relationship or resulting from factors weighted to amount to special circumstances. Under this method, problems of causation and foreseeability commonly arise. Third, courts recently have premised liability on local or state legislation requiring landlords to provide certain security measures.

A. TRADITIONAL EXCEPTIONS — LIABILITY FOR DEFECTS IN THE COMMON PREMISES

The seminal case establishing a landlord's tort liability for a third party's criminal actions is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[36] A District of Columbia circuit court permitted a tenant to sue her landlord in tort for injuries sustained during a criminal assault and robbery in a common hallway[37] Applying the rationale used to invoke landlord liability for injuries caused by physical defects,[38] the *Kline* court held that "[t]he duty

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to deny summary judgment) *and* Cross v. Wells Fargo Alarm Serv., 412 N.E.2d 472, 472 (Ill. 1980) (landlord's provision of security guards from 9:00 a.m. to 1:00 a.m. increased danger to residents after 1:00 a.m. and therefore stated an actionable basis for a claim). *See also Feld*, 485 A.2d at 747 (dictum) (landlord has a duty only to insure that security police act with due care, not to guarantee that their services are adequate to protect tenants).

35. *Compare* Braitman v. Overlook Terrace Corp., 346 A.2d 76, 84 (N.J. 1975) (tenant could recover upon proof that landlord "unreasonably enhanced the risk of loss due to theft by failing to supply adequate locks to safeguard the tenant's premises after suitable notice of the defect") *with* Riley v. Marcus, 177 Cal. Rptr. 827, 830 (Cal. Ct. App. 1981) (no general duty to provide secure door locks) *and* Martin v. Usher, 371 N.E.2d 69, 70 (Ill. 1977) (no duty to maintain and repair door locks).

36. 439 F.2d 477 (D.C. Cir. 1970). The *Kline* plaintiff was not the first to advance the common premises theory as the basis of a landlord's liability for criminal activities, only the first to succeed. *See, e.g.*, Kobeski v. Judkowitz, 57 Lack. Jur. 37 (Phila. C.P. 1956) (refusing to impose liability on a landlord for injuries suffered by a tenant during a burglary due to the absence of a common law or statutory duty requiring the landlord to guard against such injuries).

37. *Kline*, 439 F.2d at 477.

38. The *Kline* court noted that "the rationale as applied to predictable criminal acts by third parties is the same [as that applied to injury due to physical defects]." *Id.* at 481.

[of protection] is the landlord's because by his control of the areas of common use and common danger he is the only party who has the *power* to make the necessary repairs or to provide the necessary protection."[39] Although the landlord is not an insurer of the tenants' safety, where he has knowledge of the insufficiency of existing security measures, he is legally bound "to take those steps which are within his power to minimize the predictable risk to his tenants."[40] Thus, to be successful, the tenant must prove that the landlord had both control and knowledge of the defect and that the defect foreseeably enhanced the risk of criminal activity

This approach to landlord liability has gained widespread acceptance, even in jurisdictions that allow only the narrowest exceptions to general landlord immunity For example, Illinois has repeatedly rejected the proposition that landlords have a duty to protect tenants from criminal activity[41] Nonetheless, Illinois has permitted claims based on the landlord's alleged control of common areas, albeit with a narrow interpretation and strict application of foreseeability and causation elements.[42]

Liability for physical defects was established in *Levine v. Katz*, 407 F.2d 303, 304 (D.C. Cir. 1968), where the court held that

> where a landlord leases separate portions of property to different tenants and reserves under his own control the halls, stairs, or other parts of the property for use in common by all tenants, he has a duty to all those on the premises of legal right to use ordinary care and diligence to maintain the retained parts in a reasonably safe condition.

39. *Kline*, 439 F.2d at 481.

40. *Id.* Here, the court premised liability on the fact that the landlord knew of other tenants who had previously been criminally assaulted, that the building's security measures had diminished since the tenant's arrival, and that the areas in need of protection were exclusively controlled by the landlord. *Id.*

41. *See* Shea v. Preservation Chicago, Inc., 565 N.E.2d 20, 23 (Ill. Ct. App. 1991) (landlord has no general duty to protect tenants from third party criminal attacks); Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1367 (Ill. 1988) (landlord-tenant relationship is not a "special" one imposing a duty to protect against the criminal acts of others).

42. *See* Morgan v. Dalton Management Co., 454 N.E.2d 57, 61 (Ill. App. Ct. 1983) (recognizing the landlord's duty but denying liability in this case due to lack of foreseeability, voluntary undertaking or special relationship between landlord and tenant); Smith v. Chicago Hous. Auth., 344 N.E.2d 536, 539-40 (Ill. App. Ct. 1976) (denying liability where the tenant's loss had no physical or causal connection to the premises' condition); *see generally* Carrigan v. New World Enter., 446 N.E.2d 265 (Ill. App. Ct. 1983) (providing a thorough survey and analysis of relevant Illinois precedent); Hiram H. Lesar, *Tort Liability of Illinois Landlords for Crimes of Third Persons*, 1983 So. ILL. U.L.J. 415 (1983) (discussing the Illinois courts' strict treatment of tort actions against landlords for criminal activities on the premises).

In proving a defect in the common premises, plaintiffs have been most successful when the alleged defect relates to the perpetrator's access to the building. Conditions such as broken or missing locks,[43] missing pass keys[44] and easily accessible ladders[45] or fire escapes[46] seem more likely to produce liability than conditions such as poor lighting[47] or defective burglar alarms.[48] Unless these latter conditions occurred in tandem with accessibility defects or caused the criminal to target the tenant, no cause of action exists.[49]

For example, one Illinois appellate court reversed summary judgment for the landlord in a case where the physical condition of the premises facilitated a tenant's murder.[50] The adverse conditions supporting potential liability consisted of inoperable exterior lights, overgrown and concealing weeds, an accessible ladder and an unlockable apartment window.[51] Because the landlord had exclusive control over these conditions which were linked directly to the intruder's ability to enter the premises, the Illinois court permit-

43. Johnston v. Harris, 198 N.W.2d 409, 411 (Mich. 1972) (allowing tenant to maintain an action based on the landlord's failure to provide locks in a vestibule); *see also* N.W. v. Amalgamated Trust & Sav. Bank, 554 N.E.2d 629 (Ill. App. Ct. 1990) (alleging landlord liability based upon failure to repair apartment building's back door lock); Beck v. Rossi, 466 N.E.2d 1124 (Ill. App. Ct. 1984) (asserting a cause of action based on landlord's failure to install and maintain locks on doors used for entry to the premises).

44. *Rowe*, 531 N.E.2d at 1368 (holding landlord liable for failing to monitor the possession of a pass key).

45. Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990) (holding that the physical layout of the premises, in this case a ladder positioned near an apartment, could support a claim of negligence under the "common areas" exception); Duncavage v. Allen, 497 N.E.2d 433, 437 (Ill. App. 1986) (holding landlord liable for leaving a ladder accessible to unauthorized persons).

46. Aaron v. Havens, 758 S.W.2d 446 (Mo. 1988) (holding that the fire escape is part of the common premises and subject to the landlord's duty of care).

47. *Rowe*, 531 N.E.2d at 1365 (refusing to find an assumption of the duty to protect the tenants against criminal acts simply because it provided inadequate illumination of the common areas).

48. Carrigan v. New World Enter., 446 N.E.2d 265 (Ill. App. Ct. 1983) (refusing to base liability on a non-working burglar alarm due to a lack of proximate cause and foreseeability).

49. *See, e.g.*, Duncavage v. Allen, 497 N.E.2d 433, 436 (Ill. App. Ct. 1986) (finding liability since the perpetrator testified that he chose the tenant's building because of its dilapidated condition); Stribling v. Chicago Hous. Auth., 340 N.E.2d 47 (Ill. App. Ct. 1975) (liability assessed where landlord negligently failed to seal off hole adjacent to tenant's apartment through which a series of previous burglars had entered).

50. *Duncavage*, 497 N.E.2d at 436.

51. *Id.* at 440.

ted the claim against the landlord.[52]

By contrast, another Illinois appellate court refused to premise landlord liability solely on a defective burglar alarm.[53] In *Carrigan v. New World Enterprises*, the court held that the alarm was not in the landlord's exclusive control because some action by the tenant was required to set a properly operative alarm.[54] Moreover, even if the tenant had set the alarm, there was no indication that an alarm would have deterred the intruder.[55]

In addition to requiring the tenant to prove that the defective condition pertains to access, courts also limit common premises liability by their reluctance to characterize an absence of higher than normal security standards as a "defective condition." As a California court explained, "a landlord's efforts to make his premises more secure against criminal activity should not be greeted by a pronouncement that if such efforts are later found to be inadequate he will incur a liability which would have been nonexistent had he done nothing."[56] No actionable defective condition exists where a landlord simply fails to provide greater than customary security measures.[57]

Assuming that an actionable defect can be proven, courts will still not impose liability unless the criminal activity has taken place in a common area; that is, in an area over which the landlord retains a superior ability to control. If the landlord does not have practical control over an area, then the landlord is not liable.

In *Aaron v. Havens*, the Missouri Supreme Court considered the appropriate definition of the "common area" in the context of several physical aspects of a landlord's premises.[58] The tenant asserted that the landlord was liable "for personal injuries alleged to have resulted from a sexual assault by an intruder who had gained

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52. *Id.*

53. Carrigan v. New World Enter., 446 N.E.2d 265 (Ill. App. Ct. 1983).

54. *Id.* at 270 (refusing to speculate whether the tenant would have set the alarm that night).

55. *Id.* (noting that no more than mere speculation indicated whether the assailant would have been "frightened and fled"); *see also* Tarter v. Schildkraut, 542 N.Y.S.2d 626 (App. Div. 1989) (holding that one layer of locked doors was sufficient since additional security would not have deterred the lover's quarrel which caused the harm).

56. Riley v. Marcus, 177 Cal. Rptr. 827 (Cal. Ct. App. 1981) (disallowing a tenant's claim than an intruder gained access to her apartment due to a door lock which was of insufficient quality).

57. *Id.*

58. 758 S.W.2d 446 (Mo. 1988).

entry to her apartment through a window adjoining a fire escape."[59] The tenant specifically alleged that the landlord was negligent in failing to install a lock on the tenant's apartment window, in failing to provide a lock for the premises' back fence and in failing to take precautions to secure the fire escape.[60] Applying traditional premises liability analysis, the *Aaron* court held that "[t]he fire escape is part of the common premises under the landlord's control" and, consequently, reversed the lower court's dismissal.[61] After reaching this conclusion, there was no need to address the remaining two allegations. However, in dicta, the court suggested that the window lock was not sufficiently within the landlord's control to provoke liability and that the landlord had no duty to provide a locked fence.[62]

Even if the defect exists in a landlord controlled common area, courts will not impose liability unless the defect *foreseeably* enhances the risk of criminal activity.[63] While in some jurisdictions foreseeability provides the basis for the landlord's duty, in common premises analysis, foreseeability is most often a surrogate for proximate cause.[64] In this latter context, foreseeability requires that the landlord have notice of criminal activities on the premises

59. *Id.* at 446.

60. *Id.* at 447.

61. *Id.* at 448.

62. *Id.*

63. *See, e.g.*, City of Mobile v. Largay, 346 So. 2d 393, 395 (Ala. 1977) (holding that an unlocked cellar door foreseeably facilitated a rape so as to produce liability); Paterson v. Deeb, 472 So. 2d 1210, 1217-20 (Fla. Dist. Ct. App. 1985) (holding that a landlord will not be liable for a criminal attack unless a failure to provide adequate locks created a foreseeable risk of crime); Duncavage v. Allen, 497 N.E.2d 433, 437-38 (Ill. App. Ct. 1986) (holding that poor or non-existent lighting and a previous burglary made a criminal assault and murder foreseeable as to make proximate cause a question of law); Trentacost v. Brussel, 412 A.2d 436, 440-41 (N.J. 1980) (holding that a mugging was a foreseeable result of the absence of a lock on the front entrance); *see also* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (holding landlord liable when aware of conditions that make possible further criminal attacks on tenants).

64. As the New Jersey Supreme Court stated, "[t]o establish proximate cause, it is sufficient to show that according to the common experience of mankind the resulting injury was a *reasonably foreseeable* consequence of the negligent act." McCappin v. Park Capital Corp., 126 A.2d 51, 52 (N.J. 1956) (citations omitted) (holding landlord liable for placing the apartment keys in an area easily accessible to the public). *See also Duncavage*, 497 N.E.2d at 437-38 (holding that a landlord's failure to keep common areas in a reasonably safe condition may be the proximate cause of a criminal act, if such act was reasonably foreseeable at the time of the landlord's negligence); *Trentacost*, 395 A.2d at 544 (holding that foreseeability is an issue of probability and a question for the jury); Scott v. Watson, 359 A.2d 548, 555-56 (Md. 1976) (providing a general discussion of the proximate cause formula).

that would cause him or her to anticipate specific future risks to the tenants.[65]

Furthermore, the tenant must prove that the risk of the *actual* crime that caused the harm was foreseeably enhanced by the defect. For example, an Illinois appellate court rejected a tenant's claim against a landlord who had tied open fire escape doors for ventilation despite repeated requests that the doors be locked.[66] Because there had been no prior crimes on the premises, the court held that the tenant had provided insufficient facts to prove her rape was a foreseeable risk from the open door.[67]

Foreseeability is most easily demonstrated when tenants can show not only that prior similar crimes had occurred on the premises, but also that past perpetrators had gained access through the same means as in the current claim.[68] In fact, knowledge that the defective condition enabled prior crimes can make foreseeable even subsequent crimes of a different type. Thus, proof that prior intruders have gained access to the premises to commit property crimes can establish the foreseeability of future entrance by intruders who may commit violent crimes.[69]

In general, courts applying common premises analysis tend to impose the strictest standards of foreseeability, relying on analogies to traditional doctrines of tort liability and strict foreseeability to limit the further expansion of landlord liability. Notwithstanding

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65. *See Duncavage*, 497 N.E.2d at 438 (stating that "prior incidents similar to the one complained of and which are connected with the physical condition of the premises may impose a duty of reasonable care"); Morgan v. Dalton Management Co., 454 N.E.2d 57, 60 (Ill. App. Ct. 1983) (subsequent assault on tenant not foreseeable to landlord simply because assailant had threatened victim in the past); Stribling v. Chicago Hous. Auth., 340 N.E.2d 47, 51 (Ill. App. Ct. 1975) (prior incidents which are similar to the one complained of and which are connected to the premises' physical condition may impose a duty of reasonable care on the landlord).

66. Petrauskas v. Wexenthaller Realty Management, Inc., 542 N.E.2d 902 (Ill. App. Ct. 1989) (dismissing the action due to absence of proximate cause).

67. *Id.* The court also stated that proof of violent crimes in the neighborhood was insufficient to establish foreseeability. *Id.*

68. *See Duncavage*, 497 N.E.2d at 435 (reversing summary judgment in landlord's favor where the ladder next to the tenant-victim's apartment had been used previously to burglarize the same apartment through the same unlockable window); *Stribling*, 340 N.E.2d at 49 (upholding liability where series of previous burglars had gained entrance through hole in common wall of an adjacent vacant apartment).

69. *Duncavage*, 497 N.E.2d at 438 (prior burglary establishes foreseeability of subsequent murder in same apartment); Aaron v. Havens, 758 S.W.2d 446, 446-47 (Mo. 1988) (finding prior burglary sufficient evidence of foreseeability of subsequent rape in same apartment).

this strict construction, common premises analysis holds no guarantee of limited liability If a court is inclined to impose liability to further some policy of risk-spreading, it can almost certainly locate some structural defect upon which to blame the criminal activity Conversely, and more commonly the case, courts have the power to artificially contract landlord liability by narrowly construing the required elements of defective condition, common area, landlord control and foreseeability Since the existence of a duty is a question of law, ample grounds exist for early dismissal of these cases.[70]

Because of this leeway and the difficulties outlined above, many jurisdictions have rejected the common premises approach as a clumsy surrogate for weighing underlying policy considerations.[71] As the Pennsylvania Supreme Court concluded, "criminal acts of a third person belong to a different category and can bear no analogy to the unfixed radiator, unlighted steps, falling ceiling, or the other myriad possibilities of one's personal negligence."[72] Courts that reject common premises liability may turn to a voluntary undertaking theory as the proper basis for imposing liability

B. TRADITIONAL EXCEPTIONS — VOLUNTARY ASSUMPTION OF DUTY TO PROVIDE SECURITY

Under the voluntary assumption theory, the landlord's duty derives from an express or implied promise to provide security[73] The *Restatement (Second) of Torts* states that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered

70. *See, e.g., Petrauskas*, 542 N.E.2d at 907 (holding that the existence of a landlord's duty to protect is a question of law and that dismissal for failure to state a claim is appropriate).

71. *See, e.g.*, Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1211-12 (D.S.C. 1990); Feld v. Merriam, 485 A.2d 742, 746 (Pa. 1984); Gulf Reston, Inc. v. Rogers, 207 S.E.2d 841 (Va. 1974).

72. *Feld*, 485 A.2d at 745.

73. This theory is similar to the negligent repair theory. *See supra* note 23.

because of the other's reliance upon the undertaking.[74]

Under this theory, the issue is not whether the landlord has a duty to provide security measures, but whether the landlord has actually undertaken that duty Voluntary assumption may occur through actions designed to provide security measures, through oral statements or promises or through express lease terms. Some jurisdictions also preserve a distinction between misfeasance and nonfeasance, requiring proof of reliance on the landlord for security when the tenant is asserting liability based upon an omission to perform,[75] but not when the tenant is claiming negligent performance.[76]

Courts sometimes find that an assumption of duty exists when a landlord has voluntarily taken actions characterized as security measures.[77] However, whether an action can be characterized as a security measure varies from jurisdiction to jurisdiction. In Illinois, for example, measures that are typically provided by landlords, but not distinctively linked to security, do not imply an assumption of duty Thus, landlords have been excused from liability for defective entrance doors,[78] parking lot gates,[79] fire escape doors and hallway lights[80] because these structures are common incidents of leased premises and not characteristically security measures. By

74. RESTATEMENT (SECOND) OF TORTS § 323 (1977).

75. *See, e.g.*, Nelson v. Union Wire Rope Corp., 199 N.E.2d 769, 778-80 (Ill. 1964) (drawing a distinction between misfeasance and nonfeasance and holding reliance unnecessary to prove the former).

76. *See, e.g.*, Figueroa v. Evangelical Covenant Church, 879 F.2d 1427, 1435 (7th Cir. 1989) (holding landlord liable for improper performance of a voluntary undertaking regardless of actual reliance).

77. This theory has also occasioned vicarious liability. *See, e.g.*, Mims v. N.Y. Life Ins. Co., 273 N.E.2d 186, 187 (Ill. App. Ct. 1971) (finding landlord liable for burglary facilitated by the landlord's agent's negligence in leaving a tenant's door open after inspecting the apartment).

78. *See, e.g.*, N.W v. Amalgamated Trust & Sav. Bank, 554 N.E.2d 629, 635 (Ill. App. Ct. 1990) (holding "that door locks are commonplace and furnished by virtually every landlord [and] conclud[ing] that a promise to maintain door locks in working condition does not rise to a voluntary undertaking to protect tenants from criminal activity").

79. *See, e.g.*, B.C. v. J.C. Penney Co., 562 N.E.2d 533, 540 (Ill. App. Ct. 1990) (holding that gate to shopping mall parking lot under construction was not a security measure undertaken for plaintiff's benefit).

80. Petrauskas v. Wexenthaller Realty Management, Inc., 542 N.E.2d 902, 908 (Ill. App. Ct. 1989) (concluding that housing code sections requiring fire escape doors and hallway lights are intended to promote the building's structural soundness, not to evidence a landlord's assumption of risk).

contrast, a voluntary assumption of duty has been successfully premised upon the landlord's installation of interior security doors and safety locks.[81]

Similarly, in Pennsylvania, the assumption of duty theory was originally limited by that state's supreme court to apply only to those situations in which a landlord provides unique or extraordinary security measures.[82] However, within two years of its imposition, this limitation was interpreted by a state appellate court to encompass ordinary locks and lighting.[83]

Other courts have analyzed assumption of duty by weighing the economic consequences of imposing more stringent security measures.[84] This factor has generally been decisive in cases involving large expanses of land where increased security measures would be especially costly [85]

In addition to the actual provision of security measures, a landlord may assume a duty to provide security by making statements or promises that induce the tenant's reliance on the

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81. *See, e.g.*, Shea v. Preservation Chicago, Inc., 565 N.E.2d 20, 20 (Ill. App. Ct. 1990) (permitting case based on landlord's failure to maintain interior door lock); Nalls v. Blank, 571 N.E.2d 1321 (Ind. Ct. App. 1991) (holding that provision of locking interior doors raised a question of fact as to whether the landlord had assumed a duty to provide security). *But see* Carrigan v. New World Enter., 446 N.E.2d 265, 273 (Ill. App. Ct. 1983) (finding no liability based upon installation of burglar alarm since this provision does not constitute a promise to protect tenant). *Cf.* Morgan v. 253 East Delaware Condominium Ass'n, No. 1-90-0472, 1992 Ill. App. LEXIS 769 (Ill. App. Ct. May 18, 1992) (provision of doorman to screen visitors did not imply a duty to provide a security force to protect tenants from visitors who had been properly screened).

82. Feld v. Merriam, 485 A.2d 742, 746-47 (Pa. 1984) (holding that the provision of one security guard subjects the landlord to a duty of care equal to the amount of protection one guard could reasonably be expected to provide).

83. Reider v. Martin, 519 A.2d 507, 510-11 (Pa. Super. Ct. 1987) (construing the "security program" described in *Feld* to include front door locks).

84. *See, e.g.*, Graham v. M & J Corp., 424 A.2d 103, 110 (D.C. Ct. App. 1980) (acknowledging "the economic burden which liability wold impose on the defendant as an important factor"); Aaron v. Havens, 758 S.W.2d 446, 448-49 (Mo. 1988) (stating that the jury may consider economic factors in ascertaining landlord liability and use of ordinary care); Lay v. Dworman, 732 P.2d 455, 457 (Okla. 1986) (listing "the economic consequences of the imposition of [a] duty" as an appropriate factor for consideration).

85. *See, e.g.*, Figueroa v. Evangelical Covenant Church, 879 F.2d 1427, 1436 n.10 (7th Cir. 1989) (holding that the availability of resources may affect the extent of a duty of protection placed upon a University for campus and parking lot safety); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. App. Ct. 1987) (holding that "the magnitude of guarding against [harm from a fraternity party] and the consequences of placing the burden on the defendant" prevented the extension of a duty to protect). *Cf.* Taylor v. Hocker, 428 N.E.2d 662, 666 (Ill. App. Ct. 1981) (holding that the imposition of a duty to protect shopping mall patrons from assault in the parking lot was too great a burden to place on mall owners).

landlord's provision of particular security measures. For example, in *Reider v. Martin*, a tenant was robbed and raped outside her apartment in a common stairway [86] Although the landlord had not implemented an official security policy, the *Reider* court held that the landlord's repeated promises to remedy faulty locks had fostered reliance by the tenant and, therefore, had established an assumed duty to provide security [87]

A landlord's duty to secure the premises may also be based on express lease provisions reasonably related to security [88] In *Blaustein v. Gilbert-Dallas Co.*, a tenant was raped by an unknown party who gained access to her apartment with a key [89] A Texas Court of Appeals reversed summary judgment for the landlord on the basis of a lease provision requiring the landlord to change locks upon request.[90] The appellate court held that this provision created an assumption of the burden of providing security sufficient to establish a duty actionable in tort.[91]

Clearly, foreseeability plays a central role under each variation of voluntary assumption. Plaintiffs have urged courts to impose liability if "the landlord's actions materially increase the risk of criminal activity although there have been no prior, similar criminal

86. 519 A.2d 507 (Pa. Super. Ct. 1987).

87. *Id.* (reversing the trial court's dismissal and remanding for further proceedings).

88. This approach may also serve as the basis for breach of contract claims. However, contract actions are brought less frequently than tort actions due to the fact that there is generally insufficient evidence of a contractual duty to provide security. Moreover, even where a contractual duty exists, damages in contract actions are limited to economic losses, such as to compensate property damage or personal injury, to the exclusion of pain and suffering or punitive damage awards. Joseph A. Page, *Selecting the Remedy*, 3 AM. JUR. TRIALS 637, 662-63 (1965).

Nonetheless, there are some advantages to a contract approach. For one, contract theory may provide a method by which to avoid the tort doctrine's narrow restriction of landlord liability for criminal activities. For example, in Richmond Medical Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988), a commercial tenant sued its lessor for failure to replace a defective exterior door through which burglars had successfully gained entrance. The trial court dismissed the claim based on tort cases rejecting a landlord's duty to provide security. *Id.* at 409. The Virginia Supreme Court, however, reversed and remanded, stating that tort doctrines did not apply to a case based on an express contract. *Id.* While foreseeability is a *prima facie* element of tort claims, in contract actions it serves merely to limit consequential damages. *Id.* If criminal activity was a reasonably foreseeable consequence of the breach of a contractual duty, the plaintiff may recover for property losses. *Id.*

89. 749 S.W.2d 633 (Tex. Ct. App. 1988).

90. *Id.*

91. *Id.* at 634.

attacks on the premises."[92] However, this assertion has been unsuccessful.[93] Instead, courts either require a "prior incident" notice similar to that required by the structural defect cases or accept a broad inference of notice from the volatile nature of the surrounding neighborhood.[94]

The voluntary assumption theory has been criticized for creating disincentives to provide security measures.[95] Ordinarily, economic incentives would encourage a landlord to repair structural defects to preserve his investment in the premises. However, these incentives are minimized or removed when the improvements also increase the landlord's potential liability to tenants. Moreover, the voluntary assumption theory serves to create an appearance of greater protection for tenants least likely to live in high crime areas since the types of housing in which "extraordinary" security programs tend to appear would be higher income properties.

Despite these problems, courts seem more willing to assess liability on this basis. One reason for this may be the theory's foundation upon the landlord's choice to provide some security measures, making the imposition of liability appear to be premised more on fault than on risk spreading. Moreover, to the extent it is drawn from traditional categories of landlord tort liability, this doctrine reflects a relatively comfortable extension of common law rules.

C. STATUTORY SECURITY DUTIES

Courts are even more comfortable extending landlord liability

92. Shea v. Preservation Chicago, Inc., 565 N.E.2d 20, 23 (Ill. App. Ct. 1990).

93. *Id.* at 24. Instead, the *Shea* court adopted a case-by-case inquiry to determine whether the landlord has assumed a duty to protect tenants from reasonably foreseeable results. *Id.*

94. Riley v. Marcus, 177 Cal. Rptr. 827, 830 (Cal. Ct. App. 1981) (holding that the mere provision of secure locks and lighting was not sufficient, in and of itself, to indicate foreseeability of future crime); Small v. McKennan Hosp., 437 N.W.2d 194, 201 (S.D. 1989) (noting that "violent criminal activity can be foreseeable simply upon common experience").

95. Ironically, in assessing the necessity of proving notice of prior criminal activities as an element of liability based upon the voluntary provision of security measures, an Illinois court discredited the element, stating that such a requirement "has the effect of discouraging landowners from taking adequate measures to protect premises which they know are dangerous." *Shea*, 565 N.E.2d at 25 (quoting Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985)). The irony lies in the fact that the theory of undertaking to provide security measures has been the only consistent basis upon which a duty has been premised in Illinois.

based on an express contractual promise or statutory duty Some states have enacted, or have authorized municipalities to enact, legislation that imposes on landlords an explicit duty to provide security Exemplifying many such enactments, the Uniform Residential Landlord Tenant Act expressly requires landlords to provide clean and *safe* housing conditions.[96] Violations of these statutes may serve as the basis for a claim of negligence.[97]

Some courts have interpreted state landlord-tenant legislation to apply only to "failures of the building — [such as] collapsing stairs, faulty walls, [and] dangerous windows."[98] However, in *Paterson v. Deeb*, a Florida district court applied its state's legislation to establish a landlord's duty to provide security[99] In that case, a tenant had been sexually assaulted in her apartment building which, at the time of the attack, had a defective front door lock and a missing back door lock.[100] The landlord's liability was premised upon a Florida statute that required leased property to be secured with locks and common areas to be maintained in a "safe condition."[101] Although Florida courts had not routinely imposed a tort duty on landlords to provide for tenant safety, the *Paterson* court

96. UNIF. RESIDENTIAL LANDLORD TENANT ACT § 2.104(a)(3), 7B U.L.A. 460 (1991).

97. *See, e.g.*, Braitman v. Overlook Terrace Corp., 346 A.2d 76, 85 (N.J. 1975) (noting that the landlord's liability for burglary could alternatively be based upon the New Jersey Tenement House Act which specifically requires dead bolt door locks) (citing N.J.A.C. §§ 5:10-6.6(d)(7)).

98. Deem v. Charles E. Smith Management, Inc., 799 F.2d 944, 946 (4th Cir. 1986). *See also* Williams v. William J. Davis, Inc., 275 A.2d 231, 232 (D.C. Cir. 1971) (stating that "[t]he terms 'safe' and 'safety' when used in the regulations refer to safety from structural defects, unsanitary conditions, fire hazards and the like"); Cooke v. Allstate Management Corp., 741 F Supp. 1205 (D.S.C. 1990) (citing *Deem* and holding that the fit and habitable requirement does not extend to protection from criminal activities); Pippen v. Chicago Hous. Auth., 399 N.E.2d 596, 599 (Ill. 1979) (noting that "the phrase 'decent, safe and sanitary dwellings' refers exclusively to the physical condition of the premises"); De Koven v. 780 West End Realty Co., 266 N.Y.S.2d 463, 467 (N.Y. Civ. Ct. 1965) (holding that, under the statute, conditions "dangerous to life, health or safety [include] are lack of heat, of running water, of light, of electricity, of adequate sewage disposal facilities, or an infestation by rodents"); Mengel v. Rosen, 735 P.2d 560, 562 (Okla. 1987) (explaining that "such words as 'safe, 'fit' and 'habitable' as used within the context of such statutes refer exclusively to the physical condition of the premises"); *see generally* Annotation, *Landlord's Obligation to Protect Tenant Against Criminal Activities of Third Persons*, 43 A.L.R.3d 331, § 5(a) (1972) (discussing statutory and regulatory bases for the landlord's duty to maintain safe premises).

99. Paterson v. Deeb, 472 So. 2d 1210, 1217 (Fla. Dist. Ct. 1985), *review denied*, 484 So. 2d 8 (Fla. 1986) (construing FLA. STAT. ANN. § 83.51 (West 1987 & Supp. 1991)).

100. *Id.*

101. *Id.* (citing FLA. STAT. ANN. §§ 83.51(2)(a) (2) & (3)).

held that such a duty logically followed from the express language of the statute.[102] Moreover, the court held that the statute eliminated the requirement of foreseeability, reasoning that it was "not willing to sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the now-discredited notion that at least one criminal assault must have occurred."[103]

Similarly, in *Brock v. Watts Realty Co.*, the Alabama Supreme Court applied a municipal ordinance to validate a claim for wrongful death against a landlord.[104] The attacker had gained entrance to the tenant's apartment through a back door with a defective lock.[105] Although the defect had been reported, the landlord had yet to undertake repairs.[106] Based on a provision of the Birmingham Housing Code requiring locks on all exterior doors and windows, the Alabama Supreme Court found that the landlord had a duty to provide security [107]

The landlord argued that his duty ended with the provision of

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102. *Id.* at 1218-19.

103. *Id.* (citing Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985)).

While other courts have sympathized with the inappropriateness of a narrow foreseeability rule, they have not followed Florida in eliminating the requirement altogether. *See* Trentacost v. Brussel, 412 A.2d 436, 444 (N.J. 1980) (focussing on the foresight of a reasonably prudent person and holding that violation of administrative regulation is "available as evidence for determining the duty owed"); Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 551 (Tex. 1985) (reciting that "[it] is not required that the particular accident complained of should have been foreseen[,only] that the injury be of such a general character as might reasonably have been anticipated" (citations and emphasis omitted)).

104. Brock v. Watts Realty Co., 582 So. 2d 438, 441-42 (Ala. 1991), *reh'g denied*, 1991 Ala. LEXIS 563. *Cf.* Klingbeil Management Group Co. v. Vito, 357 S.E.2d 200, 203 (Va. 1987) (holding a local ordinance requiring dead bolt locks preempted by a state law requiring tenants to submit a written request and a fee before the installation of such locks was required).

105. *Brock*, 582 So. 2d at 439.

106. *Id.*

107. *Id.* The court relied upon the following ordinances:

> Sec. 7-1-93 Windows, exterior doors, etc.
>
> Every window, exterior door and basement hatchway shall be reasonably weather tight, watertight and rodent proof *and shall be kept in sound working condition and good repair. Locks shall be provided on all exterior doors and all exterior openable windows.*
>
> Sec. 7-1-97 Construction, maintenance, etc., generally, of facilities, etc.
>
> Every facility, piece of equipment or utility which is required under this article shall be so constructed or installed that it will *function safely and effectively and shall be maintained in satisfactory working condition.*

Id. at 439 (emphasis added by the court).

operational locks at the beginning of the lease term, and that thereafter, pursuant to the lease, the responsibility for the locks' repair rested on the tenant.[108] The *Brock* court rejected this argument, noting that the lease also required the landlord's prior permission for all repairs.[109] Importantly, the court specifically reserved judgment on the issue of whether a broader lease term could effectively shift the responsibility for complying with the municipal ordinance onto the tenant.[110]

Although few in number, these statutory duty cases may indicate a growing trend of legislative direction in the security of leased premises. While statutory requirements provide explicit, predictable security standards tailored to the particular community, they fail to adequately protect the landlord. Because these statutes require only minimal measures — adequate door locks, for example — the landlord cannot be assured that compliance with the statute will protect him from liability Unless a jurisdiction were to enact comprehensive legislation, explicitly delineating landlord security duties, landlords still face the difficulty of predicting the extent of their liability under general negligence standards, the theory of liability imposed in most jurisdictions.

D. GENERAL NEGLIGENCE STANDARDS

Rather than applying traditional exceptions or relying on statutory or contractual duties, most courts analyze landlord liability for third party criminal activities under doctrines of general negligence. Under this approach, there are two situations in which a landlord may have a duty to protect tenants against criminal acts: (1) when there is a "special relationship" between the landlord and tenant, and (2) when there are "special circumstances" by which the landlord's act or omission exposes the tenant to an unreasonable risk of crime. Both approaches pose an exception to the general rule that there is no duty to warn or to protect others from danger.

Foreseeability is the key to liability under both approaches, with a few subtle differences. In jurisdictions applying the "special relationship" theory, a landlord presumptively has a duty to protect tenants against unreasonable risks of crime.[111] Foreseeability evi-

108. *Id.* at 441.

109. *Id.* (remanding on the issue of causation).

110. *Id.*

111. RESTATEMENT (SECOND) OF TORTS § 302B cmt. e (1965).

dence serves to prove proximate cause. Since proximate cause is a question of fact, logically, more actions brought under this theory will reach a jury

By contrast, jurisdictions requiring "special circumstances" do not entertain a presumption of a duty to protect tenants.[112] Foreseeability is the basis both for imposing the landlord's duty and for establishing proximate cause. Since duty is a question of law, foreseeability is weighed solely by the judge, usually at a preliminary stage of the case. As a result, under the "special circumstances" approach, more cases are likely to be dismissed prior to a full adjudication. Because courts are concerned with the effect of their decisions on norm articulation, they are more likely to apply stricter standards of foreseeability in establishing a duty than are juries, which consider foreseeability as a matter of proximate cause and are primarily motivated by individualized justice.

Thus far, courts have defined "special relationships" to include innkeeper-guest, common carrier-passenger, school-student and sometimes employer-employee.[113] Until very recently, most jurisdictions failed to include the landlord-tenant relationship as a "special relationship" that would invoke a duty to protect.[114] Nonetheless, an increasing minority of jurisdictions are now moving toward recognition of the residential landlord-tenant relationship as one which is categorically analogous to the innkeeper-guest relationship.[115]

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112. *See, e.g.*, Faheen v. City Parking Corp., 734 S.W.2d 270, 272 (Mo. Ct. App. 1987).

113. The landlord may also be liable as a result of his or her relationship with the wrongdoer. *See, e.g.*, Kendall v. Gore Properties, Inc., 236 F.2d 673, 678 (D.C. App. 1956) (holding landlord liable for failing to conduct a pre-employment check of employee's character prior to giving him access to a young woman's apartment); Henderson v. Nolting First Mortgage Corp., 193 S.E. 347, 354 (Ga. 1937) (holding landlord liable for assault on tenant's guest by a janitor who had been negligently hired); Zerder v. Friman Holding Co., 274 N.Y.S. 588, 589 (1934) (holding landlord liable for negligence in selecting a dishonest employee to paint tenant's apartment); LaLone v. Smith, 234 P.2d 893, 897 (Wash. 1951) (holding landlord liable for assault by janitor whose violent character was known to the landlord prior to making the decision to hire).

114. *See, e.g.*, Morgan v. Dalton, 454 N.E.2d 57 (Ill. App. Ct. 1983); Scott v. Watson, 359 A.2d 548, 552 (Md. 1976); Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984); Gulf Reston Inc. v. Rogers, 207 S.E.2d 841, 844 (Va. 1974).

115. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970); O'Hara v. Western Seven Trees Corp. Intercoast Management, 142 Cal. Rptr. 487, 490 (Cal. Ct. App. 1977); Kargul v. Sandpiper Dunes Ltd. Partnership, 1991 Conn. Super. LEXIS 203 (Conn. Super. Ct. Jan. 29, 1991); Smith v. General Apartment Co., 213 S.E.2d 74, 77 (Ga. Ct. App. 1975); Stephens v. Stearns, 258 678 P.2d 41, 50 (Idaho 1984); Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843 (Mich. 1975);

However, it is difficult to characterize with certainty the approach of many jurisdictions since many decisions base liability not solely on general negligence theory, but on alternative grounds such as voluntary assumption or policy considerations as well.[116]

The underlying basis for the special relationship approach is the landlord's superior position to perceive and prevent risks of criminal conduct. Thus, in assessing whether the relationship gives rise to a duty, courts must first decide whether the landlord was in fact in such a superior position.[117] In making this assessment, the courts' analysis resembles the general negligence approach.

Under a negligence approach, the landlord's duty to protect depends upon the outcome of a case-by-case balancing of the probability and severity of harm against the costs of avoidance. By law, this balance rests, in large part, on the following factors:

> [The] foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[118]

Foreseeability, the crucial factor in this balance, requires that the landlord have notice both of the risk of crime and of a condition of the premises that would enhance that risk.[119]

Logically, some conditions are more likely to enhance risk foreseeably than others.

Trentacost v. Brussel, 412 A.2d 436, 440 (N.J. 1980); Sherman v. Concourse Realty Corp., 365 N.Y.S.2d 239, 245 (App. Div. 1975); Tedder v. Raskin, 728 S.W.2d 343, 347 (Tenn. App. Ct. 1987).

116. *See, e.g.*, Sharp v. W.H. Moore, Inc., 796 P.2d 506, 509 (Idaho 1990) (discussing a relationship but basing liability on assumption of duty).

117. *See* Faheen v. City Parking Corp., 734 S.W.2d 270, 272 (Mo. Ct. App. 1987).

118. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968) (reversing summary judgment in tenant's favor in action by guest injured on a broken faucet (multiple supporting citations omitted)).

119. RESTATEMENT (SECOND) OF TORTS § 448 (1965) (stating that a third party's criminal act sever's liability "unless the actor at the time of his negligent conduct realized or should have realized that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime").

> Such simple measures as providing adequate lighting in hallways and locks on outside entrances are peculiarly within the landlord's capability and could substantially reduce the risk of harm to his tenants. Under these circumstances, to hold the landlord unaccountable for injuries proximately caused by the condition of the common areas would be unconscionable.[120]

However, even though prior criminal acts need not be proven, the landlord must at least have had notice of an overall high risk of crime in the premises' neighborhood.[121] The required degree of specificity of such notice lessens as the connection between the general nature of the criminal activity and the landlord's specific act or omission increases and as the burden of imposing the duty of protection decreases.[122]

Thus, where the landlord knows of identifiable third persons who may present specific dangers to tenants, but does not issue warnings to the tenants, he may be liable for resulting injuries. For example, in a California case, a landlord who had been supplied composite drawings of an area rapist failed to disclose that information to a prospective tenant, but instead reassured her that the premises were safe and well-patrolled.[123] The tenant was later raped in her apartment by the attacker identified in the composite drawing.[124] The California court of appeals held that the tenant

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120. Tedder v. Raskin, 728 S.W.2d 343, 348 (Tenn. Ct. App. 1987) (affirming directed verdict in landlord's favor in an action by a tenant who was struck by a bullet which came through the wall of a neighboring apartment); *see also* Johnston v. Harris, 198 N.W.2d 409 (Mich. 1972) (holding landlord liable for assault and robbery of elderly tenant in dimly-lit, unlocked vestibule); Trentacost v. Brussel, 395 A.2d 540 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 412 A.2d 436 (N.J. 1980) (holding landlord liable for tenant mugged in hallway of unlocked apartment building).

121. Riley v. Marcus, 177 Cal. Rptr. 827, 830 (Cal. Ct. App. 1981) (finding that tenant raped in apartment did not state a claim based on inadequate lighting and locks where landlord was unaware of the level of criminal activity in the neighborhood).

122. 7735 Hollywood Blvd. Venture v. Superior Court, 172 Cal. Rptr. 528 (Cal. Ct. App. 1981) (holding a burned out hallway light bulb insufficient to establish duty to protect tenant against rapist despite landlord's knowledge of burglary and rape in the general area); *see generally* Kwaitkowski v. Superior Trading Co., 176 Cal. Rptr. 494 (Cal. Ct. App. 1981) (summarizing California cases raising the foreseeability issue); FOWLER V HARPER & FLEMING JAMES, JR., 2 THE LAW OF TORTS § 18.2, at 1026 (1956).

123. O'Hara v. Western Seven Trees Corp. Intercoast Management, 142 Cal. Rptr. 487 (Cal. Ct. App. 1977).

124. *Id.*

had stated a claim for tort liability, fraud and deceit.[125]

Moreover, liability may attach where the landlord did not know the potential assailant's identity but knew that there had recently been frequent occurrences of violent crimes on the premises. This situation is known as the "violent crimes exception."[126] In some jurisdictions, this exception has been applied sparingly The fact "that the premises is located in a high crime area where criminal conduct would be more foreseeable than in some other area [has been deemed] 'insufficient special facts' to create a duty "[127] In these jurisdictions, the prior incidents of violent crime must be on the premises itself and sufficiently numerous and recent to put the landlord on notice, either actual or constructive, that there is a probable danger to the tenants.[128] Furthermore, the past incidents must also be sufficiently similar to the incident for which liability is asserted that a reasonable landlord would have taken precautions to protect tenants against that type of harm.[129]

Nonetheless, the majority of courts have rejected the proposition that the landlord must have been aware of prior incidents that closely match the crime committed against the plaintiff in type and means of commission.[130] As a California court commented, "[w]hat is required to be foreseeable is the general character of the

125. *Id.* The court also held that punitive damages were an available remedy. *Id.*

126. *See, e.g.*, Faheen v. City Parking Corp., 734 S.W.2d 270, 273-74 (Mo. Ct. App. 1987) (concluding that violent crimes exception is a viable legal theory but affirming dismissal due to a specific lack of foreseeability).

127. *Faheen*, 734 S.W.2d at 273 (citation omitted); Irby v. St. Louis County Cab Co., 560 S.W.2d 392, 395 (Mo. Ct. App. 1977) ("The allegation of a 'high crime area does not ipso facto mandate [a] duty [of care].").

128. *Faheen*, 734 S.W.2d at 272.

129. *Id.* at 273-74.

130. Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 658-59 (Cal. 1985) (criticizing prior similar incidents rule and adopting balancing approach to foreseeability); Sharp v. W.H. Moore, Inc., 796 P.2d 506, 510 (Idaho 1990) (stating that "[t]he 'prior similar incidents' requirement is not only too demanding, it violates the cardinal negligence principle that only the general risk of harm need be foreseen, not the specific mechanism of injury"); Sharpe v. Peter Pan Bus Lines, 519 N.E.2d 1341 (Mass. 1988) (holding that a patron's being stabbed was a reasonably foreseeable consequence of a bus company's failure to provide security); Small v. McKennan Hosp., 437 N.W.2d 194 (S.D. 1989) (analyzing facts under "totality of circumstances" test instead of allowing lack of prior similar incidents to be dispositive).

The reasoning underlying the courts' disregard of the similarity requirement closely parallels that applied to reject the "one free bite" rule. *See Isaacs*, 695 P.2d at 658 (reasoning that "surely a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property"); *Sharp*, 796 P.2d at 510 (stating that "[t]here is no 'one free rape' rule in Idaho").

event or harm, not its precise nature or manner of occurrence."[131] Thus, in a majority of jurisdictions, any crimes on the premises, in sufficient number and degree, may provide notice of future criminal activity sufficient to provoke liability

Some jurisdictions characterize knowledge in an even less precise manner, going so far as to allow constructive notice of the propensity for crime in the surrounding area to serve as a substitute for the more particular foreseeability discussed above. Liability has been assessed even though there have been no prior serious crimes on the leased premises, but merely because of a high rate of crime in the neighborhood.[132]

Given this wide variance of approaches and range of relevant factors, the chance of judicially resolving a case at a preliminary stage is very slight and the difficulty of accurately predicting the liability risks is very high.

E. THE LANDLORD'S DUTY TO PROTECT TENANTS: IN GENERAL

Cumulatively, these tort cases, holding a landlord liable for a third party's criminal actions against tenants, represent a shift of the public policing responsibility to landlords.[133] However, the duty imposed is not a responsibility to control the conduct of the third party; rather, it is a responsibility to provide or maintain the leased premises so as to reduce the third party's ability to commit crime thereon. In other words, it is a duty of crime prevention.

Studies of crime prevention techniques indicate that a structural condition can "invite" crime at a particular location.[134] One com-

131. Wylie v. Gresch, 236 Cal. Rptr. 552, 556 (Cal. Ct. App. 1987) (citing *Isaacs*, 695 P.2d at 659, quoting Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947 (Cal. 1983)).

132. *See* Johnston v. Harris, 198 N.W.2d 409 (Mich. 1972) (holding that actionable negligence may lie against landlord who provided inadequate lighting and unlocked doors for a building in a high crime district); Trentacost v. Brussel, 412 A.2d 436 (N.J. 1980) (finding a mugging the foreseeable consequence of a landlord's failure to provide front lock on building where ample evidence existed of criminal activity in the neighborhood and of landlord's knowledge of an attempted theft within the building); Skaria v. State, 442 N.Y.S.2d 838 (1981) (finding that landlord knew or should have known from the building's location in a high crime area that tenants were susceptible to injury from outsiders).

133. *See Johnston*, 198 N.W.2d at 411-12 (Brennan, J., dissenting) (criticizing the extension of tort liability as an aspect of the trend of "intrusion of private industry into the business of public safety").

134. Madeline Johnson, *Landlord's Responsibility for Crime: Determining Legal Causation*, 17 REAL ESTATE L.J. 234, 238-41 (1989) (reviewing the literature on situational

mentator has identified several crime prevention approaches relevant to a landlord's duty to provide security [135] For instance, the landlord can increase visibility of crime by providing lighting or security patrols or he can decrease vulnerability to crime by providing locks or security doors.[136]

These techniques are related primarily to the physical condition of the premises, an area for which responsibility has traditionally been allocated to the landlord. Thus, the change brought about by these cases is not in the nature of the duty, i.e., control and maintenance of the physical structure, but in the purpose of the duty, i.e., reduction of the opportunity for crime rather than of the risk of injury from the structural premises. However, establishing the broader principle — that a landlord can be responsible for criminal activities on leased premises — has opened the door to an extension of the landlord's duty far beyond control and maintenance of the physical premises to direct control of the conduct of others.

II. FROM A DUTY TO PROTECT TENANTS TO A DUTY TO POLICE TENANTS

A landlord may be liable for the criminal activities of tenants under several doctrines. First, as discussed above, landlords have been liable if the condition of the premises contributed to the crime or if the landlord failed to disclose information concerning risks of crime. As a result, landlords may be held responsible for a tenant's behavior if it endangers another tenant.

Second, a landlord may be liable for a tenant's conduct based on public nuisance doctrines. This doctrine may oblige a landlord to compensate the victims of a tenant's illegal activities if those activities interfere with the neighbor's use and enjoyment of his property In addition, public nuisance doctrines provide equitable remedies such as orders to evict tenants, injunctions against certain uses, and closure of property for up to one year. In the enforcement of these equitable remedies, landlords may be liable for fines or even imprisonment for civil or criminal contempt.

Third, recent legislation provides for forfeiture of property

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crime prevention and concluding that "the decision [whether] to commit a crime is usually not related to opportunity; [but that] the decision regarding where to commit the crime may be related to opportunity").

135. *Id.* at 238.

136. *Id.* at 239

connected with illegal activities. A landlord is at risk to lose his property interest entirely due to a tenant's illegal activity on the premises. The landlord's risk rests primarily on the civil rather than criminal versions of these statutes, though both apply While protection for innocent owners are built into these statues, the definition of "innocence" as applied to a landlord is subject to interpretation and is certainly narrower than a criminal law standard of innocence. This section will explore the standards and application of each of these doctrines.

A. TORT DUTIES TO POLICE THE CONDUCT OF TENANTS

Courts have uniformly rejected crime victims' tort claims based on a landlord's duty to provide secure premises when neither the criminal nor the victim have a relationship with the landlord.[137] However, when the criminal activity originates with a tenant, plaintiffs have argued that liability should be premised on theories similar to those underlying the landlord's duty to protect tenants from third party crime.[138]

One theory consistently, though unsuccessfully, advanced by plaintiffs in these cases analogizes the landlord's duty to that imposed under the structural defects analysis. For example, in *Muniz v. Flohern, Inc.*, a pedestrian on a public sidewalk outside a store was shot by a bullet that originated from inside the building during a robbery attempt.[139] The victim claimed that the landlord knew the tenant was conducting a drug business and thereby had a duty to stop the activity The appellate court reversed summary judgment for the landlord and remanded for trial. The court, relying on cases involving structural defects,[140] held that the landlord owed

137. *See* Waters v. New York City Hous. Auth., 505 N.E.2d 922 (N.Y. 1987) (holding that the landlord had no duty to protect pedestrian who was accosted on the sidewalk then robbed and sexually assaulted in defendant's building); *see also* Hutchins v. 1001 Fourth Ave. Assoc., 802 P.2d 1360 (Wash. 1991) (acknowledging the general rule that there is no duty to protect another from an injury resulting from a third party's conduct unless the defendant has a special relationship with the wrongdoer or with the foreseeable victim). *But see* RESTATEMENT (SECOND) OF TORTS § 302B cmt. g (1977) (a landlord owes a duty if he creates a special or peculiar temptation or opportunity for crime).

138. Some jurisdictions, recognizing the difficulties of limiting this duty to provide security, give standing only to tenants and not to third party strangers who may be injured on the premises. *See, e.g.*, Glick v. Olde Towne Lancaster, Inc., 535 A.2d 621, 625 (Pa. Super. Ct. 1987).

139. 553 N.Y.S.2d 313, 316 (App. Div. 1990), *rev'd*, 570 N.E.2d 1074 (N.Y. 1991).

140. *See* Appel v. Muller, 186 N.E. 785, 787 (N.Y. 1933) (landlord had duty to protect

a duty to the pedestrian-victim.[141] Moreover, the court articulated a landlord duty to control the conduct of persons on their premises whenever the landlord is reasonably aware of the necessity to do so.[142]

The New York Court of Appeals rejected the lower court's reasoning. Because the landlord had no relationship to the gunman and the robbery was not related to drug trafficking, the court held that the landlord did not owe a duty to the pedestrian.[143]

The Missouri Court of Appeals used a similar analysis to deny liability in *Conroy v. Solon Gersham, Inc.*[144] In *Conroy*, a tenant's invitee was injured during a drug raid on the tenant's apartment. The court refused to hold the landlord liable under a common premises theory because the conduct occurred entirely within the leased premises.[145] However, the court indicated that even if the landlord knew of prior illegal and dangerous activities within the apartment, the plaintiff needed to show that the tenant who had shot the plaintiff had been involved in these prior "dangerous activities."[146] This additional analysis suggests that the court might have imposed liability if the landlord had known the tenant was dangerous.

Plaintiff-tenants have also attempted without success to prove liability by analogizing their claims to cases involving a voluntary assumption of duty.[147] For example, a New York court held that

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pedestrians from falling glass); *see also* Gillette v. Luone Co., 114 N.Y.S.2d 713 (N.Y. Sup. Ct. 1952) (landlord liable for damages caused when a tenant's sign fell on sidewalk pedestrians, but landlord entitled to indemnification from the tenant).

141. *Muniz*, 553 N.Y.S.2d at 316. *See also* RESTATEMENT (SECOND) OF TORTS § 371 (1965) (describing landowner liability to persons outside the land for activities occurring on the land).

142. *Muniz*, 533 N.Y.S.2d at 316.

143. *Muniz*, 570 N.E.2d at 1074.

144. 767 S.W.2d 381 (Mo. App. 1989).

145. *Id.* at 383. In a similar case, a resident manager/tenant stood in his own apartment and shot another tenant standing in the door of his apartment across the hall. Bryant v. Brannen, 446 N.W.2d 847 (Mich. App. 1989). That court reversed the tenant's jury verdict due in part to the fact that the conduct occurred on the leased premises. *Id.* at 852. The court reasoned that "a common area under the landlord's control was involved only to the extent that a bullet flew through the common hallway." *Id.*

146. *Conroy*, 767 S.W.2d at 383.

147. In a 1983 Illinois case, the tenants argued that lease provisions prohibiting conduct that was illegal or disturbing to other tenants evidenced the landlord's voluntary assumption of a duty to protect the tenant from the dangerous conduct of other tenants. Morgan v. Dalton Management Co., 454 N.E.2d 57, 59 (Ill. App. Ct. 1983). Not surprisingly, the appellate court affirmed the dismissal of the tenant's claim, stating that a landlord is "not

lease provisions allowing eviction of objectionable tenants did not provide a basis for imposing a duty to protect a tenant's child from being bullied by another tenant's child.[148] The court stated that lease provisions did not appear to have been designed to protect tenants and that the plaintiffs did not prove they relied on the provisions when executing the lease.[149]

Successful claims have been based on the theory that if a landlord knew or should have known of a tenant's dangerousness, he should be liable to co-tenants.[150] This superior knowledge has been held to create an obligation for the landlord to warn or otherwise take actions to protect tenants.[151] Proof that a landlord knew of a tenant's criminal proclivity strongly supports a finding of superior knowledge. Indeed, one of the earliest cases in which a landlord was found to have a duty to protect others from a tenant was based on this theory.[152] In *Dean v. St. Paul Union Depot Co.*, the defendant-landlord leased a train depot to a tenant who the landlord knew had an employee with a "vicious temper."[153] The employee assaulted the plaintiff, who was waiting in the depot for a train.[154] Analogizing to cases in which landowners kept savage

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normally required to act as an intermediary in the disputes that arise between his tenants." *Id.* at 61.

148. Bennett v. Ames, 434 N.Y.S.2d 766 (App. Div. 1980) (involving 8-year-old struck with a baseball bat by a co-tenant's 10-year-old son on a common outdoor area of the housing development).

149. *Id.* at 767-68.

150. As a matter of general premises liability, landowners may be liable for failure to control the conduct of persons on their premises when the premises' use makes criminal or violent conduct sufficiently probable. *Compare* Palmucci v. Falcone, 1990 U.S. Dist. LEXIS 6363 (D.N.J. May 7, 1990) (holding owner of fitness club not liable for attack by one patron upon another) *with* Chomatopoulos v. Roma DeNotte Social Club, 515 A.2d 296, 300 (N.J. Super. Ct. 1985) (finding potential for violence where illegal gambling occurs sufficiently probable to impose duty on landowner to provide security system).

151. Florida, in particular, has well-developed case law on this matter. *See, e.g.*, Salerno v. Hart Fin. Corp., 521 So. 2d 234, 235 (Fla. Dist. Ct. App. 1988) (finding that tenant of mobile home injured by acts of co-tenant can maintain an action against the landlord, if the landlord had prior knowledge of similar criminal conduct on the premises and such conduct was reasonably foreseeable); Vasques v. Rocha, 509 So. 2d 1241 (Fla. Dist. Ct. App. 1987) (concluding that landlord may be liable for injuries to a tenant from a dog owned by another tenant if the landlord knows of the animal's presence and its vicious propensity and can contest its presence); Lambert v. Doe, 453 So. 2d 844 (Fla. Dist. Ct. App. 1984) (holding landlord who recognized and assumed a duty to protect tenants from foreseeable criminal conduct liable for injuries to minor tenant who was sexually molested by another minor tenant since the landlord knew of the molester's proclivity).

152. Dean v. St. Paul Union Depot Co., 43 N.W. 54 (Minn. 1889).

153. *Id.* at 55.

154. *Id.*

animals on their leased property,[155] the *Dean* court held that the landlord owed a duty to the victim based on his knowledge of the dangerousness of the tenant's employee.[156]

Similarly, the landlord's knowledge of a tenant's mental illness has provided some limited basis of liability In *Samson v. Saginaw Professional Building, Inc.*, a landlord leased part of a building to a mental health facility, knowing that some patients had violent tendencies.[157] The landlord did not secure the remainder of the building despite requests by the other tenants to segregate violent patients.[158] The Michigan Supreme Court held that the landlord had "a duty to investigate and take available preventative measures."[159] The majority's standard suggests a potential duty to check the background of tenants and either exclude tenants with criminal histories or "circulate a memo that a former or present mental patient or person with a criminal history works or lives in the building."[160] However, while the court did not expressly tie the landlord's duty to investigate the tenant's background to the fact that the premises were leased to a mental health facility, whose patients included inmates from a nearby state prison, that factor was probably critical to the outcome.[161]

In contrast to the broad duty outlined in *Samson*, a New York Court reversed a jury verdict for a tenant who was attacked and stabbed by a mentally ill co-tenant in a common apartment build-

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155. The analogy is telling. Viewing criminals as "wild animals" justifies their restraint in maximum security prisons as well as society's abandonment of notions of rehabilitation. Similarly, three decades earlier, courts were still analogizing African slaves to domesticated animals to justify less than humane treatment. *See generally* KENNETH M. STAMP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 192-236 (1956).

156. *Dean*, 43 N.W at 55. Landlords may be liable to third parties injured by their tenants' dangerous animals as well. The Alaskan Village, Inc. v. Smalles, 720 P.2d 945 (Ala. 1986); Uccello v. Laudeslayer, 118 Cal. Rptr. 741 (1975); Strunk v. Zoltanski, 468 N.E.2d 13 (N.Y. 1984); Palermo v. Nails, 483 A.2d 871 (Pa. 1984). *But see* Wright v. Schum, 781 P.2d 1142 (Nev. 1989) (refusing to follow *Uccello*). For a thorough discussion, see Danny R. Veilleux, Annotation, *Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant*, 87 A.L.R. 4th 1004 (1991).

157. 224 N.W.2d 843 (Mich. 1975).

158. *Id.* at 846.

159. *Id.* at 851.

160. *Id.* at 855 (Levin, J., dissenting).

161. The *Samson* court's opinion is difficult to characterize because the original opinion of the court, written by Justice Kavanagh, contains an addendum added after the opinion was distributed to respond to to Justice Levin's dissent. *See id.* at 850-51 (clarifying a landlord's duty to affirmatively act to protect tenants from mental health patients/tenants).

ing hallway.[162] The court held that the landlord had no duty to protect the tenant because the landlord could not have anticipated the violent attack.[163] Although the landlord knew of the attacking tenant's chronic mental illness, in seven years there had been only one complaint when the tenant peacefully entered and then left another's apartment.[164]

The injured tenant argued that if the landlord had investigated his tenant's background, he would have discovered the tenant's propensity for violence.[165] The New York court refused to hold that the landlord had a duty to investigate the tenant's background, reasoning that such a duty would be a gross intrusion into the tenant's privacy and that there are "widely recognized inherent difficulties in predicting dangerousness."[166] The court contrasted the duty to provide secure locks and adequate lighting imposed by general tort standards with the duty requested by the plaintiff. The court concluded that "[a] landlord is not competent to assess the dangerous propensities of his mentally ill tenants, nor does he have the resources, or control over his tenants necessary to avert the sort of tragedy presented by this case."[167]

The plaintiff also argued that the landlord had a duty to evict the tenant based on the likelihood that his mental illness would cause him to engage in violent acts.[168] Under the governing public housing authority regulations, however, evictions for "nondesirability" of a tenant were only permitted if the tenant's *repeated* objectionable behavior indicated a propensity for future harm.[169] Moreover, although the regulations permitted evictions for alcoholism if the tenant's actions disturbed the peace or interfered with the housing authority operation, they did not contain a similar provision for mental illness.[170] Thus, the court concluded

162. Gill v. New York City Hous. Auth., 519 N.Y.S.2d 364 (App. Div. 1987). *See also* Davis v. Gomez, 255 Cal. Rptr. 743 (Ct. App. 1989) (holding that landlord had no duty to investigate, monitor or control behavior of tenant despite co-tenants' reports that the tenant was "casting spells" on people and had a gun in her apartment).

163. *Gill*, 519 N.Y.S.2d at 363.

164. *Id.* at 367.

165. *Id.*

166. *Id.* at 368 (citing JOHN MONAHAN, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 47-49 (1981)).

167. *Id.* at 370.

168. *Id.* at 371.

169. *Id.*

170. *Id.*

that the landlord had neither the duty nor the right to evict the tenant.[171]

Plaintiff-tenants have also argued that a landlord has a duty to control a tenant's conduct if he has notice that a tenant is selling illegal drugs on the premises. Three reported cases have addressed this issue. However, while other legal standards have more aggressively sought to extend liability for drug-related activity,[172] the courts have not been willing to extend tort liability on this basis. In the *Muniz* case,[173] for example, the plaintiff claimed that landlord liability was appropriate because the landlord knew of tenant drug activity.[174] The lower court held that the shooting was directly related to the landlord's permissive attitude toward the illegal drug activity because drug sales are "known to attract violent crime."[175] The appellate court, however, rejected this argument and held that the landlord did not owe a duty to the plaintiff.[176]

In two other cases, shots fired from neighboring apartments of alleged drug traffickers entered the plaintiff-tenants' apartments.[177] In both of these cases, the courts found that complaints to the landlord regarding suspected drug dealing were insufficient to create a duty to evict the suspected tenants.[178] Both plaintiffs presented evidence of activities consistent with illegal drug dealing, including a large volume of short-term visitors and visits by persons with reputations for involvement in drug sales.[179] Since there were no arrests prior to the incidents at issue, the courts were reluctant to find that the landlord had a duty to evict.[180] The result of such a holding, according to one court, would be that "[a]ny tenant would have a potent weapon to be used against any

171. *Id.* at 372. While the *Gill* court resisted creating a landlord duty to police his tenants, the very fact that the case proceeded to a jury verdict indicates that the courts are willing to entertain arguments on this issue.

172. *See infra* notes 298-309 and 369-480.

173. Muniz v. Flohern, Inc., 553 N.Y.S.2d 313 (App. Div. 1990), *rev'd*, 570 N.E.2d 1074 (N.Y. 1991). *See supra* text accompanying notes 139-43.

174. *Muniz*, 553 N.Y.S.2d at 314.

175. *Id.* at 315.

176. *Muniz*, 570 N.E.2d at 1074.

177. Williams v. Gorman, 520 A.2d 761 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 526 A.2d 182 (1987); Tedder v. Raskin, 728 S.W.2d 343 (Tenn. App. Ct. 1987).

178. In *Tedder*, the Tennessee appellate court affirmed a directed verdict for the landlord. 728 S.W.2d at 352. In *Williams*, the New Jersey appellate court affirmed a partial summary judgment in favor of the landlord regarding the duty to evict. 520 A.2d at 765.

179. *Tedder*, 728 S.W.2d at 345-46; *Williams*, 520 A.2d at 763.

180. *Tedder*, 728 S.W.2d at 350-51; *Williams*, 520 A.2d at 763-65.

other tenant with whom she has a dispute or whom she just dislikes."[181] Both courts suggested that the landlords would not be liable for the shooting injuries, even if they had notice of illegal drug activity The courts were concerned with proximate causation problems. The *Tedder* court specifically rejected the proposition that a shooting is a "probable, ordinary, natural, or usual result of drug dealing."[182] The courts reached these conclusions despite the widely-shared public perception that drugs cause violent crime.[183]

While the few cases placing liability on the landlord for the acts of tenants have generally been based on extreme facts,[184] it is likely that a duty to police tenants will develop further.[185] Particularly in those jurisdictions in which the landlord has a duty to provide security,[186] it would be logical to extend the benefit of that duty to protect third parties or tenants from other tenants.

Moreover, the extension of landlord liability to include tenants' criminal activities could serve to reduce the incidence of crime. Indeed, one successful technique for reducing crime is managing environmental conditions.[187] This environmental management may require changes in tenant behavior.[188] It may also require increased tenant monitoring to eliminate tenants whose activities increase the probability of crimes, such as tenants engaging in drug activities. However, extension of tort liability is not likely to provide a sufficient incentive for the increased level of behavioral

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181. *Tedder*, 728 S.W.2d at 350.

182. 728 S.W.2d at 350; *see also Williams*, 520 A.2d at 765 (finding that shooting and possible drug dealing in co-tenant's apartment were not related)

183. *See supra* note 3 and accompanying text.

184. *See, e.g.*, Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843 (Mich. 1975).

185. *See* Clara Tuma, *Ex-Prosecutor is Banking That Crime Will Pay*, Texas Law., Feb. 4, 1991, at 1 (describing attorneys specializing in representing crime victims who sue landlords for inadequate security). One Houston attorney claims to have settled 20 to 25 tenant actions against landlords for between $500,000 and $1.5 million apiece. *Id.* at 19. Another attorney reported settling between 100 and 200 victim's cases for between $15,000 and $450,000 apiece. *Id.*

186. *See supra* text accompanying notes 138-61.

187. *See* Johnson, *supra* note 134, at 239 (discussing environmental management measures designed to eliminate crime).

188. For example, the landlord may encourage tenants not to keep cash on the premises. *Id. See generally* Aaron v. Havens, 758 S.W.2d 446, 447-48 (Mo. 1988) (en banc) (victimized tenant known to keep substantial amounts of cash in apartment); Kazanoff v. United States, 753 F. Supp. 1056 (E.D.N.Y. 1990), *aff'd*, 945 F.2d 32 (2d Cir. 1991) (intruders targeted tenant who operated furrier shop based on information that the tenant kept substantial valuables in the apartment).

monitoring that may be effective in reducing crime.

Furthermore, even if landlords evicted all criminal or dangerous tenants, it is likely that criminals would just be relocated and crime would still occur. To date, most reported cases have appropriately refused to extend tort liability to increase landlords duties. While maintaining the physical condition of the premises is a customary aspect of the modern residential lease, monitoring and controlling the behavior of tenants is less customary [189] Nonetheless, these creative tenant arguments have rarely been dismissed as frivolous, and their mere assertion may raise the settlement value of cases in enough instances to succeed as a practical matter.

B. LANDLORD LIABILITY FOR PUBLIC NUISANCES CAUSED BY TENANTS

In contrast to tort standards, public nuisance doctrine may create broad landlord liability for tenants' illegal activities. Nuisance doctrines, both public and private, encompass a broad range of activities and have been characterized as "the great grab bag, the dust bin, of the law"[190] Nuisance law developed initially in the context of private claims between individuals. The earliest private nuisance cases acted as simple environmental land use regulation.[191] These cases involved use of land that caused loud noise, noxious fumes and the obstruction or destruction of rights of way [192]

Common law public nuisance grew by analogy to these private claims and addressed interference with public land use rights, such as use of public highways.[193] Whereas private nuisance actions were brought by individuals as civil claims, public nuisance actions were brought by a representative of the sovereign as either civil or

189. Increasingly, leases include rules regulating the use of the premises. However, rather than serving as a basis for a landlord's duty to police the premises, these rules provide more of a basis for the landlord's right to evict a tenant or a landlord's ability to recover damages resulting from a tenant's destructive or disturbing activity.

190. Awad v. McColgan, 98 N.W.2d 571, 573 (Mich. 1959), *overruled by* Mobil Oil Corp. v. Thorn, 258 N.W.2d 30 (Mich. 1977).

191. The nuisance action developed out of the common law action on the case and the assize of nuisance. GEORGE T. BISPHAM, THE PRINCIPLES OF EQUITY 695-96 (Joseph D. McCoy, ed., 10th ed. 1929). *See generally* J.R. Spencer, *Public Nuisance — A Critical Examination*, 48 CAMBRIDGE L.J. 55, 57-58 (1989) (describing evolution of public nuisance claims).

192. *Id.* at 57-58.

193. *Id.* at 58-59.

criminal actions.[194] Under both the private and the public actions, because the infringed rights involved real property for which damages were historically considered inadequate, the doctrine provided ready access to equitable remedies such as injunctions and abatement.[195]

The flexibility of the public nuisance doctrine and its equitable remedies soon led to its application in cases less specifically related to land use.[196] For example, the famous organized labor injunction case, *In re Debs*, was brought as a public nuisance action.[197] Eventually, public nuisance acquired a broad definition, encompassing any "unreasonable interference with a right common to the general public."[198] These interferences traditionally have included threats to the public's health, safety or morals.[199] This common law doctrine has been codified in every state.[200]

Throughout the latter half of the nineteenth century, civil and criminal public nuisance statutes were a primary method of controlling vice, particularly alcohol sales and use and prostitution. Today, nuisance actions have become a popular means of inhibiting the use of property for illegal purposes, primarily illegal drug activity.[201] Under public nuisance statutes,[202] landlords may be liable

194. *Id.*

195. BISPHAM, *supra* note 191, at 696.

196. The outside limits of the public nuisance action were addressed by an 1893 United States Supreme Court opinion. Northern Pac. R.R. v. Whalen, 149 U.S. 157 (1893). A railroad company attempted to close saloons where railroad employees got drunk and, consequently, became unable to work. The Court refused to grant an injunction closing the saloons because the railroad had no common law or statutory authority upon which to base the nuisance action. *Id.* at 162.

197. 158 U.S. 564 (1895) (granting injunction to stop railway unions' strike and restore transportation of the mails, persons and property).

198. RESTATEMENT (SECOND) OF TORTS § 821B (1979); *see also* KEETON et al., *supra* note 20, at 643-44 (defining public nuisance).

199. ID.

200. *Id.* at 646.

201. In 1987, Portland, Oregon was the first major city to use its public nuisance abatement laws to close drug houses. *Now, Cities Hit Drug Suspects Where They Live*, N.Y. TIMES, Jan. 25, 1991, at B16. Since 1987, Portland has invoked its ordinance over 700 times and other cities have followed suit. *Id. See also* Katherine Bishop, *Neighbors in West Use Small Claims to Combat Drugs*, N.Y. TIMES, Oct. 17, 1989, at A16 (using nuisance actions in small claims courts against owners of buildings that house drug related activity).

202. A landlord may also be liable for a tenant's conduct in a private nuisance action. The early common law rule regarding landlord liability for a tenant's nuisance stated that a landlord was not responsible for activities or conditions that arose after he had transferred possession to the tenant unless a contrary agreement existed. This immunity was

for fines or subject to injunctions against their property because of the illegal activity of their tenants.[203]

Under these statutes, the government is responsible for bringing public nuisance actions,[204] although private parties may have standing if they can show some unique or special injury.[205] Common law public nuisance provided remedies of damages and sum-

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based on the view that the lease was a transfer of property rather than a contractual or status relationship. *See* RESTATEMENT (SECOND) OF TORTS § 356 cmt. a (1977); *see also* Nagel v. Landels, 530 P.2d 1239 (Or. 1975) (holding landlord not liable to visitor injured on stairway missing handrail because the handrail was attached at the beginning of the lease and the tenants had not notified the landlord of its detachment).

However, a number of exceptions to landlord immunity developed based on the landlord's knowledge and control. *See* RESTATEMENT (SECOND) OF TORTS §§ 357-58 (1977). The landlord's liability may be premised on his actual or constructive notice of the property's uses and of the likelihood that those activities will cause a nuisance. RESTATEMENT (SECOND) OF TORTS § 837 (1977). Liability does not require any unlawful action by the landlord, but may result merely from leasing the premises to someone who is likely to conduct a nuisance. New York v. Monarch Chem., 456 N.Y.S.2d 867 (App. Div. 1982) (denying landlord's motion to dismiss because liability would exist if he knew tenant was storing toxic chemicals which were likely to leak). Likewise, a landlord may be liable for a tenant's conduct arising after the lease begins, if the landlord has notice of the conduct and is able to control that conduct. *See* Putnam v. Stout, 345 N.E.2d 319 (N.Y. 1976) (noting that right to control can be shown by a duty to repair, a right of reentry and the landlord's overall involvement in the tenancy); People v. Scott, 258 N.E.2d 206 (N.Y. 1970) (finding that landlord may be liable if he has right of entry and notice of a nuisance). For example, if an individual is disturbed by the increased traffic, noise and harassment caused by what he suspects is a drug business being operated by a neighboring tenant on leased premises, he can bring a private nuisance action for the conduct. *See* Oscar v. University Students Co-operative Assoc., 939 F.2d 808 (9th Cir. 1991) (involving apartment tenants who sued neighboring student housing co-operative, alleging that the students' massive drug violations interfered with the quiet enjoyment of their property). Yet despite the possibility of liability for a tenant's illegal conduct, private nuisance actions are relatively scarce in this situation. One reason for this may be that since illegal activity by a tenant tends to affect an entire neighborhood and since recovery of damages and the limited injunctions against the activities (rather than the eviction of the tenants) are the preferred private nuisance remedies, no single neighbor is likely to pursue this type of action. *See* Southwestern Constr. Co. v. Liberto, 385 So. 2d 633 (Ala. 1980) (holding that an injunction is the proper remedy to abate a private nuisance).

203. *See, e.g.*, S.C. CODE ANN. § 15-43-10 (Law Co-op 1977) (injunctions); TENN. CODE ANN. § 29-3-101 (1980) (fines); UTAH CODE ANN. § 47-1-1 (1989) (lessor subject to penalties for tenant nuisances).

204. *See, e.g.*, Lindsey v. Massios, 360 N.E.2d 631 (Mass. 1977) (holding that under a public nuisance statute declaring standards for safe maintenance of common passageways in leased buildings, visitor to building who fell in darkened passageway did not have private right of action).

205. *See generally* William B. Johnson, Annotation, *What Constitutes Special Injury that Entitles Private Party to Maintain Action Based on Public Nuisance — Modern Cases*, 71 A.L.R.4th 13 (1990). A number of statutes give standing to any citizen within the jurisdiction where the public nuisance is being maintained. See *infra* notes 273-80 and accompanying text.

mary abatement.[206] The statutory counterparts provide additional remedies of building closure, property forfeitures, criminal fines and imprisonment.[207]

There are various types of public nuisance statutes. First, all jurisdictions define nuisance generally[208] and allow for injunctive and monetary relief. These statutes are merely codified versions of the common law of public nuisance. The definition of public nuisance is often broad, including any activity threatening the health, safety or morals of the community[209] regardless of whether these activities are illegal.[210]

Second, virtually all states have a specialized public nuisance statute that focuses on vice activities. Jurisdictions vary in the activities defined, the criminal or civil nature of these statutes and the range of sanctions available. In general, these statutes can be divided into those providing for criminal nuisance liability and those directed at civil nuisance abatement.

This section focuses on the specialized public nuisance statutes, because these are the provisions under which a landlord most often will be subject to liability for the criminal activities of his tenant. This section describes first the criminal then the civil forms of these public nuisance statutes.

1. Criminal Nuisance Statutes

The common law crime of public nuisance (often called common nuisance) imposed criminal liability for a range of mischiefs for which the criminal law did not otherwise provide satisfactory

206. *See* City of Chicago v. Festival Theatre Corp., 438 N.E.2d 159, 165 (Ill. 1982) (discussing common law remedies); State v. Johnson, 195 P.2d 1017, 1019 (N.M. 1948) (nuisance statutes did not impair courts' common law power to impose damages or summarily abate a public nuisance).

207. *See, e.g.*, FLA. STAT. ANN. § 823.01 (West Supp. 1992) (criminal fines); ILL. ANN. STAT. ch. 100 1/2, ¶ 5 (Smith-Hurd 1987) (property forfeiture and building closure); MICH. COMP. LAWS ANN. § 600.3820 (West 1987) (imprisonment). *See generally* 58 AM. JUR. 2D, Nuisances §§ 229-232 (1989) (discussing penalties).

208. *See id.* at § 1 (Most jurisdictions use a broad, general definition of nuisance because an exact definition could not encompass all appropriate fact patterns.).

209. *See, e.g.*, IOWA CODE § 657.1 (1988) ("Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance.").

210. *Cf.* Toushin v. Chicago, 320 N.E.2d 202 (Ill. App. Ct. 1974) (affirming a temporary injunction prohibiting the operation of a masturbatory massage parlor despite the fact that the defendant's activities "bordered on illegality without quite crossing into it"); *accord* Chicago v. Geraci, 332 N.E.2d 487 (Ill. App. Ct. 1975).

relief. Many public nuisance prosecutions involved either activities that were not criminal or activities that were criminal but punishable by such a minimal penalty that nuisance prosecution provided a greater penalty [211]

Statutory criminal nuisance definitions mirror the broad public nuisance common law. For example, in New York, one is guilty of a second degree criminal nuisance if he "knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct."[212] Similarly, the Utah criminal statute defines a public nuisance as any unlawful act or omission that "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of three or more persons; or [o]ffends public decency "[213] Some courts have expressed concern that the application of these broad definitions may create new crimes.[214] For example, a New York court determined that "to be deemed a public nuisance, an act either must itself be illegal, or must be performed in an illegal manner."[215] This restriction attempts to ensure that only activities independently determined to be criminal may provide the basis for criminal nuisance actions.

Determining the standard of culpability under some nuisance statutes is difficult. Under private nuisance, liability can attach for conduct that is intentional, reckless or negligent.[216] For abnormally dangerous conditions, there is strict liability [217] While the *Restatement (Second) of Torts* suggests that the same standards apply to criminal public nuisance,[218] most courts have applied only strict liability standards to activities constituting public nuisances.[219] For example, Utah's criminal public nuisance statute con-

211. Spencer, *supra* note 191, at 77.

212. N.Y. PENAL LAW § 240.45(2) (McKinney 1989).

213. UTAH CODE ANN. § 76-10-803(a)-(b) (1991).

214. For example, former provisions of New Jersey's public nuisance statutes were held unconstitutionally vague. Commercial Credit Corp. v. Congleton, 90 A.2d 550 (Essex County Ct. 1952). *But cf.* State *ex rel.* Webster v. Daugherty, 530 S.W.2d 81 (Tenn. Ct. App. 1975) (ruling nuisance statute not unconstitutionally vague).

215. Commissioner of Dept. of Bldgs. of New York v. Sidne Enters., Inc., 394 N.Y.S.2d 777 (N.Y. Sup. Ct. 1977) (applying nuisance statute regarding places used for lewd purposes to a topless and bottomless dancing establishment).

216. RESTATEMENT (SECOND) OF TORTS § 822 (1977).

217. *Id.*

218. *Id.* § 822 cmt. a.

219. Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 368 (1990).

tains no *mens rea* requirement and the courts have refused to infer such a requirement.[220] For instance, New York's concern that its second degree criminal nuisance statute created "virtually a crime of absolute liability"[221] resulted in amendment of the statute to include "knowing or reckless" standards for liability.[222] Even if strict liability is applied to public nuisance actions, however, courts must still assign liability to either the landlord or the tenant, or both.

Under early common law, courts refused to hold landlords liable for a criminal nuisance caused by a tenant, under the theory that a lease was considered a conveyance transferring all rights to control the use of the premises to the tenant.[223] However, a number of exceptions have developed that now expose landlords to criminal liability. For example, a landlord will be liable if he leases property knowing the tenant will be using the property for illegal purposes *and* the landlord is "active in advising . . or in aiding and assisting" in the nuisance.[224] Moreover, as the landlord's contractual powers to control tenant conduct have grown, courts have extended the breadth of the statutes.[225]

Courts have differed on the extent to which a landlord must be actively involved in the nuisance in order to be criminally liable. Most courts interpreting these statutes have focused on the meaning of "maintain" as establishing the outside boundaries of a landlord's liability. In 1970, for example, a New York court held that if a nuisance is caused by a tenant's activities on leased premises, the landlord may be liable merely by knowing of the conduct and failing to take action to abate it.[226] In *People v. Campbell*, anoth-

220. UTAH CODE ANN. § 76-10-803 (1990); *see* People v. Burtlesen, 47 P. 87, 89 (Utah 1896) (holding that intent is immaterial in public nuisance cases). *See also* People v. Rubenfeld, 172 N.E. 485 (N.Y. 1930) (Cardozo, J.) (finding defendant liable with no discussion of intent or mens rea), *cited* in Abrams & Washington, *supra* note 219, at 373-74.

221. William C. Donnino, *Practice Commentaries*, N.Y. PENAL LAW § 240.45 at 274 (McKinney 1989) (discussing how New York public nuisance law presently construes the mens rea requirement).

222. N.Y. PENAL LAW § 240.45 (McKinney 1989).

223. *See* St. Louis v. J.E. Kaime & Bros. Real Estate Co., 79 S.W. 140 (Mo. 1904); New York v. Corlies, 2 Sand. Ch. 301 (N.Y. 1891).

224. State v. Williams, 30 N.J.L. 102, 106 (1862).

225. As the cases in this section reveal, much of the interpretation of the landlord's contractual or statutory ability to control tenants is used to impose responsibility on landlords for tenant conduct.

226. People v. Schriber, 310 N.Y.S.2d 551, 552 (App. Div. 1970) (convicting landlord

er New York court stated that "a 'do-nothing' policy is tantamount to acquiescence."[227] In that case, there had been 107 arrests for narcotics violations in a 6-month period on the premises of a "flophouse."[228] The landlord cooperated with the police investigations and set up security systems to restrict public access to the building.[229] The court held that these efforts negated the landlord's guilt under the statute.[230] The dissent argued that more than a "token effort" should be required and that the owner had "failed to supply the high degree of specialized supervision that the situation demanded."[231]

Some state statutes specifically outline landlord liability for tenant nuisances. For example, the Rhode Island statute provides:

> Every person who shall let any building for any of the purposes [prohibited by statute], or who shall knowingly permit any such building to be so used while under his control, or who shall, after five (5) days notice from any officer or magistrate of any such use of said building omit to take all reasonable measures to eject the tenant [shall be] guilty of aiding in the maintenance of such nuisance.[232]

However, landlord liability is usually less clearly defined.

Criminal nuisance can be a costly and difficult means to deter illegal use of property Many modern criminal nuisance statutes require proof of owner knowledge and participation in the nuisance.[233] Additionally, constitutional guarantees require proof beyond a reasonable doubt[234] and a right to a jury trial in criminal

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of criminal nuisance because he knew of and acquiesed in marijuana smoking on leased premises).

227. 256 N.Y.S.2d 467, 469 (Crim. Ct. 1965).

228. *Id.* at 468.

229. *Id.* at 469.

230. *Id.*

231. *Id.* at 470 (Matzkin, J., dissenting).

232. R.I. GEN. LAWS § 11-30-7 (1981).

233. *See supra* notes 216-25.

234. *See* Ramsey v. United Mine Workers of America, 401 U.S. 302, 320 (1971) (stating that "[a]s a rule of evidence, clear proof should be required, so that criminal responsibility should not be imputed but proven beyond a reasonable doubt in order to impose liability"); *In re* Winship, 397 U.S. 358, 364 (1970) (requiring proof beyond a reasonable doubt during the adjudicatory stage of a juvenile proceeding for offenses which would be criminal if committed by an adult); *see also* Kirby v. United States, 174 U.S. 47, 55 (1899) (noting that "the presumption of the innocence of an accused attends him through-

actions.[235] Due to concerns about the high costs of these procedures, public officials have increasingly used civil public nuisance law instead of criminal statutes to remedy alleged nuisances.

2. Public Nuisance Abatement Statutes

Nuisance abatement statutes can be traced back to the early common law, which permitted civil and criminal actions for keeping "disorderly houses." These were places "kept in such a way as to disturb, annoy, and scandalize the public generally or the neighborhood, or the passers-by on a highway"[236] This definition reflected the central concept that nuisance involved interference with other's property rights. However, as discussed previously, the use of the nuisance action soon grew beyond this core concept.[237] Thus, a building could be deemed a nuisance even if the activities therein were neither visible from the outside nor breached the peace.[238] In some situations, the nature of the building's visitors, rather than the visitors' visible activities, defined the character of the place. Thus, one court defined a disorderly house as a place that was "the habitual resort of thieves, drunkards, prostitutes, or other idle and vicious and disorderly persons."[239]

The statutory versions of this common law doctrine have long been used to regulate whatever vice crimes were at the forefront of public attention.[240] These statutes include the tobacco[241] and

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out the trial and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt").

235. U.S. CONST. amend. VII. *See also* Walton v. Arizona, 110 S. Ct. 3047, 3088 (1990) (stating that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government"); *id.* (Stevens, J., dissenting) (tracing the history of the Constitutional right to a jury trial).

236. Mossman v. Ft. Collins, 90 P. 605, 606 (Colo. 1907).

237. *See supra* text accompanyhing notes 190-203.

238. Beard v. State, 17 A. 1044, 1045 (Md. Ct. App. 1889) (approving jury instruction to convict even if no conspicuous improprieties were evident).

239. *Mossman*, 90 P. at 606 (citing State v. Williams, 30 N.J.L. 102 (1862)); *see also* R.I. GEN. LAWS § 11-30-1 (1981) (nuisances include places "where intemperate, idle, dissolute, noisy or disorderly persons are in the habit of resorting").

240. The history of vice control in this country and in Europe reflects a cycle of repression and tolerance. *See generally* Jerome H. Skolnick, *The Social Transformation of Vice*, 51 LAW & CONTEMP. PROBS. 9 (1988) (discussing historical trends in attitudes toward vice control). Similar vice statutes have existed throughout history. The Prostitution Act of Paris 1635 allowed the closing of houses of prostitution, and the summary headshaving, flogging and banishment of their resident meretrices. Mackey, *Red Light Law: An Aspect of the Study of Prostitution*, in 8 E.C. BARKSDALE STUDENT LECTURES 31 (1983-84).

241. *See* Austin v. State, 48 S.W. 805 (Tenn. 1898) (upholding ordinance which re-

alcohol ordinances[242] of the nineteenth century, the Red Light Abatement Acts of the early twentieth century,[243] the Speak-easy and liquor control statutes of the prohibition period[244] and the modern narcotics laws.[245] These statutes, like their common law counterparts, have been directed at protecting public morality.[246]

Under these public nuisance ordinances and statutes, if an alleged nuisance occurs on a leased premises, the owner as well as the tenant may be subject to suit. Thus, landlords are particularly susceptible to liability for their tenant's criminal activities. Because these statutes are the primary form of nuisance actions brought against landlords, they will be examined in some detail here. First, the available remedies will be outlined. Next, the types of activities deemed nuisances, the types of evidence used to establish nuisances and the standards for landlord liability will be analyzed. Finally, a case study demonstrating the interaction of these principles will be presented.

a. Remedies

Nuisance abatement statutes provide a potent arsenal of reme-

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stricted sale of cigarettes). *But see* City of Zion v. Behrens, 104 N.E. 836 (Ill. 1914) (striking down ordinance which prohibited smoking in public parks, streets and buildings); Hershberg v. City of Babourville, 133 S.W. 985 (Ky. 1911) (voiding ordinance which forbade smoking within corporate limits).

242. *See* Henry Schofield, *Equity Jurisdiction to Abate and Enjoin Illegal Saloons as Public Nuisances*, 8 ILL. L. REV. 19 (1912) (discussing alcohol ordinances).

243. The Red Light Abatement Acts were enacted throughout the United States in the early 20th century to regulate prostitution houses. *See* N.H. REV. STAT. ANN. § 544:1 (1974) (initially enacted in 1919); N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985) (initially enacted in 1909).

244. See Annotation, *Constitutionality of Statute Providing for Forfeiture & Property Upon Which Intoxicating Liquor is Manufactured or Sold*, 10 A.L.R. 1591 (1921).

245. *See, e.g.*, WIS. STAT. ANN. § 823.113 (West Supp. 1989) (defining drug houses as public nuisances subject to abatement actions). These statutes regarding illegal drugs are not recent developments. States conducted nuisance prosecutions based on statutes which made it a misdemeanor to "'open[] or maintain[] a place where opium, or any of its preparations, is smoked by other persons.'" People v. Reed, 61 N.Y.S. 520, 520 (App. Div. 1899) (quoting N.Y. PENAL CODE § 388).

246. The impetus for the statutes may not always be directed toward morality. For example, prostitution laws first developed in England after prostitution was connected with transmission of venereal diseases. Mackey, *supra* note 240, at 35. Some commentators have suggested that morality laws may simply be bureaucratic strategies to extend the power and resources of the institution. Donald T. Dickson, *Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade*, DRUGS AND POLITICS 31-54 (Paul E. Rock, ed. 1977) (arguing that a combination of both moral and bureaucratic factors will exist in any given moral crusade).

dies short of criminal fines and imprisonment. These remedies include eviction of the tenant and injunctions against the defendants and the property itself which prohibit further criminal activities. Many of these statutes also allow for closure or "padlock" orders which prohibit access by anyone, including the owner, for up to one year.[247]

One important remedy provided by most statutes is a preliminary injunction restraining further illegal use of the premises.[248] Typically, preliminary injunctions require the person requesting the injunction to post a bond, a requirement dispensed with when the injunction is sought on behalf of the public.[249] Likewise, to obtain a preliminary injunction, one must usually show a likelihood of success on the merits, the immediate threat of irreparable harm if the injunction is not issued and a balancing of equities that favors the plaintiff.[250] However, to obtain relief under the typical abatement statute, the plaintiff need only provide some evidence that a nuisance exists. Depending on the jurisdiction, the range and type of evidence required for these preliminary orders varies from mere allegations at the pleading stage to clear and convincing evidence presented at a hearing.[251]

In addition to preliminary relief, injunctions are a common

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247. The constitutional validity of such orders remains in doubt under certain circumstances. *Compare* Sanders v. State, 203 S.E.2d 153 (Ga. 1974) (holding permanent padlock order on bookstore unconstitutional) *with* State *ex rel.* Kidwell v. U.S. Mktg., Inc., 631 P.2d 622 (Idaho 1981) (holding one-year padlock order on bookstore constitutional), *appeal dismissed*, 455 U.S. 1009 (1982). *But see infra* note 254. For a more detailed discussion of padlock orders, *see* Jeffrey S. Trachtman, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478 (1983).

248. *E.g.*, CAL. HEALTH & SAFETY CODE § 11570 (West 1991); HAW. REV. STAT. § 712-1270 (1990); N.Y. PUB. HEALTH LAW § 2323 (McKinney 1991); S.C. CODE ANN. § 15-43-30 (Law. Co-op. 1991); TENN. CODE ANN. § 29-3-105 (1980); UTAH CODE ANN. § 47-1-2 (1989); VA. CODE ANN. §§ 4-82, 48-8 (Michie, 1989); WIS. STAT. ANN. § 823.10 (West Supp. 1990).

249. *E.g.*, S.C. CODE ANN. § 15-43-30 (Law. Co-op. 1977); TENN. CODE ANN. § 29-3-105(b) (1980); UTAH CODE ANN. § 47-1-2 (1989).

250. City of New York v. Castro, 542 N.Y.S.2d 101, 103 (Sup. Ct. 1989), *aff'd*, 559 N.Y.S.2d 508 (App. Div. 1990).

251. *Compare* TENN. CODE ANN. § 29-3-105 (1980) ("the court shall, upon the presentation of a bill or petition therefor, alleging that the nuisance complained of exists, award a temporary writ of injunction") *with* N.J. REV. STAT. § 2A:54A-2 (1990) (allowing ex parte temporary restraining order "to preserve samples of materials located at the premises which are allegedly involved in the nuisance" but permitting a preliminary injunction only "if at the [later] hearing, the allegations of the petition are sustained by clear and convincing evidence").

form of final relief. Most "padlock" statutes permit authorities to close a premises from any access or use for up to one year.[252] At least one public nuisance statute goes beyond limited closings and allows total forfeiture of property used for activity involving illegal drug sales.[253]

The constitutionality of padlock orders has generally been upheld.[254] The only constitutional challenges to these preliminary injunction orders that have consistently prevailed have been challenges by closed adult book stores or movie theatres. In that context, because of First Amendment concerns with prior restraint of speech, the United States Supreme Court and many state courts have held injunction orders unconstitutional.[255]

The Texas legislature provided a unique alternative to closing premises after the United States Supreme Court declared its previous abatement statute unconstitutional.[256] The new statute provides that if a person continues to maintain a previously enjoined nuisance, the political subdivision may: (1) cut off public utility services, (2) prohibit private utility companies holding franchises to use public streets from providing services to the premises, (3) revoke the certificate of occupancy, and (4) prohibit the use of public streets or rights of way to access the premises.[257] Such closure orders are not punitive, but rather provide a deterrent to

252. *E.g.*, HAW. REV. STAT. § 712-1275 (1990); MO. REV. STAT. §§ 195.130, 195.253 (1989); TEX. CIV. PRAC. & REM. CODE ANN. § 125.002 (West 1986 & Supp. 1991).

253. WIS. STAT. ANN. § 823.113-.114 (West Supp. 1990).

254. *See generally* Annotation, *supra* note 244, 10 A.L.R. at 1591 (citing cases which upheld padlock statutes as constitutional); *see also* Gaskins v. People, 272 P. 662 (Colo. 1928) (upholding constitutionality of closure orders even when owner of property is not made a defendant in the proceedings because provisions for bonding by owner sufficient to satisfy due process); State v. Rossitto, 191 A.2d 642 (Del. Ch. Ct. 1963) (bonding provisions in statute satisfied due process).

255. *See, e.g.*, Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (striking down Texas statute which authorized judges to enjoin future exhibitions of films not yet held obscene); J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984) (facial First Amendment challenge to state nuisance statutes permitted); Airways Theater Inc. v. Canale, 366 F Supp. 343 (W.D. Tenn. 1973) (holding nuisance statute which permitted seizure of film equipment and film merely upon a determination of obscenity by a police officer unconstitutional); People *ex rel.* Arcara v. Cloud Books, Inc, 503 N.E.2d 492 (N.Y. 1986) (closing an adult bookstore under public nuisance statutes implicated state constitutional expression rights requiring a narrowly tailored statute). *But see* State v. Panno, 447 N.W.2d 74 (Wis. Ct. App. 1989) (holding mandatory closure of book store not unconstitutional where consistent pattern of illegal public sexual conduct exists).

256. *Vance*, 445 U.S. 308.

257. TEX. CIV. PRAC. & REM. CODE ANN. § 125.045 (West Supp. 1991).

continued illegal use of the property.[258] Though equity courts will not generally enjoin a crime, an exception is made for public nuisances where continual arrests and minimal punishments are of little effect in deterring the ongoing criminal enterprise.[259]

The scope of the available injunctive relief depends on the connection between the activities claimed to constitute a nuisance and the premises upon which they occur. For example, the Washington Supreme Court held that merely because prostitutes regularly took their clients to a particular hotel, that activity alone did not indicate that the whole building was a house of prostitution for purposes of the public nuisance statute.[260] The court stated that in order to padlock the building, its predominant use must be for the purposes of prostitution.[261] Thus, if illegal activities are confined to only one separable portion of the premises, such as one apartment or floor, the closure order may only extend to that portion of the premises.[262]

Remedies vary from state to state, including some exceptionally creative lawmaking. Missouri and Rhode Island have provisions under which any tenant's use of leased premises for certain illegal activities renders the lease automatically void, without any notice or action by the landlord.[263] Provisions for the seizure and sale of personal property used in connection with the illegal activities are not uncommon.[264] Texas statutes provide for fee shifting in

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258. *See, e.g.*, Grosfield v. United States, 276 U.S. 494 (1928) (interpreting abatement provisions of the National Prohibition statute as preventive rather than punitive).

259. *See* Toushin v. City of Chicago, 320 N.E.2d 202, 207 (Ill. App. Ct. 1974); Douglas v. Wiener, 370 N.W.2d 720 (Neb. 1985).

260. State *ex rel.* Carroll v. Gatter, 260 P.2d 360 (Wash. 1953).

261. *Id. See also* Otten v. Town of China Grove, 660 S.W.2d 565 (Tex. Ct. App. 1983) (finding testimony of three witnesses regarding two incidents of gambling on private property on Sundays insufficient to establish "habitual use" of property for gambling).

262. In State *ex rel.* Brucker v. Robinson, 229 N.W. 403 (Mich. 1930), an apartment building with 50 apartments could not be closed as a public nuisance because evidence existed of prostitution in one apartment only. However, dicta indicated that if the apartments hosting the illegal activities could not be specifically identified, then the entire building might be closed. *Id.* at 405. *See also* People *ex rel.* Dougherty v. Holschuh, 209 N.W. 158 (Mich. 1926) (ruling that because illegal liquor sales by tenant occurred on first floor of two-story building with separate entrances, the padlock order could only close off first floor); Rogers v. City of Abilene, 704 S.W.2d 145 (Tex. Ct. App. 1986) (holding injunction overbroad both floors of building were closed even though there was only proof of alcohol and drug violations on the first floor).

263. *See* MO. REV. STAT. §441.020 (1989) (gambling); R.I. GEN. LAWS § 11-30-6 (1990) (prostitution, lewdness, gambling, illegal liquor).

264. *E.g.*, HAW. REV. STAT. § 712-1230 (1985); ILL. ANN. STAT. ch. 100 1/2 ¶ 5 (Smith-Hurd 1987); S.C. CODE ANN. § 15-43-80 (Law. Co-op. 1976); TENN. CODE ANN.

public nuisance actions.[265] Washington state recently enacted legislation providing for "off-limits orders" which can be implemented as part of nuisance abatement proceedings.[266] Under these orders, a court may designate an area to be "protected against drug trafficking" use area, or a "PADT area," and enjoin "a known drug trafficker who has been associated with drug trafficking in an area that the court finds to be a PADT area, from entering or remaining in a designated PADT area for up to one year."[267] Finally, at least one municipal abatement ordinance allows the costs of law enforcement activities conducted on the premises to be levied against landlords who have been warned of illegal activities on their properties.[268]

While the actions for injunctions are civil in nature, the contempt proceedings to enforce the injunctions may be either civil or criminal. Some states specifically provide for civil contempt sanctions if injunctions in nuisance actions are violated.[269] If criminal contempt proceedings are brought, proof of the owner's actual knowledge and participation in conduct violating a nuisance abatement order is required.[270]

Unlike its private nuisance cousin, public nuisance is not a tort, but rather is an administrative claim brought on behalf of the entire community Under the law of private nuisance, neighbors can act to abate nuisances without legal process.[271] In the case of public nuisances involving disorderly houses, however, self-help abate-

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§ 29-3-101 (1980).

265. TEX. CIV. PRAC. & REM. CODE ANN. § 125.022(g) (West Supp. 1991).

266. WASH. REV. CODE ANN. §§ 10.66.005-66.130 (West 1990).

267. *Id.* at § 10.66.020.

268. LANSING, MICH., ORDINANCES § 630.04 (1991). Under the Lansing, Michigan nuisance abatement ordinance, a landlord who was warned by police about drug sales on his leased property was assessed $1,475 by the city council to cover the costs of a second drug raid on his rental house, and the house was ordered closed for two months. *Landlord Penalized for Tenant's Crimes*, WASH. TIMES, Apr. 17, 1991, at B5.

269. TEX. CIV. PRAC. & REM. CODE ANN. § 125.022(e) (including as sanctions for "civil contempt" fines of $1,000-$10,000 or jail for 10-30 days or both).

270. *See* Gaskins v. People, 272 P. 662, 663 (Colo. 1928) (allowing owner of premises where tenant conducted a nuisance the opportunity to post bond against abatement order instead of being held in criminal contempt for failure to appear since she lived out of state and was unaware of the nuisance order). *But see* Horne v. City of Cordele, 329 S.E.2d 134 (Ga. 1985) (finding contempt action available against owner refusing to obey nuisance abatement order regardless of his knowledge of the nuisance).

271. *See, e.g.*, Climax Specialty Co. v. Seneca Button Co., 103 N.Y.S. 822 (N.Y. Sup. Ct. 1907).

ments are not permissible.[272] But, some statutes allow private citizens to prosecute public nuisance actions themselves and to seek eviction of tenants without joining the landlord.[273]

Some states provide an intermediate position by setting up administrative systems in which citizens can bring nuisances to the attention of the prosecutorial government officials. For example, a Texas statute uses public meetings to identify public nuisances against which abatement actions may lie.[274] Under this provision, upon the request of ten percent of the registered voters in an election precinct, the district attorney may call a public meeting at which neighbors state their complaints about an alleged public nuisance.[275] The owner of the property is personally served with notice of the meeting.[276] The results of the meeting are reported to the district attorney, who may then begin proceedings to abate the nuisance.[277] Similarly, a Florida statute authorizes creation of local administrative boards for the purpose of receiving complaints and conducting hearings regarding alleged public nuisances.[278] These administrative bodies have the power to declare a place a public nuisance and prohibit further "operating or maintaining of the place or premises" for one year.[279] The board may also seek temporary and permanent injunctions from the courts.[280]

b. Definitions of Nuisances and Evidentiary Standards for Landlord Liability

Nuisance abatement statutes usually proscribe only certain illegal or immoral activities. The range of activities included varies from state to state, and may involve pornography,[281] prostitu-

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272. Slaughter v. People, 2 Doug. 334 (Mich. 1846) (holding that neighbors of house of prostitution may not tear down the building in an attempt to abate the nuisance).

273. *See, e.g.*, Kellner v. Cappellini, 516 N.Y.S.2d 827 (N.Y. City Civ. Ct. 1986) (applying city eviction ordinance against occupants of vacant building in which drug sales and drug related activities were said by neighbors to occur).

274. TEX. CIV. PRAC. & REM. CODE ANN. § 125.042 (West Supp. 1987).

275. *Id.*

276. *Id.* § 125.043.

277. *Id.* § 125.044.

278. FLA. STAT. ANN. § 893.138 (West Supp. 1991) (applicable to illegal drug-related and street-gang activities). This statute was amended in 1991 to add prostitution to the list of public nuisances covered by its provisions. 1991 Fla. Laws 143.

279. FLA. STAT. ANN. § 893.138.

280. *Id.* § 893.138(6).

281. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 124.021 (West Supp. 1991) (prohibiting the commercial manufacture, distribution or exhibition of material defined as obscene

tion,[282] illegal drugs,[283] illegal alcohol or drunkenness,[284] gambling[285] and similar vices.[286] These statutes penalize "inducing

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by criminal statute). A prior version of the Texas statute was declared unconstitutional in Vance v. Universal Amusement Co., 445 U.S. 308 (1980). *See also* HAW. REV. STAT. §§ 712-1270, 1271-1280 (1990) (addressing display or promotion of pornography); TENN. CODE ANN. § 29-3-101 (1990) (declared unconstitutional in Airways Theater, Inc. v. Canale, 366 F. Supp. 343 (W.D. Tenn. 1973)); WASH. REV. CODE ANN. §§ 7.42.010, .020-.900 (Supp. 1983-1984) (invalidated in Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), insofar as the word "lust" is to be understood as reaching protected materials).

Use of these statutes to control obscenity presents special problems involving the First Amendment and prior restraint which are beyond the scope of this article. *See generally* Peter J. O'Connor, *The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Businesses in the Mid-Town Area*, 46 FORDHAM L. REV. 57, 67 (1977); Doug Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509 (1977); B. Kay Albaugh, Comment, *Regulation of Obscenity Through Nuisance Statutes and Injunctive Remedies — The Prior Restraint Dilemma*, 19 WAKE FOREST L. REV. 7 (1983); Carolin D. Bakewell, Comment, *Constitutional Law — The Constitutionality of North Carolina's Nuisance Abatement Statute: A Prior Restraint on Nonobscene Speech*, 61 N.C. L. REV. 685 (1983); Steven T. Catlett, Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616 (1984).

282. One statute defines "house of prostitution" as a place "used for the purpose of lewdness, assignation, or prostitution." N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985). *E.g.*, HAW. REV. STAT. §§ 712-1270, 1271-1280 (1985); IOWA CODE ANN. §§ 99.1, 99.2-31 (West 1984 & Supp. 1991); MICH. COMP. LAWS ANN. §§ 600.3801, 600.3802-4001 (West 1987 & Supp. 1991); MO. ANN. STAT. § 191.680 (Vernon Supp. 1991); S.C. CODE ANN. §§ 15-43-10, 20-130 (Law. Co-op. 1977); TENN. CODE ANN. §§ 29-3-101, 102-115 (1980 & Supp. 1991); UTAH CODE ANN. §§ 47-1-1, 2-8 (1989); VA. CODE ANN. §§ 48-7, 8-15 (Michie 1989).

283. *E.g.*, FLA. STAT. ANN. § 823.10 (West Supp. 1991); HAW. REV. STAT. §§ 712-1240, 1241-1256 (1990); MICH. COMP. LAWS ANN. §§ 600.3801, 3802-4001 (West 1987 & Supp. 1991); MO. ANN. STAT. § 195.130 (Vernon Supp. 1991); N.J. STAT. ANN. §§ 24:21-35, 36-37 (West Supp. 1991); TENN. CODE ANN. §§ 29-3-101, 102-115 (1980 & Supp. 1991); WASH. REV. CODE ANN. §§ 7.48A.010, .011-.900 (West Supp. 1991); WIS. STAT. ANN. §§ 823.01, .02-.22 (West 1977 & Supp. 1991).

284. *See, e.g.*, MO. ANN. STAT. § 311.740 (Vernon 1963) (defining nuisance to include "all property kept and used in maintaining such a place and any still, doubler, worm, worm tub, mash tub, fermenting tub "); *See also* MICH. COMP. LAWS ANN. §§ 600.3801, 600.3802-4001 (West 1987 & Supp. 1991); R.I. GEN. LAWS §§ 11-30-1, 2-11 (1981); TENN. CODE ANN. §§ 29-3-101, 102-115 (1980 & Supp. 1991); VA. CODE ANN. §§ 4-81,82-83 (Michie 1988).

285. *E.g.*, FLA. STAT. ANN. §§ 849.01, .02- 46 (West 1976 & Supp. 1991); HAW. REV. STAT. §§ 712-1220, 1221-1231 (1985 & Supp. 1991); IOWA CODE ANN. §§ 99.1, .2-.31, 99A.10 (West 1984 & Supp. 1991); MICH. COMP. LAWS ANN. §§ 600.3801, 600.3802-4001 (West 1987 & Supp. 1991); R.I. GEN. LAWS §§ 11-30-1, 2-11 (1981); TENN. CODE ANN. §§ 29-3-101, 102-115 (1980 & Supp. 1991).

286. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 22-25-6 (1988) (unlawful betting on animal races); TENN. CODE ANN. §§ 29-3-101, 102-115 (1980 & Supp. 1991) (quarreling, fighting & breaches of peace); WASH. REV. CODE § 77.16.100 (Supp. 1991) (use of dogs while hunting).

vice, rather than the vice itself."[287] Municipalities have adopted similar public nuisance abatement ordinances.[288]

Various pieces of evidence may be used to prove a violation under these ordinances and statutes. Since the common law definition of disorderly houses depended on the status of the persons who gathered there, the character of visitors to property may be used as presumptive evidence of activities that occur on those premises.[289] The general reputation of the place as one at which illegal activities occur may also be introduced.[290] Indeed, the centrality of this evidence is demonstrated by early cases that refer to these nuisances as houses of "ill repute."[291] A number of state statutes raise a presumption of illegal activities based on general reputation.[292] Noise, fighting and other disturbances, sufficient in

287. People v. Vandewater, 164 N.E. 864, 867 (N.Y. 1928).

288. *E.g.*, Nuisance Abatement Law, NEW YORK CITY ADMIN. CODE §§ C16-2.0, 2.01-.22 (Supp. 1985-86). A complete text of the original ordinance is provided as an appendix to O'Connor, *supra* note 284, at 79.

289. *See* Steinberg v. People, 390 P.2d 811 (Colo. 1964) (holding tavern to be public nuisance based substantially on evidence that frequent visitors included "'police characters,' prostitutes, and other undesirables"); Beard v. State, 17 A. 1044 (Md. 1889) (finding general reputation for lewdness of women who frequented defendant's house competent evidence to establish disorderly house conviction); State *ex rel.* Cahalan v. Bernstein, 226 N.W.2d 56, 58 (Mich. Ct. App. 1974) (finding police testimony that prostitutes frequented bar sufficient to support closing the bar for one year); City of New York *ex rel.* Redlich v. Goldman, 356 N.Y.S.2d 754, 757-58 (N.Y. Civ. Ct. 1974) (concluding that reputation of visitors constituted presumptive evidence of unlawful activities on premises).

290. *See* State *ex rel.* Cox v. Taft, 100 S.E.2d 161, 163-64 (W. Va. 1957) (evidence regarding the general reputation of the premises permitted to establish the defendant's knowledge of the public nuisance). *But see* State v. Calley, 10 S.E. 455, 456 (N.C. 1889) (finding testimony proving the loose morals and conduct of a woman and her daughters in their own house insufficient to prove the existence of a disorderly house); Morgan v. City of Humble, 598 S.W.2d 364, 365-66 (Tex. Ct. App. 1980) (holding that it was reversible error to allow police officer to testify regarding general reputation of club as a location for solicitation by prostitutes because the officer had no actual knowledge of the club's reputation).

291. *See* Beard v. State, 17 A. 1044, 1044 (Md. Ct. App. 1889) (defining bawdy house as house where certain persons of "evil name and fame, and of dishonest conversation, [came] to frequent"); State v. Calley, 10 S.E. 455, 456 (N.C. 1889) (calling bawdy house a house of "ill-fame").

292. *See, e.g.*, OHIO REV. CODE ANN. § 3767.05 (Baldwin 1989) ("evidence of the general reputation of the place is prima facie evidence of [a public] nuisance); R.I. GEN. LAWS § 11-30-5 (1990) ("notorious character of any such premises, or the notoriously bad or intemperate character of persons visiting the same shall be evidence that such premises are nuisances"); *see also* Kellner v. Cappellini, 516 N.Y.S.2d 827, 830 (N.Y. City Civ. Ct. 1986) (finding that under New York City Abatement ordinance "proof of the ill repute of the demised premises or those resorting thereto shall constitute presumptive evidence of unlawful use").

themselves to constitute a public nuisance under the common law and some statutes,[293] may also be evidence that criminal activities take place at a location.[294]

Arrests can constitute evidence of a nuisance, but they must be sufficiently frequent to establish a habitual illegal use of the property.[295] Some statutes specify that a certain number of arrests on the premises constitutes prima facie evidence of a public nuisance.[296] However, the presumption of nuisance can be rebutted under most of these statutes.[297]

Recently, an Ohio court of appeals evaluated standards for evidence and the appropriate burden of proof.[298] In that case, a citizen anti-crime organization, Concerned Christian Men (CCM), was conducting a public relations campaign and learned from several residents in one Dayton neighborhood that marijuana was being sold from a particular house.[299] CCM contacted the police, who began surveillance of the house. The police noticed "an inordinate volume of traffic which stopped in front of the house and purchased unidentified packages."[300] This evidence was sufficient to obtain an ex parte temporary restraining and search order under Ohio's public nuisance statutes.[301] As part of the inventory search

293. *See, e.g.*, TENN. CODE ANN. §§ 29-3-101, 102-115 (1989) (nuisance includes fighting and quarreling); *see also* Commonwealth v. Tick, Inc., 233 A.2d 866, 868 (Pa. 1967) (ruling that trial court abused discretion in failing to close tavern when drunk, disorderly and loud patrons used foul language outside bar disturbing the neighbors).

294. State *ex rel.* Freeman v. Pierce, 573 N.E.2d 747, 749 (Ohio App. Ct. 1991) (drug activities on premises deemed per se nuisance).

295. *See* State *ex rel.* Patterson v. Motorama Motel Corp., 307 N.W.2d 349, 352 (Mich. App. 1981) ("a nuisance involves repeated or continuing conduct and should not be based upon proof of a single isolated incident unless [there is a] reasonable inference that the prohibited conduct was habitual"); *see also* Kentucky Alcoholic Beverage Control Bd. v. Jacobs, 269 S.W.2d 189, 191-92 (Ky. App. 1954) (closing tavern for one violation of liquor laws violated constitutional due process); Morgan v. City of Humble, 598 S.W.2d 364, 366 (Tex. Ct. App. 1980) (holding two arrests without convictions for prostitution at a nightclub insufficient to establish nuisance).

296. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2324-a (McKinney 1988) (making two or more convictions within one year for any prostitution offense presumptive evidence of a nuisance).

297. People *ex rel.* City of New York v. MacBeth Realty Co., 420 N.Y.S.2d 252, 254-55 (1979) (allowing hotel owner to rebut presumption that hotel was nuisance because three prostitution arrests had occurred within one year).

298. *Freeman*, 573 N.E.2d 747.

299. *Id.* at 748.

300. *Id.* The mother of the defendant later testified that she was operating a food catering business outside of the home. *Id.*

301. *Id.*

conducted to preserve evidence of the nuisance, the police found five pounds of marijuana.[302] At a subsequent hearing, the lower court found the house a public nuisance and issued a one year padlock order.[303]

On appeal, the Ohio court held that the appropriate burden of proof was not the criminal law's reasonable doubt standard, but rather a civil law standard.[304] Because the statute allowed injunctive relief, the court held that clear and convincing evidence was the appropriate standard of proof.[305] As to the elements necessary to prove a nuisance, the court noted that, like negligence per se, the plaintiff need only prove a "de facto violation" of a criminal law not a "de jure conviction."[306]

The most difficult aspect of this case related to whether the relator was required to prove that the property owner had any relationship to the nuisance. The Ohio statute did not specifically require that the owner be made a defendant to abatement proceedings or be proven to have had knowledge of the illegal activities.[307] The relator argued that once he proved a violation, the burden shifted to owners to show their innocence in regard to the nuisance.[308] The court disagreed and held that in any abatement action in which the owner is a defendant, the relator must show "by clear and convincing evidence that the defendant had knowledge of and either acquiesced to or participated in a felony violation on the property."[309]

Unlike the Ohio statute, some state statutes expressly require proof of a landlord's fault in closure actions. Under these laws, much of the evidence used to establish a nuisance is also relevant to proving that the landlord had notice of the nuisance. Reputation evidence may help establish not only that a building's use constituted a nuisance but that the owner knew of the use.[310] While

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302. *Id.* For the applicability of constitutional search and seizure protection in the context of nuisance abatement proceedings, see Parish of Jefferson v. Bayou Landing Ltd., 350 So. 2d 158 (La. 1977).

303. *Freeman*, 573 N.E.2d at 749.

304. *Id.*

305. *Id.* at 752.

306. *Id.* at 750.

307. *Id.* (citing OHIO REV. CODE ANN. § 3719.10).

308. *Id.*

309. *Id.* at 752.

310. State v. Taft, 100 S.E.2d 161, 163-65 (W. Va. 1957) (finding evidence of reputation admissible but not sufficient to sustain padlock order against owner where no other

reputation evidence alone may be insufficient to establish actual knowledge, a reputation for illegal activities plus a substantial rent payment may be sufficient to meet some states' standards of constructive knowledge.[311] Some statutes provide presumptions of landlord knowledge and acquiescence based on the frequency of illegal activity[312] or the reputation of the premises.[313]

Not all courts have required proof of landlord knowledge in a nuisance action. Many courts presume that a property owner knows how his property is being used.[314] For example, the Texas Court of Appeals[315] relied on a 1915 precedent and held that if property is determined to be a nuisance, closure orders may be granted regardless of proof of the owner's knowledge or participation in the nuisance.[316] Moreover, the court held that the owner had the burden of proving the nuisance had been abated.[317]

In determining whether knowledge on the part of the landlord is required, some courts distinguish between *in personam* proceedings and *in rem* proceedings. Many courts view closure orders as *in personam* actions which must be supported by evidence of the landowner's knowledge and participation in the nuisance.[318] However, other courts view closure orders as in rem actions against the

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evidence of his knowledge of illegal alcohol service existed).

311. State v. Irving, 700 S.W.2d 529, 533 (Mo. Ct. App. 1985) (ruling that owner's $60,000 net annual income from tenant's business and the widespread reputation of the business as masturbatory massage parlor provided sufficient evidence of owner's knowledge to support one year closure order).

312. TEX. CIV. PRAC. & REM. CODE ANN. § 125.004 (West. Supp. 1991).

313. N.Y. PUB. HEALTH LAW § 2324-3(c) (McKinney 1985 & Supp. 1991).

314. *See, e.g.*, City of New York v. Castro, 542 N.Y.S.2d 101, 102-03 (N.Y. Sup. Ct. 1989), *aff'd*, 559 N.Y.S.2d 508 (App. Div. 1990) (enjoining defendant from occupying his building despite the fact that he had no knowledge or notification that illegal gambling occurred on his newly purchased premises).

315. Rogers v. City of Abilene, 704 S.W.2d 145 (Tex. Ct. App. 1986).

316. *Id.* at 146 (citing Moore v. State, 181 S.W. 438 (Tex. 1915) and limiting holding to civil nuisance cases while continuing to require knowledge in criminal nuisance actions).

317. *Id.*

318. *See, e.g.*, Tennessee Coal, Iron & R.R. Co. v. Hartline, 11 So. 2d 833, 837 (Ala. 1943) (holding owner knowledge required because "ownership of real property imposes no responsibility for a nuisance created and maintained thereon by other parties"); Ahern v. Steele, 22 N.E. 193 (N.Y. 1889) (finding landlord who acquired property by inheritance not liable for a nuisance of which he had no knowledge). *Cf.* State *ex rel.* Webster v. Daugherty, 530 S.W.2d 81 (Tenn. Ct. App. 1975) (concluding that innocent owner can be subjected to permanent, perpetual injunction against operation of property without violating due process because no liability for damages or fine or penalty is imposed on the owner and there is no retroactive effect).

property itself; hence, the owner need not have participated in or have had knowledge of illegal activities on the premises.[319] This latter view results in a strict liability standard.

The constitutionality of a strict liability approach has been addressed in a number of cases, with no clear result. Appellate decisions by the Michigan courts illustrate the confusion with their varying interpretations of the constitutionality of the Michigan nuisance abatement statute. The Michigan statute does not require that the owner have knowledge or notice of the nuisance for a closure order.[320] In 1977, the Michigan Court of Appeals held that an owner's knowledge or notice of illegal use of premises is not constitutionally required to uphold a closure order to issue.[321] The court relied on the United States Supreme Court's decision permitting forfeiture of a vessel carrying contraband even though the owner had no knowledge that his lessee was arrested for smoking a single marijuana cigarette.[322] The Michigan court's justification for its interpretation summarizes the position taken by many courts throughout the history of these statutes.

> Closing the premises for up to one year prevents illegal reuse of the property and substantially decreases any profit derived from criminal activity Even though innocent, the defendants may have been negligent in failing to discover the flagrant misconduct alleged; the statute will encourage them to be more careful in the future. The confiscation threatened by the Michigan statute is at most a temporary deprivation of use of the premises and forfeiture of the furnishings [323]

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319. *See* People v. Barbiere, 166 P. 812, 815 (Cal. Dist. Ct. App. 1917) (holding that an action *in rem* does not require owner knowledge of the nuisance); *see also* People *ex rel.* Hicks v. Sarong Gals, 117 Cal. Rptr. 24, 28 (Cal. Ct. App. 1974) (proceedings directed against the property did not violate defendant's First Amendment rights); People v. McCaddon, 192 P. 325 (Cal. Dist. Ct. App. 1920) (finding owner's lack of knowledge regarding nuisance irrelevant in abatement action); People v. Bayside Land Co., 191 P. 994, 995 (Cal. Dist. Ct. App. 1920) (reasoning that statute's purpose is to reform property, so innocence of owner is irrelevant).

320. MICH. COMP. LAWS ANN. § 600.3815(2) (West 1987).

321. State *ex rel.* Patterson v. Weaver, 254 N.W.2d 68 (Mich. App. 1977). The Michigan nuisance abatement statute does require that the owner be named as a defendant in order for the court to issue a closure order. MICH. COMP. LAWS ANN. § 600.3801 (West 1987 & Supp. 1991).

322. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

323. *Weaver*, 254 N.W.2d at 70.

In 1981, the Michigan Court of Appeals again addressed the issue of landlord knowledge in *State ex rel. Oakland County Prosecutor v. Motorama Motel Corporation*.[324] In that case, the court relied on a 1927 Michigan Supreme Court decision which held that proof of the owner's "knowledge, acquiescence or consent" was constitutionally required to close a building.[325] While noting that the Michigan Supreme Court decision had been virtually ignored for nearly fifty years, the court found that it had never been overruled and approved the supreme court's analysis.[326]

The very next year the Michigan appellate court again addressed the issue of owner knowledge.[327] Despite acknowledging the confusion in its prior decisions on the issue, the court did not clarify the status of the law Rather, the court concluded that, as a practical matter, owner knowledge always would be present in an abatement case.[328] The court reasoned that even if an owner did not know about illegal activities on his property prior to a proceeding in abatement, the issuance of the complaint provided notice and the owner could then avoid closure by taking steps to voluntarily abate the nuisance.[329] The court concluded that, "[a]s between society and the owner of the premises, it is not unfair that the risk of loss be placed on the owner who leased the premises to the person who used the premises for the unlawful purpose."[330]

One justification for placing the risk on the landlord is that these statutes provide sufficient protection against unfair closures of property Under these abatement statutes, a court can rescind a padlock order against property if the owner pays the costs of the nuisance proceeding and posts a bond against further nuisances on the premises.[331] The court must be satisfied with the owner's

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324. 307 N.W.2d 349 (Mich. App. 1981).

325. *Id.* at 351 (*citing* People v. Schoonmaker, 216 N.W. 456 (1927)).

326. *Motorama Motel*, 307 N.W.2d at 351 (*citing* State v. Weitzman, 176 N.W.2d 462 (Mich. App. 1970)) ("We are admittedly perplexed by the apparent inconsistencies of *Schoonmaker* and the later decided cases, but we find that until some authoritative ruling is made in this area, we shall use the holding espoused in *Schoonmaker*.").

327. State v. Mesk, 333 N.W.2d 184 (Mich. App. 1982).

328. *Id.* at 191.

329. *Id. See also* Commonwealth *ex rel.* Funk v. Michl, 258 S.W.2d 493 (Ky. 1953) (noting that a court may deny an injunction if the owner abates nuisance and there is no likelihood of its recurrence); Rogers v. City of Abilene, 704 S.W.2d 145 (Tex. Ct. App. 1986) (permitting permanent injunction for continued violation without abatement by owner).

330. *Mesk*, 333 N.W.2d at 191 n.4.

331. *E.g.*, N.Y. PUB. HEALTH LAW § 2332 (McKinney 1988); S.C. CODE ANN. § 15-

good faith pledge to abate the nuisance and prevent further nuisances from arising.[332] Some statutes specify a required amount for the bond, while others vest discretion in the judge.[333] However, relief from a closure order does not vacate any other orders issued in the proceeding. For example, personal injunctions issued in the same proceeding against the defendants are still valid.[334]

While effective in some circumstances, public nuisance abatement proceedings are complicated. The following case study demonstrates the frustrations of all parties involved in a nuisance abatement proceeding.

c. A Case Study in Nuisance Abatement

The saga of an attempt to close a 70-room, single-occupancy hotel (The Ridgefield Hotel) in an Upper West Side neighborhood of New York City illustrates the difficulties in a nuisance abatement proceeding.[335] A great deal of prostitution activity allegedly occurred at the hotel, and the police undertook an investigation at the request of the neighbors.[336] Undercover officers were solicited on the street "some distance" from the hotel, walked with the prostitutes to the hotel, and arrested the prostitutes in the lobby.[337]

After three convictions for prostitution in the hotel in 1978, the New York attorney general brought an abatement action to close the hotel.[338] The request for a preliminary injunction was sup-

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43-110 (Law Co-op. 1990); WIS. STAT. ANN. § 823.15 (West 1989). These types of provisions have been upheld against attacks that they are unconstitutional deprivations of property. The National Prohibition Act, which included proceedings to abate liquor nuisances, was upheld in Schlieder v. United States, 11 F.2d 345 (5th Cir. 1926). This case was later cited by the United States Supreme Court when it upheld the Prohibition Act provision at issue in a case ordering an injunction against occupancy and use. Grosfield v. United States, 276 U.S. 494, 498 (1928).

332. *E.g.*, N.Y. PUB. HEALTH LAW § 2332 (McKinney 1988); S.C. CODE ANN. § 15-43-110 (Law. Co-op. 1990).

333. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.3840 (West 1988) ($1,000 to $50,000); N.Y. PUB. HEALTH LAW § 2332 (McKinney 1988) (value of the property); S.C. CODE ANN. § 15-43-110 (Law. Co-op. 1990) (value of the property as ascertained by the court); TEX. CIV. PRAC. & REM. CODE ANN. § 125.002 (West 1987) ($10,000); WIS. STAT. ANN. § 823.15 (West 1989) (discretion of court).

334. *E.g.*, N.Y. PUB. HEALTH LAW § 2332 (McKinney 1988); S.C. CODE ANN. § 15-43-110 (Law. Co-op. 1990); WIS. STAT. ANN. § 823.15 (West 1989).

335. People *ex rel.* City of New York v. MacBeth Realty Co., 420 N.Y.S.2d 252 (N.Y. Sup. Ct. 1979) ("MacBeth II").

336. *Id.* at 253.

337. *Id.*

338. People *ex rel.* City of New York v. MacBeth Realty Co., 406 N.Y.S.2d 298 (App.

ported by evidence of these arrests and by affidavits from four witnesses who testified that the hotel had a reputation for frequent prostitution.[339] One witness testified that the rooms beyond the lobby desk were rented seven or eight times each evening.[340] The New York trial court issued a preliminary injunction, closing the entire hotel on February 14, 1978.[341]

Both the state and federal courts rejected the defendant-owner's requests for a stay, but a number of hotel residents also brought a class action requesting a stay of the closure order.[342] The federal court for the Southern District of New York granted a preliminary injunction restraining enforcement of the state court order against innocent tenants on April 7, 1978.[343] On June 15, 1978, the Appellate Division of the New York Supreme Court modified its original order, conforming its terms to those of the federal court's order.[344] The Appellate Division now held that the closure order would apply only to the two rooms behind the lobby desk and to any rooms that became vacant.[345] This modification was necessary to prevent innocent tenants from being forced to relocate and because the evidence of prostitution was limited to the rooms behind the lobby desk.

The court was not in full agreement. In a separate concurrence, one judge noted that he thought the federal court had violated abstention principles by enjoining the state court's order.[346] Two dissenting judges would have upheld the original order because it was supported by "clear and convincing evidence of a continued pattern of prostitution at the premises."[347] One dissenting opinion objected to the more limited injunction because it would be difficult, if not impossible, to enforce.[348] The other dissenter commented on the irony of the court's decision:

Div. 1978) ("MacBeth I"). The Supreme Court of New York County issued a preliminary injunction in an unreported decision.

339. *Id.* at 300.

340. *Id.*

341. *Id.* at 298.

342. *Id.* at 300. These plaintiffs were represented by the hotel owner's attorney. *Id.*

343. *See id.* at 299 (citing the unreported federal decision).

344. *Id.* at 298-99.

345. *Id.* at 298.

346. *Id.* at 299 (Kupferman, J., concurring).

347. *Id.* (Sullivan, J., dissenting).

348. *Id.* at 300.

> While one arm of the City government, attempting to enforce the anti-prostitution laws, seeks to have the building closed as a public nuisance another arm of the City is paying the rent for the welfare tenants in the building who are represented by the attorney for the owners and 'hotel' operator in an attempt to keep the building open. Such are the annals of the poor.[349]

The final action for a permanent injunction and damages was tried nearly one year later, at which time the court held for the defendant landowner.[350] The court characterized hotels like the defendant's as "hells on earth" and "dumping places for the unwanted, the unfortunates and 'losers' in our society"[351] The court sympathized with the "justifiable resentment on the part of the Upper West Side community that they are bearing a disproportionate part of the burden created by these 'hotels'"[352] Nevertheless, the court stated that three arrests in one year were insufficient evidence that the hotel was being operated as a house of prostitution.[353] The court found the statutory presumption adequately rebutted because, even with a concerted police effort, only three arrests were made for prostitution and none were made on the premises.[354] Thus, the court denied the requested relief, suggesting that the proper avenue for regulating the hotel's operations was through the administrative agency that provided welfare referrals to the hotel.[355]

This two-year effort to close the Ridgefield Hotel demonstrates the different standards of evidence required to obtain preliminary injunctions and final closure orders, the dangerous impact of closure orders on innocent third parties, the cooperation of the community and the police in pursuing a nuisance action, and the varied motivations for these actions. This case also illustrates how the lack of predictability regarding these nuisance standards results in inefficiency While the owner eventually won, the process spanned

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349. *Id.* at 301 (Fein, J., concurring in dissent).

350. MacBeth II, 420 N.Y.S.2d at 253-55.

351. *Id.* at 253.

352. *Id.* at 254.

353. *Id.* at 255.

354. *Id.* at 255. These facts were contrasted with testimony by a police officer that, at a well-known Manhattan luxury hotel, there had been twenty arrests within a few weeks and that several such luxury hotels were houses of prostitution.

355. *Id.* at 256.

two years, five court proceedings and the temporary closure of the apartment building.

C. MODERN FORFEITURE LAWS AS A BASIS FOR LANDLORDS' DUTY TO CONTROL/PREVENT TENANT CRIMINAL ACTIVITY

The high profile and often dramatic results of forfeiture statutes provide an image of effective law enforcement efforts. Forfeiture provisions exist in a variety of statutes including customs reporting provisions[356] and organized crime laws.[357] The most commonly invoked forfeiture statutes at both the federal and state level are those relating to illegal drugs. At the federal level, section 881 of the Comprehensive Drug Abuse Prevention and Control Act of 1970[358] addresses the forfeiture of property used in connection with illegal drugs. At the state level, the structure of forfeiture statutes follows the Uniform Controlled Substances Act of 1970.[359]

Under these statutes, the illegal activities of a tenant create the risk of civil forfeiture of the landlord's property A criminal conviction of the tenant or landlord is not necessary to invoke a civil forfeiture action.[360] Even the tenant's acquittal in a prior criminal proceeding does not preclude a civil forfeiture action.[361] An ac-

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356. Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5317(c) (1989).

357. Racketeer Influenced and Corrupt Organizations (RICO) Comprehensive Forfeiture Act of 1984, 18 U.S.C. § 1963 (1988). *See generally* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976) (analyzing the Supreme Court's treatment of cases involving civil and monetary penalties, forfeitures of property and other "quasi-criminal" actions under a variety of statutes); James R. Maxeiner, Note, *Bane of American Forfeiture Law — Banished at Last?*, 62 CORNELL L. REV. 768 (1977) (providing a thorough description of the history of forfeiture proceedings in both England and the United States).

358. 21 U.S.C. § 881 (1988).

359. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 1 (1990). When the Uniform Controlled Substances Act was originally proposed in 1970, all fifty states, Puerto Rico and the Virgin Islands adopted it. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. at 47-48 (Supp. 1991). However, each state approved its own version of the Act. The modifications made were numerous and substantial. In 1990, a new version of the act was adopted by the Commissioners of Uniform Laws. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 1 (1990 & Supp. 1991). The new act has not yet been adopted by any state.

360. *See* United States v. $152,160.00 U.S. Currency, 680 F. Supp. 354, 356 (D. Colo. 1988).

361. *See* United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987) (holding previous acquittal in criminal trial does not raise issues of res judicata or collateral estoppel in a civil forfeiture proceeding); United States v. One 1977

quittal only means the state was not able to prove the crime beyond a reasonable doubt.[362] In a civil forfeiture action, once the government establishes probable cause to link the property to drugs, the defendant must refute the charges by a preponderance of the evidence.[363]

Even when a criminal forfeiture proceeding accompanies a federal criminal conviction, the civil proceeding is necessary to assert third-party interests in the property.[364] Therefore, a landlord's third-party interest is litigated in a subsequent and separate trial, either following a criminal forfeiture action or as the sole forfeiture action under the federal civil provisions.[365]

Interests subject to forfeiture under the civil forfeiture provisions include contraband, vehicles, money and personal property, with separate standards applying to each.[366] The constitutional issues raised by these provisions have been the subject of extensive analysis and commentary.[367] This article will not repeat that task,

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Lincoln Mark V, 453 F. Supp. 1388, 1391 (S.D.N.Y. 1978) (finding defendant's acquittal in narcotics trial not dispositive in forfeiture proceeding because standards and burdens of proof are different).

362. *1977 Lincoln*, 453 F. Supp. at 1391.

363. *E.g.*, United States v. 900 Rio Vista Blvd., 803 F.2d 625, 629 (11th Cir. 1986); One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 761 (8th Cir. 1986).

364. *See* United States v. Stazola, 893 F.2d 34, 36 (3rd Cir. 1990) (noting that subsequent to a criminal forfeiture, a third party may file a claim asserting a legal interest in the forfeited property, pursuant to 21 U.S.C. § 853(n)(2)); United States v. Campus, 859 F.2d 1233 (6th Cir. 1988); United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987).

365. Generally, "[b]ecause innocent third parties are not involved in this trial [criminal forfeiture action], they may not assert their claims to the defendant's forfeited interest until the trial has been completed." Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1263. However, concurrent state civil and federal criminal forfeiture actions are permissible. United States v. Draine, 637 F. Supp. 482 (S.D. Ala. 1986).

366. *See* Goldsmith & Linderman, *supra* note 365 (discussing evolving standards for innocent third parties under federal statutory provisions relating to forfeiture of vehicles).

367. *See generally* Brad A. Chapman & Kenneth W. Pearson, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. S. 881: The "Innocent" Lienholder's Rights*, 21 TEX. TECH. L. REV. 2127 (1990) (examining constitutional issues arising under the federal law); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976) (discussing federal forfeiture provisions in the context of constitutional distinctions between criminal and civil punishment); Jean R. Hutar, *A "Kinder, Gentler" Interpretation of the Comprehensive Forfeiture Act of 1984*, 24 LOY. L.A. L. REV. 171 (1990) (examining constitutional problems raised by forfeitures at the pre-conviction stage); Mark A. Jankowski, *Tempering the Relation-back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990) (discussing the proper standard of knowledge a subsequent purchaser must demonstrate to claim innocent ownership and insulate himself from forfeiture); Lalit K. Loomba, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime*

but will focus on application of these standards to landlord forfeiture for tenant criminal activities.[368] First, the primary federal statute under which landlords' property is subject to forfeiture is explored. Particularly, this section will examine application of federal standards, procedures and innocent owner defenses to landlords. Second, a variety of state statutes providing for forfeiture of real property are outlined.

1. Forfeiture of a Landlord's Real Property Interests Under Federal Statutes

Real property was not subject to forfeiture under the original version of the federal drug statute.[369] In 1982, the statute was amended to include the proceeds of illegal activities as forfeitable

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Control Act of 1984, 58 FORDHAM L. REV. 471 (1989) (advocating a balancing approach that accounts for the interests of property owners and society); James B. Speta, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165 (1990) (arguing that the federal forfeiture law should be limited in light of Eighth Amendment jurisprudence); Katherine M. Yusavage, *The Landlord and Forfeiture Under the Comprehensive Drug Abuse Prevention and Control Act of 1970*, 9 GLENDALE L. REV. 33, 35 (1990) (examining landlords' forfeitures, burdens of proof and remedies); Note, *Fifth Amendment — Seizures and Forfeiture of Property — Federal Court Upholds Pre-notice Seizure and Forfeiture of Real Property Used for Narcotics Trafficking*, 104 HARV. L. REV. 1139 (1991) (examining property forfeiture and Fourth and Fifth Amendment jurisprudence); Christopher M. Neronha, Comment, *In re Metmor Financial Inc.. The Better Approach to Post-seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 NOTRE DAME L. REV. 853 (1990) (examining the constitutionality of awarding a post-seizure interest to an innocent owner under the Drug Control Act); Peter Petrou, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822 (1984) (arguing that due process is violated by shifting the burden of proof onto the individual opposing the forfeiture statute).

368. The list of forfeitable property defined in § 881(a) was amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 418. In part, the amendment expressly identifies "any leasehold interest" as forfeitable. 21 U.S.C. § 881(a)(7) (1988).

369. The original version of the act limited forfeitures to vehicles and contraband, proscribing:

> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.
> (2) All raw materials, products, and equipment of any kind which are used in violation of this title.
> (3) All property which is used or intended for use, as a container for property described in paragraph (1) or (2).
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport property described in paragraph (1) or (2).

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1276 (1970).

property.[370] Under this provision, real property was forfeitable only as a "thing of value" if received "in exchange for a controlled substance."[371] In 1984, Congress amended the statute again to clarify the circumstances under which real property could be forfeited.[372] Under this amendment, real property was added to the list of items subject to forfeiture if it was used to facilitate a violation.[373]

Thus, under the current statute, a landlord's real property interests may be forfeitable under two separate provisions. Section 881(a)(6) causes a landlord to forfeit real property if it is considered part of the proceeds of a criminal drug enterprise.[374] Section 881(a)(7) subjects a landlord's property to forfeiture if it has "facilitated" a drug violation.[375]

a. Standards for Forfeiture

Under either statutory provision, the government need only

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370. The 1982 amendment provided for forfeiture of:

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter

21 U.S.C. § 881(a)(6).

371. *Id.*

372. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306(a), 98 Stat. 2040, 2050 (1984); *see also* S. REP. NO. 225, 98th Cong., 1st Sess. 195 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374 (noting that the amendments were "designed to enhance the use of forfeiture as a law enforcement tool in combatting racketeering and drug trafficking"). The legislative history reveals that Congress was concerned that property "indispensable" to committing drug offenses was not subject to forfeiture under the previous provisions. *Id.* 199, 1984 U.S.C.C.A.N. at 3378.

373. The new provision reads:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7).

374. 21 U.S.C. § 881(a)(6).

375. 21 U.S.C. § 881(a)(7).

show probable cause existed to seize the property.[376] Thereafter, the burden shifts to the landlord to prove either that the property was not used to facilitate a drug violation or that the tenant's illegal use was without the landlord's knowledge or consent.[377]

Probable cause exists when the government has a reasonable belief that statutory violations have occurred.[378] This belief may be supported by less than prima facie evidence, but it must be based on more than mere suspicion.[379] To prove probable cause, the government must show the property was used for drug activities, though it need not link the property to any one particular transaction.[380] As in nuisance abatement proceedings, probable cause may be established by hearsay[381] and circumstantial evidence.[382]

Of the two provisions, it is more difficult to establish probable cause that the property was used to "facilitate" a violation. The federal circuit courts disagree substantially regarding the appropriate standard for facilitation under section 881(a)(7). Some interpret the term consistent with its common meaning of making an activity easier or freeing it from hindrances.[383] More recently, one court applied the language of the statute itself, deeming facilitation to mean "used, or intended to be used, in any manner or part" to further a violation.[384] Other courts, however, have required a "substantial connection" between the forfeited property and the drug offense.[385] Unlike the nuisance standards, the substantial

376. United States v. 900 Rio Vista Blvd., 803 F.2d 625, 629 (11th Cir. 1986).

377. *See* United States v. 5 Bell Rock Road, 896 F.2d 605, 610-12 (1st Cir. 1990) (upholding summary judgment for government because it met its burden and the defendants did not meet theirs); United States v. 526 Liscum Drive, 866 F.2d 213, 216 (6th Cir. 1988) (stating that once the government proves probable cause, "the burden then shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture").

378. *526 Liscum Drive*, 866 F.2d at 216.

379. *Id.*; United States v. 11348 Wyoming, 705 F. Supp. 352, 355 (E.D. Mich. 1989).

380. United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 (2d Cir. 1986).

381. Franks v. Delaware, 438 U.S. 154, 165 (1978); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

382. United States v. 4492 S. Livonia Road, 889 F.2d 1258, 1269 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990).

383. *See* United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 157 (3d Cir. 1981), *cert. denied*, 454 U.S. 818 (1981).

384. United States v. 916 Douglas Ave., 903 F.2d 490, 492-93 (7th Cir. 1990), *cert. denied*, Born v. United States, 111 S. Ct. 1090 (1991) (finding two telephone calls to arrange a drug transaction sufficient to forfeit home).

385. *See, e.g.*, United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990) (ruling that

connection test does not require ongoing activities or violations but may be met by a single violation on the property.[386]

Moreover, because section 881(a)(7) provides for forfeiture of "[a]ll real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land,"[387] courts have upheld broad forfeitures. For example, courts have approved forfeiture of entire tracts of land based on illegal activity on only a portion of the land.[388] In addition, entire buildings may be seized even though illegal drug activity occurred in only parts of the building.[389]

b. Federal Procedures for Seizure of Property

Forfeitures under federal provisions may proceed pursuant to the Federal Rules of Criminal Procedure,[390] which permit a judge to issue a seizure warrant only after an ex parte probable cause hearing.[391] Section 881 also authorizes the seizure of forfeitable property without prior notice or hearing if the Attorney General shows probable cause that property is forfeitable.[392] The federal

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dental office used over 40 times to issue illegal prescriptions for eight patients constituted substantial connection); United States v. Santoro, 866 F.2d 1538, 1542 (4th Cir. 1989) (finding four sales of cocaine from home in one month constituted substantial connection); United States v. 3639-2nd St., N.E., 869 F.2d 1093, 1097 (8th Cir. 1989) (concluding house was substantially connected to illegal drug activity where cocaine, drug scales, a sifting device, drug paraphernalia, drug notes, weapons and $250 in government "buy money" were found in the residence). Some states require a substantial connection by statute. *See, e.g.*, WASH. REV. CODE ANN. § 69.50.502(a)(8) (West 1991) (requiring a "substantial nexus between commercial production or sale of the controlled substance and the real property").

386. United States v. 3097 S.W. 111th Avenue, 699 F Supp. 287, 290 (S.D. Fla. 1988) (ordering house forfeited after drugs were transferred between cars parked in the driveway), *aff'd*, 921 F.2d 1551 (11th Cir. 1991). *But see* United States v. Certain Lots in Virginia Beach, Virginia, Known as Lots 18 and 19 in Block 3, 657.F Supp. 1062, 1065 (E.D. Va. 1987) (holding single violation insufficient for forfeiture absent other evidence of criminal use of the property).

387. 21 U.S.C. § 881(a)(7).

388. *See, e.g.*, United States v. 40 Moon Hill Road, 884 F.2d 41, 44-45 (1st Cir. 1989) (17.9 acres forfeited); United States v. Santoro, 866 F.2d 1538, 1534 (4th Cir. 1989) (26 acres including family home forfeited).

389. United States v. 141st Street, 911 F.2d 870, 873 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); United States v. 16 Clinton Street, 730 F. Supp. 1265, 1266 (S.D.N.Y. 1990).

390. FED. R. CRIM. P. 41.

391. *See* 21 U.S.C. § 881(d) (stating that all provisions of law related to forfeitures generally are applicable to seizures and forfeitures under this statute).

392. 21 U.S.C. 881(b)(4).

circuit courts have disagreed over the constitutionality of these ex parte seizures.

In *United States v. 4492 S. Livonia Road*,[393] the Second Circuit held that the seizure of an isolated farmhouse on 120 acres without a prior adversarial hearing violated the claimant's right to due process.[394] The court applied the due process test articulated by the Supreme Court in a series of cases decided in the 1970s relating to pre-trial remedies.[395] Under that standard, constitutional seizure of property without notice and hearing requires consideration of three factors: the need to secure an important governmental interest, the special need for prompt action and the strict control over the state's monopoly of legitimate force.[396] The *Livonia* court balanced the significant need for effective crime enforcement against not only the owner's interest in fair process but also the constitutional concern for protecting the privacy of one's home.[397] Moreover, the court rejected a finding that exigent circumstances create a need for prompt action because "a home cannot be readily moved or dissipated."[398] Thus, the court concluded that due process required notice and a hearing before the seizure.[399]

Other courts have held that drug forfeitures involve inherently extraordinary circumstances that justify ex parte seizures. These courts rely on *Calero-Toledo v. Pearson Yacht Leasing Co.*[400] In that case, a leased yacht was seized when marijuana was found on board.[401] The Supreme Court upheld the constitutionality of the seizure and forfeiture despite the lack of notice to the yacht's les-

393. 889 F.2d 1258 (2d Cir. 1989) (affirming the validity of the forfeiture despite the constitutional violation), *reh'g denied*, 897 F.2d 659 (1990).

394. *Id.* at 1265-66.

395. *Id.* (applying Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 341-42 (1969)).

396. *Fuentes*, 407 U.S. at 91.

397. *4492 S. Livonia Road*, 889 F.2d at 1265.

398. *Id.*

399. *Id.* However, since a full hearing subsequent to the seizure had established probable cause, the court ultimately upheld the forfeiture. *Id. See also* United States v. Parcel I, Beginning at a Stake, 731 F Supp. 1348, 1353-54 (S.D. Ill. 1990) (holding that an ex parte magistrate proceeding was insufficient to protect claimants' rights given their private interest in their seized homes).

400. 416 U.S. 663, *reh'g denied*, 417 U.S. 977 (1974).

401. *Id.* at 665.

sor.[402] The court reasoned that seizure for purposes of forfeiture "presents an 'extraordinary' situation [justifying] postponement of notice and hearing."[403]

The analysis in *Pearson Yacht* has been used to justify seizures of leased real property, despite the differences in exigency presented by seizure of a movable vehicle versus seizure of real property In *United States v. 141st Street Corp.*,[404] the Second Circuit refused to apply the *Livonia* analysis to commercially leased property because, unlike the private residence in that case, "the private interest involved [was the] ownership and possession of an apartment building solely for commercial purposes."[405] Moreover, the court noted that because the seizure was pursuant to an ex parte hearing before a magistrate, sufficient protection against erroneous deprivation of property was provided.[406] Thus, the Second Circuit apparently established a dual standard of due process for real property seizures, requiring higher protection for private residences than commercial properties. This rationale has been followed by other courts. In *United States v. 16 Clinton St.*, the court held that ex parte judicial review was sufficient to justify the seizure of a large commercial building, containing two stores and eight apartments.[407]

c. The Innocent Owner Defense

Similar to the closure orders issued against a landlord's property in nuisance abatement actions,[408] forfeiture provisions have been challenged on takings grounds; courts have held that the desirability of deterring illegal use of property outweighs the economic loss to lessors. The Supreme Court in *Pearson Yacht* noted:

> To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring

402. *Id.* at 680.

403. *Id.* at 679-80.

404. 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

405. *Id.* at 874-75.

406. *Id.*; *see also* United States v. 300 Cove Road, 861 F.2d 232 (9th Cir. 1988) (holding that a magistrate's review before seizure offered sufficient protection), *cert. denied*, 493 U.S. 954 (1989).

407. 730 F. Supp. 1265 (S.D.N.Y. 1990).

408. *See supra* text accompanying notes 247-68.

possession of their property [409]

In qualifying these remarks, however, the Court acknowledged that innocent third parties may have a constitutional defense against civil forfeiture, but only in an extreme situation.

> [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property [410]

Thus, due process and takings challenges to civil forfeiture proceedings are foreclosed by the *Pearson Yacht* decision, and the innocent owner defense is the only means for landlords to defeat forfeiture.[411]

The landlord's risk of forfeiture under section 881(a)(6) (the "proceeds" provision) is less than the risk under section 881(a)(7) (the "facilitating" provision). The proceeds provision is limited. Under *Caplin & Drysdale, Chartered v. United States*, if a service is provided for remuneration and the provider did not have a reasonable basis to know the assets were potentially subject to forfeiture, the assets are immune from forfeiture.[412] Whereas a landlord may have a reasonable basis to know that illegal activities are occurring on his premises, he is less likely to have a reasonable basis to know the rent he is receiving is the product of drug transactions.

Section 881(a)(7) poses a greater threat to landlords and raises the most difficult questions regarding innocence.[413] Under this facilitating provision, an innocent or ignorant owner may prevail

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409. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687-88, *reh'g denied*, 417 U.S. 977 (1974).

410. *Id.* at 689.

411. *See generally* Goldsmith & Linderman, *supra* note 365, at 1264-67 (discussing the legal consequences of *Pearson Yacht*).

412. 491 U.S. 617 (interpreting 21 U.S.C. § 853(n)(6)(B) (1988) which "gives a third party who entered into a bona fide transaction with a defendant a right to make claims against forfeited property, if that third party was 'at the time of [the transaction] reasonably without cause to believe that the [defendant's assets were] subject to forfeiture'").

413. 21 U.S.C. § 881(a)(7).

"by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner."[414] Thus, if there is evidence a landlord actually witnessed illegal transactions, he has no innocent owner defense.[415] Willful blindness similarly will remove an innocent owner defense.[416]

The defense may also include the element of consent. Some courts have held that the innocent owner defense requires both lack of knowledge and lack of consent.[417] Other courts have permitted an innocent owner defense even if a landlord knew of illegal activities on the premises, as long as he did not consent to these activities.[418]

United States v. 141st Street Corp. illustrates application of the innocent owner defense.[419] In that case, an apartment building containing forty-one apartments was the site of extensive narcotics activity.[420] Undercover police found narcotics in seventeen of the building's forty-one apartments.[421] The police had raided the building on two separate occasions. Initially, police executed search warrants for eight apartments, arrested twenty-six people and seized narcotics, money and weapons. Two weeks later, they executed warrants in nine additional apartments, arrested another twelve people and recovered more contraband.[422] At that time, the building was seized pursuant to an ex parte application to a United States magistrate under the provisions of section 881(a)(7).[423]

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414. *Id.*

415. United States v. 19,026 Oakmont South Drive, 715 F Supp. 233, 237 (N.D. Ind. 1989) (allowing no innocent owner defense where two witnesses testified the defendant was in the room when cocaine was being sold and used).

416. United States v. 5745 N.W. 110 Street, 721 F. Supp. 287, 290 (S.D. Fla. 1989); *cf.* MODEL PENAL CODE § 2.02(7) (1985) ("knowledge [of a fact] is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist").

417. United States v. Lot 111-B, Waipouli, Kapaa Island, 902 F.2d 1443, 1445 (9th Cir. 1990); United States v. 418 57th Street, 737 F. Supp. 749, 751 (E.D.N.Y. 1990).

418. United States v. 6109 Grubb Road, 886 F.2d 618, 626 (3d Cir. 1989) (allowing innocent owner defense if owner proves *either* lack of knowledge or consent), *reh'g denied*, 890 F.2d 659 (3d Cir. 1989); *see also* United States v. 92 Buena Vista Ave., 937 F.2d 98 (3d Cir. 1991); United States v. 141st Street Corp., 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); United States v. 418-57th Street, 737 F. Supp. 749 (E.D.N.Y. 1990); United States v. R.D. 4, Box 382E, 727 F. Supp. 149 (D. Del. 1989).

419. 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

420. *Id.* at 873. Crack vials and crack pipes were found throughout the building. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* In executing the warrant, 15 apartments were sealed and their occupants evict-

The owner was a corporation whose president and principle stockholder, Mark Hersh, was the building's managing agent.[424] The president's uncle, Morris Nahmias, was the superintendent of the building and often also acted as a managing agent.[425] The owner was unable to establish an innocent owner defense at the district court level.[426] The jury decided that forfeiture was appropriate because the owner knew of or consented to the drug activity.[427] One basis for the jury's finding that the owner knew about the drug activity was that police had spoken with Nahmias three times during one summer regarding the extensive drug problem at the building.[428] The police also left several telephone messages and mailed a letter to the president, asking him to come speak to them about the building.[429] Apparently, the jury disbelieved the president's testimony that he had received none of these messages.[430]

On appeal, the corporate owner argued that Nahmias's knowledge of the drug activities was not sufficient to establish its knowledge because there was extensive evidence that Nahmias had taken bribes from drug dealers in the building in exchange for leasing apartments to them.[431] Thus, the corporation argued, Nahmias was acting adversely to the corporation's interests and his knowledge could not be imputed to it.[432] The court rejected this argument because the corporation never proved that it did not benefit from its agent's actions.[433] Moreover, the court held that there was sufficient proof of the president's knowledge to implicate the corporate owner.[434] The president testified that he had visited the apartment about a hundred times.[435] The court noted that because the apartment was "a veritable anthill of drug activity," the jury

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ed. *Id.*

424. *Id.* The realty corporation was the record owner of the building. *Id.*

425. *Id.*

426. *Id.* at 874. The government had satisfied its burden to establish that the building had been used to facilitate a drug violation, shifting the burden to the defendant.

427. *Id.*

428. *Id.* at 873.

429. *Id.*

430. *Id.*

431. *Id.* at 876.

432. *Id.*

433. *Id.*

434. *Id.* at 877.

435. *Id.*

was entitled to find that the president had knowledge.[436]

The court also rejected the argument that the owner's knowledge alone was sufficient to defeat its defense by applying the interpretation of section 881(a)(7) that allows lack of consent as a separate defense.[437] In defining lack of consent under section 881(a)(7), the court followed the *Pearson Yacht* case and required that the innocent owner do all that reasonably could be expected to preclude the illegal use.[438] The court believed that the *Pearson Yacht* standard provided "a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner."[439]

The *141st Street Corporation* court held that under this standard the corporation did not establish an innocent owner defense because it did not take affirmative steps to curb the drug activity until after the police first raided the property.[440] After that raid, the only action the corporation took was to instruct Nahmias not to accept rent from tenants who had been arrested.[441] "The jury concluded either that Realty Corp. knew of the narcotics activity before [the first raid] and took no steps to stop it, or that Realty Corp.'s response after learning of the raid was inadequate."[442]

Exactly what constitutes taking all reasonable steps to curb drug activity is unclear. Even when landlords have engaged in extensive efforts to regulate the use of their premises, the requirement that they take *all* reasonable steps can invite challenge from

436. *Id.*

437. *Id.* at 878.

438. *Id.* at 879.

439. *Id. See also* United States v. Premises Described as Route 2, Box 61-C, 727 F. Supp. 1295, 1299 (W.D. Ark. 1990) (following *Pearson Yacht* standard requiring defendant to prove either lack of knowledge or that all reasonable steps were taken to prevent the illegal activity). *But see* United States v. Lots 12, 13, 14 and 15, Keeton Heights Subdivision, 869 F.2d 942, 946-47 (6th Cir. 1989) (rejecting incorporation of *Pearson Yacht* standard into definition of consent under § 881(a)(7)); United States v. 171-02 Liberty Avenue, 710 F. Supp. 46, 49-50 (E.D.N.Y. 1989) (rejecting the *Pearson Yacht* standard); United States v. Certain Real Property, 724 F. Supp. 908, 914 (S.D. Fla. 1989) (holding that the defendant can prevail with an innocent owner defense under § 881(a)(7) without proving all reasonable steps were taken).

440. *141st Street Corp.*, 911 F.2d at 879.

441. *Id.*

442. *Id.* at 879-80. The court stated that the evidence supported either conclusion. *Id.* at 880.

the government. In *United States v. 710 Main Street*,[443] the government began a forfeiture action against a bar and arcade in which drug activity had taken place.[444] The owner admitted knowledge of the illegal activities, but he offered evidence that he had taken several steps to stop them.[445] The owner had attempted to obstruct illegal activity by his employees[446] and his patrons.[447] The owner limited his use of the property to those areas he could effectively control[448] and also attempted to enlist the police department in his personal efforts to eliminate drugs from the property.[449] The landlord voluntarily pursued these actions despite the fact he "did not have a complete high school education, a law enforcement background, or even the advice of law enforcement agencies to guide him."[450]

Originally, the district court dismissed this case, but reopened it a few days later after the *141st Street Corp.* decision. The government argued that under the standard applied in *141st Street Corp.*, the owner did not do "all that could have reasonably been expected."[451] The government asserted that the owner could have hired a bouncer or doorman to screen and control patrons and that he should not have discontinued his use of an electromagnetic "buzzer" lock on the front door of the building, even though he found it a hindrance to his business.[452] The government also claimed that the owner should have personally supervised the street in front of the property, rather than watching from an upstairs window.[453]

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443. 753 F.Supp. 121 (S.D.N.Y. 1990).

444. *Id.*

445. *Id.* at 123.

446. *Id.* He fired two bartenders after they were arrested on drug charges. *Id.*

447. *Id.* He installed signs, as a scare tactic, to warn patrons that they were subject to being photographed and searched, ejected persons who were not patrons, and instituted a locked restroom policy in which only one person could use the restroom at a time, for only one minute, after requesting a key from the bartender to gain access. *Id.*

448. *Id.* at 123-24. For example, he closed off the rear portion of the restaurant area, restricted the bar's daily operating hours and closed the third floor residential apartments. *Id.*

449. *Id.* at 124. The owner personally engaged in surveillance of the property from a nearby second-story window and provided anonymous phone tips to the police. *Id.* In addition, he wrote to the Commissioner of the Peekskill Police Department asking for cooperation in ridding the property of drugs, but he received no response. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

Regarding his leased arcade, the government argued that he should have closed it or rented it to another business which "would have been less conducive to that kind of heavy pedestrian traffic."[454] While the district court ultimately rejected the government's arguments, the very fact that such extreme measures by a landowner to control his premises were subject to two separate court challenges demonstrates the extensive reach of the "all reasonable steps" interpretation.[455]

Perhaps the broadest interpretation of section 881(a)(7)'s knowledge or consent standard was articulated by the court in *United States v. 2011 Calumet*.[456] The court held that the standard required a landlord prove that he "did not know and *had no reason to know* of the illegal use; [that he was not] involved in the illegal use; and [that he] did all that could reasonably be expected to preclude *or discover* the illegal use."[457] Thus, under this standard, "actual knowledge or willful blindness" becomes a generalized "constructive knowledge" standard and "consent" becomes "negligence in failing to preclude or discover." In *2011 Calumet*, the landlord leased commercial property through management agents.[458] The court held that the owner could not assert an innocent owner defense because his agents had notice of illegal activity and neither the owner nor the agents took all reasonable steps to prevent the activity.[459] The court found the owner had constructive knowledge of the illegal activities for several reasons, including: the property had been leased for a rent which was high for the neighborhood, the owner's agents were aware of unauthorized alterations including steel doors, barricaded windows, and "an unusual mirror system above the door," and the property manager and other employees had been aware of several drug raids on the premises.[460] The owner was found to have constructive knowledge because he was bound by his agents' knowledge and acts or omissions.[461] The landlord's failure to prevent the illegal activities provided an alternative basis for the forfeiture. The *2011*

454. *Id.*
455. *Id.* at 125.
456. 699 F. Supp. 108 (S.D. Tex. 1988).
457. *Id.* at 110 (emphasis added).
458. *Id.* at 109.
459. *Id.* at 110.
460. *Id.*
461. *Id.*

Calumet court emphasized that, even though the lease disallowed the property's use for illegal purposes, the landlord neither investigated nor evicted the tenants.[462]

2. State Forfeiture Provisions

State statutes vary as to whether and under what circumstances real property may be forfeited. Some state forfeiture laws adopt the express language of the Uniform Controlled Substances Act.[463] Under that Act, real property interests, including leaseholds, are not expressly subject to forfeiture; however, "containers" of controlled substances may be forfeited.[464] At least one court has made real property subject to forfeiture under this provision, because a building was specifically designed to contain and conceal a large marijuana growing operation.[465] Other state courts have rejected this interpretation, but have permitted forfeiture of real property under those statutory provisions that define "things of value used to facilitate violations" as forfeitable property.[466]

As discussed in the context of public nuisance laws, some jurisdictions incorporate forfeiture of real property interests into a graded scheme of nuisance remedies.[467] Other states have modified the Uniform Controlled Substances Act to bring real property under the statute. These statutes provide for forfeiture based on:

1) Proceeds: "Things of value furnished or intended to be furnished in exchange for controlled substance, all proceeds traceable to such an exchange."[468]

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462. *Id.*

463. UNIF. CONTROLLED SUBSTANCES ACT § 505, 9 (Part II) U.L.A. 1, 833 (1988 & Supp. 1990). Those states adopting this Act without real property provisions include Alaska, ALASKA STAT. § 17.30.110 (Supp. 1991), and New Mexico, N.M. STAT. ANN. § 30-31-34 (Michie Supp. 1991).

464. UNIF. CONTROLLED SUBSTANCES ACT § 505(a)(3), 9 (Part II) U.L.A. at 834.

465. Smith v. Mount, 726 P.2d 474, 478 (Wash. App. 1986); *see also* In re Forfeiture of 45,649 Maben Road, 434 N.W.2d 238, 241-42 (Mich. App. 1988) (property forfeited as a thing of value used to facilitate illegal drug activity *and* as a container).

466. *See* People v. 2850 Ewing Road, 409 N.W.2d 800 (Mich. App. 1987) (rejecting forfeiture by "container" standard but permitting forfeiture by "used to facilitate" standard).

467. COLO. REV. STAT. § 16-13-504(2) (1986 & Supp. 1990) (forfeiture provision does not include real property). *But see* § 16-13-303(1)(c) (real property is a class 1 public nuisance if used for any drug-related activity) and § 16-13-301(2) (such property subject to forfeiture); MD. CRIM. LAW. CODE ANN. § 297(b)(1)-(10) (1988 and Supp. 1992) (nuisance remedies provide for real property losses); WIS. STAT. ANN. §§ 161.53-.55 (West 1989) (forfeiture provision includes real property and also incorporates a nuisance provision).

468. ARIZ. REV. STAT. ANN. § 13-4313 (Supp. 1991); WIS. STAT. ANN. § 161.55(f)

2) Facilitation: "All real property including any right, title and interest in any lot or tract of land, and any appurtenances or improvements, which are used, or have been used, or are intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of the act."[469]

3) Both proceeds and facilitation.[470]

It is beyond the scope of this article to detail each of the state variants regarding procedure and standards.[471] However, since most of the states that permit real property forfeiture do so by analogy to the federal statute, the federal standards shed light on these state applications as well.[472]

Most states that permit real property forfeitures have also adopted the federal "knowledge or consent" provisions for innocent owner protection.[473] The same questions of interpretation will

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(West 1989).

469. ARK. CODE ANN. § 5-64-505(7) (Michie 1987 & Supp. 1991); IDAHO CODE § 37-2744A(a) (Supp. 1991); ILL. ANN. STAT. ch. 56 1/2, ¶ 1505(a)(5) (Smith-Hurd 1985 & Supp. 1991).

470. *See, e.g.*, DEL. CODE ANN. tit. 16, § 4784(a) (1990); FLA. STAT. ANN. § 823.13 (West 1992); GA. CODE ANN. § 16-13-49(d)(6) (Michie 1991); HAW. REV. STAT. § 712A-5(2)(a) (1990); KAN. STAT. ANN. § 65-4135(a)(7) (1990); KY. REV. STAT. ANN. § 218A.410 (Baldwin 1990); 1989 MASS. ADV. LEGIS. SERV. § 653 (Law. Co-op.); MICH. COMP. LAWS ANN. §§ 333.7521 (West Supp. 1991); MINN. STAT. ANN. § 609.5311(2) (West Supp. 1991); MO. ANN. STAT. § 513.607(1) (Vernon Supp. 1991); MONT. CODE. ANN. § 44-12-102(1)(h)(i) (1991); NEV. REV. STAT. ANN. § 453.301(8) (Michie 1989); OKLA. STAT. tit. 2 §503(A) (1990); OR. REV. STAT. § 3-791 (1989); 42 PA. CONS. STAT. ANN. §6801 (1989); R.I. GEN. LAWS § 21-28-5.04 (1989); WASH. REV. CODE ANN. § 69.50.505(a)(8) (1991); W. VA. CODE § 60A-7-703 (1989); WYO. STAT. § 35-7-1049(a)(viii) (1989).

471. For commentary on specific state statutes, see Steven L. Kessler, *New York's New Forfeiture Legislation (Part I)*, N.Y.L.J., Nov. 5, 1990, at 1 (reporting that legislation provides law enforcement agencies and prosecutors more power); Robert P. Brouillard, Note, *Civil Forfeiture Law in Oregon: Efforts Toward Effective and Equitable Change*, 25 WILL. L. REV. 455, 470 (1989) (asserting that law should protect innocent third parties); Kent Fischman, Comment, *An Overview of Oregon's New Forfeiture Act*, 69 ORE. L. REV. 169, 175 (1990) (concluding that new act poses constitutional problems).

472. For example, even though Michigan has its own version of the Uniform Act, its courts use interpretations of similar provisions of the federal forfeiture statute as persuasive authority. In re Forfeiture of $53.00, 444 N.W.2d 182, 186 (Mich. 1989).

473. *E.g.*, ARK. STAT. ANN. § 5-64-505 (1987 & Supp. 1991); DEL. CODE ANN. tit. 16, § 4784(a)(8) (1990); HAW. REV. STAT. § 712A-5(2)(b)-(e) (1990); IDAHO CODE § 37-2744A(d) (1991); KAN. STAT. ANN. § 65-4135(a)(6) (1990); KY. REV. STAT. ANN. § 218A.410 (Baldwin 1990); ME. REV. STAT. ANN. § 5821A (West 1989); MICH. COMP. LAWS ANN. § 333.7521 (West Supp. 1991); OKLA. STAT. ANN. tit. 2 § 503(A) (1990); OR. REV. STAT. § 3-791 (1989); 42 PA. CONS. STAT. ANN. §6801 (1989); R.I. GEN. LAWS § 21-28-5.04 (1989); UTAH CODE ANN. § 58-37-13(1)(g)(i) (Michie 1991); W. VA. CODE § 60A-7-703(a)(6)-(7) (1989); WYO. STAT. § 35-7-1049(a)(viii) (1989).

arise with respect to these state provision as have arisen under the federal statutes.[474] Some states impose an actual or constructive knowledge standard without any defense for lack of consent.[475] South Dakota and Missouri apply an "actual knowledge" standard,[476] while Florida and Montana require that the act occur with the owner's actual knowledge or express consent.[477] These actual knowledge standards allow landlords to ignore intentionally the use of their property At the opposite extreme, some states impose general negligence standards to require accountability for illegal uses of the property [478] Finally, some states provide no innocent owner defenses whatsoever.[479]

For states using nuisance abatement statutes to effect forfeitures, the same standards of owner knowledge and the defenses of voluntary abatement apply to forfeiture in the same way they apply to closure orders.[480]

D. FUNDAMENTAL COMPARISONS AMONG TORT, PUBLIC NUISANCE AND FORFEITURE DOCTRINES

Forfeiture and public nuisance doctrines have much in common. Most forfeiture statutes operate like nuisance abatement actions, asserting *in rem* jurisdiction against property used for illegal purposes. Like nuisance statutes, these actions can be both criminal and civil. Civil forfeiture procedures are preferred for the reasons of administrative convenience and efficiency In both nuisance and forfeiture actions, circumstantial evidence of illegal conduct can provide sufficient proof to invoke the remedy

Under both forfeiture and nuisance, once the offending property

474. See *supra* text accompanying notes 413-62.

475. *E.g.*, FLA. STAT. ANN. § 823.13 (West 1992) (actual knowledge); R.I. GEN. LAWS § 21-28-5.04 (1989) (actual or constructive knowledge).

476. S.D. CODIFIED LAWS ANN. § 34-20B-70.1 (1991); MO. ANN. STAT. § 297(a)(4)(ii) (Vernon Supp. 1991).

477. FLA. STAT. ANN. § 893.12(2)(b) (West 1992) (exempting real property from forfeiture if crime occurred without knowledge or consent of owner); MONT. CODE. ANN. § 44-12-102(1)(h)(i) (1991).

478. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4304(3)(c) (West 1989); CAL. HEALTH & SAFETY CODE § 11470(g) (West Supp. 1991); GA. CODE ANN. § 16-13-49(e) (Michie Supp. 1991) (disallowing forfeiture if owner did not consent, did not know, could not reasonably have known and did not gain from illegal activity); IDAHO CODE § 37-2744(d)(3) (1991); IOWA CODE ANN. § 809.14(1) (West Supp. 1991).

479. *See* WIS. STAT. ANN. § 161.55 (West 1989) (providing innocent owner defense only for vehicular seizures while allowing seizure of real property).

480. COLO. REV. STAT. § 16-13-303 (1986 & Supp. 1990).

is proven subject to the remedy, the burden then shifts to the owner to redeem his property Thus, both forms of remedy provide significant incentives for landlords to police their properties. Both pose the serious threat of depriving a landlord of property, or of rental income from property, before a full hearing is conducted, impeding the landlord's financial ability to protect his legal interests in the offending property

One difference between these provisions is that forfeiture proceedings are always commenced by a government entity, whereas relator actions are allowed in most nuisance actions. Also, although states more often authorize municipalities to enact nuisance abatement statutes than forfeiture statutes, the creativity of municipal legislatures in fashioning "abatement" statutes can provide remedies nearly as potent as forfeiture.[481] Because public nuisance statutes rely on a long tradition of common law actions, the courts may be more willing to interpret freely or supplement their provisions with scienter or notice requirements than they are when interpreting the newer federal and state forfeiture statutes. As a practical matter, however, both provisions are enforced through similar measures.[482]

Perhaps the most significant difference between nuisance and forfeiture statutes is the scope of the remedy Whereas nuisance statutes authorize closure for up to one year, they do not transfer title or management responsibility to the government. However, the forfeiture statutes result in complete loss of the offending property, a much more significant deprivation. Moreover, transferring management responsibility of property, particularly housing, to the government is an expensive remedy,[483] and there is no evidence that government is better able to control crime on these properties than are private landlords.

The nuisance and forfeiture statutes create a landlord's duty to

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481. In Lansing, Michigan for example, if the City Council declares a property a public nuisance, it may also determine "that the owner shall be liable for the full cost of any personnel (including police and code-compliance officers) involved in each raid subsequent to the first raid, and the full cost of any City personnel and materials involved in the boarding-up or padlocking and assess those costs against the property." LANSING, MICH., ORDINANCES § 630.04 (1991).

482. *See infra* text accompanying notes 526-40.

483. The U.S. Marshals Service, which maintains properties forfeited under the federal acts, prohibits, as a matter of policy, the seizure of real property unless it has an equity of $50,000 or more. Monte R. Young & Michael Slackman, *Cracks in the Laws: Officials say they lack tools to shut drug dens for good*, NEWSDAY, May 6, 1990, at 5.

police tenants. Tort doctrines also create a policing duty, though not as extensive as forfeiture and nuisance duties. Tort standards require landlords to prevent foreseeable criminal activity[484] Most nuisance and forfeiture standards set much less demanding foreseeability requirements and shift the burden to the landlord to meet them. Tort doctrines can be invoked only by a specific individual who has been harmed. Neither nuisance nor forfeiture provisions require any harm, or even criminal convictions, for their invocation. Moreover, the tort damages remedy, though significant, does not affect the landlord's ability to defend these cases as does the closure/seizure remedy of nuisance and forfeiture.

Despite these differences among the tort, nuisance and forfeiture provisions, all share the same basic assumptions regarding the ability and responsibility of landlords to police their property The next section of this article will explore those assumptions.

III. THE IDEOLOGY AND RHETORIC OF DOCTRINES REQUIRING LANDLORDS TO REDUCE CRIMINAL ACTIVITIES ON LEASED PREMISES

As evidenced by the doctrines described in this article — tort standards imposing a duty upon the landlord to police and protect tenants and nuisance abatement and forfeiture statutes permitting tenants' unlawful activities to place the landlord's property at risk — legal responsibility for the security of leased property has shifted to the landlord. From a theoretical perspective, this change represents an ideological shift from relatively individualist standards to more communalist standards.[485] This section will explore this ideological shift, first describing the characteristics of a change in focus along the spectrum from individual to communal standards and then identifying some rhetorical devices used to effectuate this shift consistent with the common law process.

A. Shifting Standards from Individualist to Communalist

The individualist perspective favors individual autonomy and self-regulation,[486] disapproving of laws addressed to the protection

484. *See supra* text accompanying notes 111-19.

485. Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 13-21 (1986); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713 (1976); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980.

486. *See* Jack M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 206

or regulation of group interests, such as family, women or tenants.[487] The communalist perspective values responsibility to others based on role or status and uses law as a vehicle to encourage such responsibility.[488] Accordingly, liability from the communalist perspective is based on norms of responsibility without fault, endorsing affirmative remedies at a systemic level rather than an individual level.[489] Communalist values favor the achievement of social goals via societal allocation of duties rather than by reliance upon individual effort and competition.[490]

Many significant legal developments may be seen as variants along the spectrum from individualism to communalism.[491] In many cases, the direction of movement along this spectrum depends upon the perspective from which the law is viewed.[492]

(1990) (explaining that rules which are individualist in nature de-emphasize an actor's responsibility for the effects of his/her actions on others).

One scholar, Leslie Green, has identified three theses associated with a theory of ethical individualism.

> The first is *egoism*, the view that everyone should act only to promote their own interests, such as increasing their own wealth, status or power. The second is *instrumentalism* which holds that all social relations and institutions are of value only to the extent that they promote the ends of individual persons. Finally, there is the weak thesis that [Green calls] *humanism*, according to which morality must have some connection (not necessarily instrumental) with the interests of persons.

Leslie Green, *Associative Obligations and the State*, *in* LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM? 93, 109 (Alan C. Hutchison et al. eds. 1989). Of these, instrumentalism seems particularly relevant in the characterization of traditional landlord-tenant law as individualist in orientation.

487. *See* Will Kymlicka, *Liberalism, Individualism, and Minority Rights*, *in* LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM?, *supra* note 486, at 181, 183-88 (discussing the opposition of the individualist position to minority rights).

488. *See* Green, *supra* note 486, at 108-14 (discussing communalists' reliance on roles and status); *see generally* ALASDAIR MACINTYRE, AFTER VIRTUE 33-34 (2d ed. 1984) (discussing societies where one's identity is largely dependent on his relationship to others in society).

489. Balkin, *supra* note 486, at 206.

490. *Id.*

491. This variance is exemplified by developments in tort law, spanning from intent to negligence to strict liability, and contract law, advancing from freedom of contract to consumer rights. *See* generally Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question under Title VII*, 62 N. CAR. L. REV. 943, 990-91 (1984) (discussing movement in American legal system away from a purely fault-based liability system toward a willingness to find liability without fault).

492. Individualism and communalism are not two separate and opposing viewpoints, but rather points along a spectrum of theories about the relationship between law and people. *See* Balkin, *supra* note 485, at 19 (noting that identification of a rule as either individualist or communalist in nature depends on the alternative to which the rule is compared).

Viewed from a societal perspective, recent developments in landlord policing responsibilities signify movement toward a more individualist standard since, overall, the general public's policing responsibility is being reallocated to the private sector.[493] This trend acts to decentralize policing responsibilities, effectively making the protection of others an individual responsibility, one of the "thousand points of light" contemplated by President Bush.[494]

Thirty years ago the "community" responsible for criminal law enforcement was composed of the citizenry as a whole, operating through the state's police power. Currently, the definition of the responsible "community" is more narrowly construed, dividing the citizenry into smaller groups, such as landlords, business owners, parents, health professionals and so forth, each responsible for criminal activities likely to arise within their sphere of activity Thus, there has been a shift from a larger community to a smaller community, making the focus more individualist in nature.[495]

On the other hand, when the perspective changes from this macro view to the narrower concerns of landlords and tenants, the shift is clearly one from relatively individualist to more communalist standards. First, standards producing landlord liability are based less on fault and more on responsibility Consider, for example, the tort standards placing liability on landlords for criminal activities on the premises.[496] These tort standards have moved from a position in which the landlord had no responsibility for a tenant's safety unless he expressly agreed to undertake that responsibility to a position in which a landlord's responsibility may arise based simply on the general foreseeability of crime.[497] Courts applying

493. *See* Balkin, *supra* note 486, at 208 n.35 (noting that "policies that deny governmental protection in the hope of encouraging persons to take care of themselves are usually relatively individualist").

494. *See Successful Drug Prevention Programs Highlighted as Part of Points of Light Celebration of Service*, PR Newswire Association, Inc., Apr. 19, 1991, *available in* LEXIS, Nexis Library, Wires File.

495. Commenting on this shift in the context of tort liability, a New York court noted:

> The trend toward enlarging the duty of landlords and other private parties to provide security against criminal acts, even in the absence of agreements to do so, has the potential of reaching absurd proportions. One can foresee landowners, proprietors of restaurants, stores, theaters, banks, schools and, indeed, public buildings being civilly responsible for all crimes on their premises.

Clarke v. J.R.D. Management Corp., 461 N.Y.S.2d 168, 170 (N.Y. City Civ. Ct. 1983) (granting judgment for landlord where tenant's car was broken into while parked in a rented garage, stating that tenants should be held "stringently to their proof").

496. *See supra* text accompanying notes 15-136.

497. *See, e.g.*, Muniz v. Flohem, Inc., 553 N.Y.S.2d 313, 316 (App. Div. 1990) ("The

these standards regularly invoke the disclaimer that a landlord is not an insurer of his tenant's safety.[498] However, as a practical matter, given the lack of predictability in the negligence standards and the difficulty of predicting and controlling criminal behavior, the landlord is indeed held as an insurer. As defined, the requirements of foreseeability and causation, especially as applied in general negligence approaches, depart measurably from previous rulings holding that a criminal's actions were an intervening cause that severed the landlord's liability.[499]

Nuisance and forfeiture standards are also based in notions of responsibility rather than fault. However, these standards approach this shift in a less direct analytic manner than the tort standards. Nuisance and forfeiture statutes begin with the presumption that landlords are responsible for and aware of their property's use; thus, the landlord bears the burden of proving his innocence in connection with illegal activities occurring there.[500] Indeed, many such statutes have been interpreted so that either actual or constructive knowledge can result in a foreclosure or forfeiture of the landlord's property,[501] in essence paralleling the foreseeability doctrines of tort law

Thus, tort, nuisance, and forfeiture standards all proceed from an assumption that landlords, more so than other members of society, have the responsibility for criminal activities occurring on their property

A second indicator that landlord responsibility for crime has shifted toward a more communalist perspective is evident in the underlying notion of freedom. For the individualist, freedom is defined by individual autonomy.[502] For the communalist, freedom

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common law also imposes a duty upon landlords to control the conduct of persons on their premises when they are reasonably aware of the necessity to do so."), *rev'd on other grounds*, 568 N.Y.S.2d 725 (N.Y. Ct. App. 1991).

498. *See, e.g.*, Becker v. IRM Corp., 698 P.2d 116, 129 (Cal. 1985) (holding that "like any other business proprietor or owner of property, the landlord is not an insurer of a tenant's safety") (citations omitted); Trentacost v. Brussel, 412 A.2d 436, 445 (N.J. 1980) (conceding that "[a landlord] is not an insurer of his tenants' safety"); Mostert v. CBL & Associates, 741 P.2d 1090, 1099 (Wyo. 1987) ("A landlord cannot be expected to be an absolute insurer of the safety of each and every person who enters upon property which is exclusively in the possession and control of his tenant.").

499. *See supra* text accompanying notes 111-32.

500. *See supra* text accompanying notes 408-62.

501. *See supra* text accompanying notes 247-62, 390-407.

502. Balkin, *supra* note 485, at 16 (explaining that "[f]reedom in Individualist terms is liberty from the constraints, expectations, and duties imposed by and owed

is defined by the security of group identification and protection. If landlords enjoy general immunity from liability for criminal activities on their premises, they have a large degree of individual autonomy Likewise, tenants have the autonomy to choose to exchange risks of crime for other values in selecting living arrangements. Even for limited-income tenants for whom this choice may be hypothetical at best, the shift away from landlord immunity means less tenant freedom.

Summarizing the landlord-tenant relationship as it existed in 1927, during the reign of general landlord immunity, one commentator stated as follows:

> The landlord can lease his property, live his life apart from the tenant, and forget all about him except when rent is due. The tenant, on the other hand, goes about his business free from direction by the landlord, and if he commits a personal wrong it is his own.[503]

It is axiomatic that a change in landlord autonomy must necessarily produce an equivalent change in tenant autonomy Hence, as a landlord's duty to protect and police tenants increases, so too the landlord's right to screen, control and evict tenants increases, thereby decreasing tenant autonomy by reducing the number of available housing options. For example, in *Stuyvesant Associates v. Doe*, a New Jersey court held that a landlord could summarily evict a tenant who had neglected to obtain scheduled schizophrenia treatment and, as a result, had a psychotic episode, causing property damage to his apartment as well as the common hallways.[504] The central question in the case was whether, given the tenant's psychosis, his conduct resulted in damage that was "willfully or by reason of gross negligence caused or allowed," as required by New Jersey statutory law[505] The court's analysis relied heavily upon the trend of expanding the landlord's duty with respect to tenant security[506] Even though most courts have rejected claims for landlord tort liability for damage caused by mentally ill tenants, the *Stuyvesant Associates* court justified its allowance of the summary

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to others").

503. Raymond H. Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 531, 533 (1927).

504. 534 A.2d 448 (N.J. Super 1987).

505. *Id.* at 449 (quoting N.J. STAT. ANN. § 2A: 18-61.1(c) (West 1987)).

506. *Id.* at 451.

eviction proceeding by reasoning that "[t]he landlord should not be placed in the precarious position of having to defend himself against damage or injuries caused by the irrational defendant."[507]

As courts expand the landlord's right to police and control tenant conduct, not only are tenants denied the constitutional protection afforded in the public policing context, they have less freedom in terms of privacy and autonomy.[508] This protection/oppression paradox often becomes more prevalent as the law moves towards a more communalist standard; that is, there is a greater danger that standards designed to increase protection of a group will be used to increase regulation and even repression of that group.[509]

The communalist response speaks not in terms of freedom *to* but freedom *from* — freedom from the risk of crime.[510] By placing increased responsibilities on landlords to secure leased properties, tenants and neighbors have greater individual autonomy without the threat of crime. While this concern for freedom as security is not inconsequential, to justify increased landlord responsibility fully, landlords must truly be able to reduce the threat and risk of crime. Standards that impose a policing duty on landlords represent a significant shift from individualist to communalist norms with a correlating redistribution of power and responsibility from the public sector to the private sector.

Often, movements of the law along this spectrum meet with charges of novelty, unworkability or unjustifiability. Thus, lawmakers may prefer to obscure the nature of this change. When the change occurs primarily through judicial interpretation, the judiciary's opinions may appear inconsistent with the interpretive, incrementalist view of the judicial function.[511] In interpreting statutory duties, legitimacy depends in part on the legislation's consistency with the fundamental value of fairness. Thus, courts applying these provisions use a number of devices to characterize this

507. *Id.*

508. *See infra* text accompanying notes 589-607.

509. This phenomenon has been a central theme of the debate over affirmative action and protective legislation for minorities and women. *See generally* Greschner, *Feminist Concerns with the New Communitarians: We Don't Need Another Hero*, *in* LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM?, *supra* note 486, at 119, 143-48.

510. *See* Balkin, *supra* note 485, at 17 ("Under the Communalist vision, one is truly free only when one can enjoy the protection and security which membership in the community offers.").

511. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3-8 (1982).

change from individual to communal philosophy as minimal or as consistent with existing legal norms. This section will examine some of the rhetorical devices used by courts to implement such recharacterizations or shifts.

B. Analytical Techniques Supporting Shifts Toward More Communalist Standards

The courts have played the largest role in this shift to communalist standards of responsibility, whether by modifying common law tort standards or by interpreting fault provisions in ambiguous nuisance and forfeiture statutes. Three common analytic techniques have been used to effectuate this shift: historical analysis, legal fictions and category redefinition.

1. Historical Analysis

Historical analysis can be a powerful tool in justifying legal doctrine.[512] Doctrinal change is rationalized by characterizing current doctrine as a product of historical conditions that have long since vanished. Conversely, history can be similarly manipulated to justify the retention of certain doctrines by making them appear to be the result of time-honored traditions. The changes in landlord responsibility for criminal activities rely heavily on both of these forms of historical justification.

In the recent development of landlord tort liability, attention has been drawn to the shifting basis of the landlord-tenant relationship, from status to contract, to property, to contract and back to status.[513] A typical explanation for the growth of tort liability ties the standards of liability to "the prevalent view of the lease at different points in time."[514]

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512. *See, e.g.*, Gregory S. Alexander, *History as Ideology in the Basic Property Course*, 36 J. LEGAL EDUC. 381 (1986) (discussing the function of historical perspective in understanding property law).

513. Commentary speculating on the nature of the lease transaction and its historical analogue confirms Justice Holmes' aphorism that the law of property "is a matter of history that has not forgotten Lord Coke." Gardiner v. William S. Butler & Co., 245 U.S. 603, 605 (1918). *See generally* Dale E. Bennett, *The Modern Lease — An Estate in Land or a Contract*, 16 TEX. L. REV. 47 (1937) (considering application of contract principles to modern lease transactions); John Forrester Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 446-53 (1972) (noting conceptual changes in real property leases and the role of contract principles); Hiram H. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369 (1961) (tracing the historical development of the landlord-tenant relationship).

514. Miriam J. Haines, *Landlords or Tenants: Who Bears the Cost of Crime?*, 2

In illustration, a landlord's tort immunity for injuries to or by tenants may be viewed as consistent with early lease relationships. Leases were initially executed to convey agricultural land to a tenant fully capable of operating the entire premises; consequently, the landlord was under no duty to maintain the property.[515] Nonetheless, the same historic analysis used to create landlord immunity was instrumental in its dismantling. When courts in the 1970s finally began to declare the landlord immunity doctrine obsolete, they merely changed the focus of their historical analogies. In establishing a landlord's general tort liability for criminal activity against his tenants, the inaugural court observed that the modern urban apartment lease was unlike older agricultural leases and drew from what it considered to be a more appropriate historical analogy, the innkeeper-guest relationship.[516] Thus, history may be used both to condemn current doctrine and to recharacterize new doctrines as mere extensions of analogous, well-established law.

Above and beyond its chameleon-like quality, historical analysis suffers an even greater defect: there is no accurate historical analogue embodying the modern conditions justifying society's imposition of a policing duty on landlords. It is difficult, if not impossible, to locate a period of time that offers a setting endowed with random anonymous property crimes, various liability rules and insurance options, organized professional police forces, urban crowding, a mobile society and hundred-plus unit apartment buildings with corporate ownership and non-resident management. In this sense, the modern lease is no more like the common law innkeeper-guest or the feudal lord-vassal relationships than it is the

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CARDOZO L. REV. 299, 305 (1981).

515. One commentator captured the essence of this era's landlord-tenant relationship, stating:

> It all made sense back in those days with the landlord off on the hunt or drinking port in the quiet of the evening, and the tenant asking only to be left alone to tend his fences and to shear his sheep The model landlord was the one who did the least. The tenant, in turn, was expected to run the farm, to be the omnicompetent man fully prepared to see to his own shelter, heat and light.

Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 231 (1969).

516. Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 481-83 (D.C. Cir. 1970) (holding landlord liable for injuries to tenant criminally assaulted in the common hallway of an apartment house).

common law agricultural lease.[517]

Nonetheless, a historical analysis of changes in tort liability may, indeed, serve as valuable background. Arguably, the shift toward more communalist rules of landlord liability for criminal activities by and against tenants is simply a shift to an early status-based concept of the landlord-tenant relationship.[518] But apart from this aid in labelling the nature of the shift, and given the criticism implicit in drawing analogies to anachronistic rules, a historical analysis draws little commendation.

As in the tort duty context, courts, in applying nuisance and forfeiture statutes, have drawn upon history to justify the use of remedies directed toward property rather than persons. For example, in *Pearson Yacht*, the Supreme Court carefully traced the history of the *in rem* forfeiture remedy to demonstrate constitutional acceptability.[519]

Despite this impressive application of history, one could demonstrate that these remedies are no more than a by-product of extinct public attitudes and conditions. The history of the use of forfeiture and nuisance abatement remedies has been cyclical rather than constant. These remedies have been used primarily against vice crimes such as alcohol and drug use, prostitution and gam-

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517. In this sense, the *Kline* court's reasoning and conclusion are flawed.

518. Historically, an agreement about security was inherent in the landlord-tenant relationship. In most feudal land transfers, the tenant pledged fealty and homage to the lord (the feudal "landlord") and a liege relationship was created. This status relationship required loyalty and obedience by the tenant; that is, the tenant was required to be the lord's man "in life and limb and earthly honour against all men except the king." JOHN HAMILTON BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 195 (2d ed. 1979). "The lord in return protected the tenant in his holding, ruled over him, and held court for him." *Id.* While there was little in a legal sense that required the landlord to protect the tenant from the criminal acts of third parties, there were extraordinarily strong customary bases for such protection. The law of the manor was administered in the lord's court. *Id.* If a tenant needed redress against others, the lord provided it. The lord of the manor was, in every sense of the term, a governmental agent. Likewise, the lord could be held responsible for the crimes of tenants. *Id.* at 203.

Moreover, this responsibility for tenant security extended to the entire community, each member having the obligation to disclose and apprehend any person who had broken the King's peace. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 568 (2d ed. 1905). This doctrine of communal responsibility was established in the colonies of the United States as well with the practice of "holy watching" in early Massachusetts. GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 91 (1960). "Holy watching" entailed inspection of one anothers' lives by members of a congregation, any "delinquencies" which were detected were then reported to the other members of the congregation. *Id.*

519. 416 U.S. 663, *reh'g denied*, 417 U.S. 977 (1974).

bling.[520] However, the public's definitions of and attitudes toward such vices have fluctuated throughout history.[521] Many of the historical cases challenging and justifying the remedies of forfeiture and closure arose during prohibition. Yet, the courts, in justifying nuisance abatement and forfeiture laws, call up precedent from this period to refute criticism that these remedies are unusual, novel and, therefore, illegitimate.[522]

The history invoked as ancestry for these doctrines is equivocal, at best. Depending on what era one chooses as the source of history, the current law is either a radical shift in doctrine, an example of well-established law or a return to a period of excess and abuse. For example, during the early years of prohibition, one commentator analogized nuisance abatement remedies to the early use of injunctions in England.[523] Rather than finding justification in that analysis, however, the author remarked:

> Let us hope [the increasing use of abatement orders] does not mean we are going back to something like the turbulent time of Richard II when there was a breaking down of centralized government and the powerful barons so overawed the local courts that the only way to obtain convictions for crime was to give chancery that power.[524]

Whether for criticism or justification, the exercise of tracing the historical origins of the landlord's duty to control criminal activity is but one indirect means to justify changes in common law rules.

2. Legal Fictions

Another common technique in supporting significant changes in common law is the use of legal fictions.[525] Legal fictions can

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520. *See supra* text accompanying notes 236-46.

521. Jerome H. Skolnick, *The Social Transformation of Vice*, 51 LAW & CONTEMP. PROBS. 9 (1988). The use of nuisance abatement remedies against houses of prostitution, for example, primarily arose after a period in which prostitution was tolerated rather than suppressed. *Id.* Indeed, "red light zones" were relatively common at one time in many cities; thus, many public nuisance abatement statutes are popularly named "red light abatement laws." *Id.*

522. *See, e.g.*, Commonwealth v. One 1972 Chevrolet Van, 431 N.E.2d 209, 211 n.5 (Mass. 1982).

523. Cyrus D. Shabaz, *The Historical Development of the Power of Equity Courts to Enjoin Nuisances*, 11 MARQ. L. REV. 32 (1926).

524. *Id.* at 38.

525. A "legal fiction" is a statement known to be false. LON LO FULLER, LEGAL FICTIONS 1 (1967).

serve many purposes. In addition to their use in the extension of established legal terms and definitions to meet current conditions,[526] legal fictions may be used less benignly

> to escape the duty of reasoned analysis, to perpetuate mythologies upon which the law thrives, to avoid criticism, to mask the true intent and purpose of the communicator, to avoid moral responsibility for decision, to dehumanize the cases perhaps to lessen the burden of decision-making, and, to pursue an agenda, usually political, that is inconsistent with the mainstream of thought [527]

Legal fictions play an important role in supporting the current standards of landlord liability for criminal activities. Most significantly legal fictions create the notion of "offending property." This fiction is best illustrated by the traditional approach to landlord liability by which the landlord's traditional duty to maintain the common premises provides a basis on which to impose liability on the landlord for criminal activities that are deemed to have been "caused" by a physical defect in the common premises.[528] The defective property is "responsible" for the crime and, hence, is dubbed "offending property."

This fiction is also commonly used in nuisance abatement and forfeiture proceedings where the court characterizes the property itself as an inducement to crime.[529] Through this reification, property is burdened with responsibility for crimes occurring thereon. For example, in analyzing admiralty forfeiture proceedings, the United States Supreme Court in an 1827 decision concluded "[t]he thing is here primarily considered as the offender,"[530] a fiction used to this day in nuisance abatement and forfeiture proceedings.[531]

A host of procedural and substantive consequences flow from the fiction of "offending property." Since actions are against the

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526. *Id.* at 22 (discussing the extension and modern application of out-dated linguistic terms to enable the law's progression).

527. Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 58-59 (1989) (footnotes omitted).

528. *See supra* notes 36-72 and accompanying text (discussing landlord liability for criminal activities based on the landlord's duty to maintain the common premises).

529. *See supra* note 319 and accompanying text.

530. The Palmyra, 25 U.S. (12 Wheat) 1, 14 (1827).

531. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, *reh'g denied*, 417 U.S. 977 (1974). *See supra* notes 318-19 and accompanying text.

property itself, as *in rem* proceedings, jurisdiction is more readily obtained than if the action were *in personam*.[532] More importantly, since this fiction identifies the property rather than the person as the offender, it dispenses with the requirement of fault. Issues of a landlord's knowledge, notice or consent may alternatively be considered (1) irrelevant,[533] (2) collateral concerns to be raised in separate proceedings,[534] or (3) affirmative defenses for which the landlord bears the burden of proof.[535]

Beyond the expedience of the *in rem* proceedings, this fiction may also serve to de-emphasize the roles of the landlord and the criminal perpetrator so as to ease the moral acceptability of imposing liability, essentially vicarious liability, on the landlord.[536] If the role of the landlord were emphasized, courts would have a more difficult time justifying their denial of the landlord's use of or title to the property on less than firm fault standards. Conversely, emphasis on the criminal actor would de-emphasize the owner's fault and raise the issue of vicarious criminal liability

Vicarious criminal liability has never achieved acceptance in American law. The common law of England recognized the crime of misprision of felony under which one who knows of another's felonious conduct may himself be criminally liable for failing to report or to prevent that conduct.[537] In the United States, however, that doctrine has both been rejected outright and reinterpreted to require actions amounting to aiding or abetting.[538] Mere knowledge of a crime and failure to take action to prevent it does not

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532. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court abolished formalistic distinctions between in rem and in personam proceedings, instead requiring jurisdiction to be founded upon the "minimum contacts" test enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Nonetheless, the Court admitted that the presence of property itself may go a long way towards establishing compliance with the "minimum contacts" requirements. *Shaffer*, 433 U.S. at 207-08. The beneficial and practical aspects of property ownership make the contact a weighty one. *Id.*

533. See *supra* text accompanying notes 314-17 (nuisance) and 475 (forfeiture).

534. See *supra* text accompanying notes 327-30 (nuisance) and 364-65 (forfeiture).

535. See *supra* text accompanying notes 408-18 (forfeiture).

536. *See generally* KEETON et al., *supra* note 20, at 500 (discussing the questionable justification for the imposition of vicarious liability).

537. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, 174-76 (2d ed. 1986); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 572-77 (3d ed. 1982)

538. LAFAVE & SCOTT, *supra* note 537, at 174-76 ("It is doubtful whether [misprision] ever had a meaningful existence beyond the textbook writers."); PERKINS & BOYCE, *supra* note 541, at 572-77 (suggesting that omission of the crime from the Model Penal Code is proof that the crime of misprision will ever be revived in the United States).

constitute a crime under the laws of the United States.[539] Thus, by imputing the cause of the crime to the "offending property," courts may escape difficult issues of criminal responsibility

3. Category Redefinition

A final technique used to generate acceptance of landlord liability for the criminal actions of others is the application of traditional doctrinal labels to distinct, non-traditional proceedings. For example, in tort liability cases, traditional exceptions, originally designed to establish the landlord's responsibility for the physical premises, are increasingly extended to assess liability for the acts of others.[540]

This technique is also used in the context of nuisance and forfeiture proceedings. Although dubbed civil actions, these proceedings embody many of the definitive characteristics of criminal actions. For instance, one difference between civil and criminal actions lies in the identity of the plaintiff. Criminal actions are brought by a representative of the government whereas civil actions are generally brought by private parties injured by another's actions. Despite this generalization and their characterization as civil actions, the state prosecutes nuisance and forfeiture proceedings.[541] Even though prosecution of nuisance actions proceeds on the relation of private individuals, these relators need not have suffered any injury from the criminal activity on the premises, but need only reside in the premises' district or neighborhood.[542] In forfeiture actions, the government's prosecution proceeds with even less involvement by private persons.[543] Despite this state involvement, such actions remain characterized as civil rather than criminal actions.

Further, in most situations, courts differentiate between civil and criminal actions based on the type and severity of the remedy

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539. In re David K., 145 Cal. Rptr. 349, 353 (Cal. Ct. App. 1978) (finding liability for aiding and abetting established where defendant was found in the company of identified robber in stolen car just three hours after the robbery).

540. *See supra* notes 21-49 and accompanying text.

541. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193 (March 1991).

542. *See generally* Spencer, *supra* note 191, at 66-73 (describing the historical evolution of the relator proceeding); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 591-602 (4th ed. 1971) (discussing public and private nuisance actions).

543. *Id.*

prescribed.[544] However, in nuisance and forfeiture proceedings, courts look solely to the purpose of the remedies.[545] For instance, using the legal fiction of "offending property," courts characterize the purpose of closure and forfeiture orders as preventative rather than punitive.[546] On this basis, courts label such proceedings as civil without regard for either the potentially extraordinary losses or the non-existence of a compensation principle.[547]

The unusual application of various doctrinal terms is especially pronounced in nuisance abatement actions. The label "nuisance" is usually associated with an unreasonable interference with another's use and enjoyment of property or with the public's general rights.[548] The central concept of nuisance, both public and private, is the *effects* of actions on others.[549] Yet in statutory *nuisance* abatement proceedings, bearing this same doctrinal label, effect on others is unnecessary The plaintiff need not even demonstrate that others are aware of the illegal use of property [550] Rather, it is the use of the property for illegal purposes that provides the nature of the claim, a concept much more analogous to criminal as opposed to civil actions.

In effect, the use of the nuisance label allows the statutory version of traditional nuisance actions to share the traditional remedy — injunctions — notwithstanding the fact that much of the core definition for injunctions is missing. The basic maxims of equitable remedies provide that equity acts *in personam*, that equity acts only

544. *See* Coffee, *supra* note 541.

545. *See, e.g.*, Grosfield v. United States, 276 U.S. 494, 497 (1928) (interpreting abatement provisions of the National Prohibition Act as preventative rather than punitive).

546. *Id.*

547. Except to the extent that forfeiture proceedings are characterized as a form of reimbursement to government authorities for the cost of enforcement.

548. *See* 4 RESTATEMENT (SECOND) OF TORTS § 821B (1979) ("A public nuisance is an unreasonable interference with a right common to the general public."); *id.* at § 821D ("A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land.").

549. *Id.*

550. *See, e.g.*, State v. Strawberries, Inc., 473 N.W.2d 428, 435-36 (Neb. 1991) (concluding that tavern's conduct constituted a public nuisance since it had the *effect* of unreasonably interfering with community morals); Adkins v. Thomas Solvent Co., 459 N.W.2d 22, 23 (Mich. App. 1990) (stating that a chemical company's contamination of drinking water unreasonably and substantially interfered with plaintiffs' use and enjoyment of land so as to constitute a private nuisance); City of Virginia Beach v. Murphy, 389 S.E.2d 462, 466 (Va. 1990) (holding that an ordinance which prohibited the playing of any television, radio or musical instrument in an annoying manner was a constitutional protection of the public from nuisance).

if legal remedies are inadequate, that equity will not enjoin a crime and that equity abhors a forfeiture.[551] While the current force of maxims as precedent is considerably reduced, the basic principles of equity reflected in these maxims endure in cases involving injunctions.[552] Yet in nuisance abatement actions, courts use an *in rem* proceeding with no proof that legal remedies are inadequate deterrents to effectuate a forfeiture of property rights for a period of up to one year.[553] Thus, not only have courts "redefined" the civil category of actions to encompass nuisance and forfeiture proceedings, they have "redefined" the application of the nuisance label as well.

Hence, through the use of historical analysis, legal fictions and redefined categories, the courts have succeeded in effecting a dramatic shift in the law of landlord liability, all the while making the change appear consistent with centuries of legal doctrine. Some courts, however, have rejected these approaches, arguing that the question is simply one of social policy and fairness, concepts explored in the next section of this article.

IV A SOCIAL UTILITY ANALYSIS OF LANDLORDS AS COPS

The primary justification for expanding the landlord's duty to protect and police tenants is that landlords will then take actions to reduce crime.[554] Hence, the legitimacy of these standards depends

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551. GEORGE TUCKER BISPHAM, PRINCIPLES OF EQUITY §§ 16-27 (11th ed. 1931); *see generally* Roscoe Pound, *The Maxims of Equity*, 34 HARV. L. REV. 809, 810 (1921) (tracing the history and development of the maxims of equity).

552. *See, e.g.*, EDWARD D. RE, REMEDIES: CASES AND MATERIALS 44-50 (2d ed. 1987) (stating that "one finds reference to [the maxims of equity] in a number of recent decisions").

553. The procedural requirements of injunctions are selectively imposed as well. On one hand, most nuisance abatement proceedings dispense with the disadvantageous, traditional requirement that a bond be posted in exchange for a temporary injunction closing the property. *See, e.g.*, Gagel v. Cornelius, 380 So. 2d 1333, 1336 (Fla. Dist. Ct. App. 1980) (discussing Florida's dispensation of the bond requirement for the issuance of a temporary injunction). By contrast, some states use the traditional requirements of equity to their advantage to deny the right to a jury trial in nuisance abatement actions, relying upon the absence of this right in traditional equity proceedings. *See, e.g.*, City of Girard v. Girard Egg Corp., 230 N.E.2d 294, 295 (Ill. 1967); State v. Kearns, 264 S.W. 775, 779 (Mo. 1924); State v. Peters, 203 P.2d 299, 303 (Or. 1949). Thus, courts apply the label "injunction" to remedies and procedures that are often at odds with the traditional core definition of that term.

554. In 1986, the California Supreme Court stated that the growth of liability in the residential landlord-tenant context derives from the recognition that "only the landlord is

upon their effectiveness.

However, from the landlord's perspective, the current legal standards are not sufficiently clear to predict liability [555] This ambiguity coupled with the lack of financial incentives only encourages landlords to seek other investment opportunities. Thus, in practical terms, these heightened standards will most likely serve only to further reduce the availability of rental properties, especially low-income housing properties.

In addition, from a societal perspective, shifting responsibility for crime prevention to landlords is neither efficient nor effective. Since the legal standards for landlord liability do nothing to address the causes of crime, increased landlord efforts to meet these legal standards primarily serve to relocate crime to other areas, failing to significantly decrease criminal activity overall. Compared to this minimal benefit, significant costs accompany the shift of criminal law enforcement duties to landlords. Besides the grave potential for violation of tenant rights, there is a danger of encouraging the "deputization" of the citizenry Moreover, criminal law enforcement efforts becomes more hidden, thereby increasing the corresponding opportunity for corruption and discriminatory enforcement and inviting the practice of unrestrained vigilantism.

A. THE LANDLORD'S PERSPECTIVE: HOW TO RESPOND TO INCREASED LEGAL STANDARDS

The tort, public nuisance and forfeiture laws discussed in this article were designed to provide incentives for landlords to police their tenants' use of the property so as to reduce crime. Landlords might respond to these incentives positively or negatively They may attempt to comply with the responsibilities imposed by these standards, either by policing current tenants or by screening potential tenants to detect and avoid those who pose risks of criminal activities. On the other hand, landlords may seek to avoid these responsibilities by avoiding contact with leased premises and tenants, by contractually shifting the risk of criminal conduct or by changing to investments that pose a lesser risk of liability Unfortu-

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in the position to secure common areas, [and therefore] he has a duty to protect against types of crime of which he has notice and which are likely to recur if the common areas are not secure." Frances T. v. Village Green Owners Assoc., 723 P.2d 573, 578 (Cal. 1986).

555. *See* Johnson, *supra* note 134 (discussing inconsistencies of current legal standards concerning landlord liability for criminal activities).

nately, this last option is the easiest, and likely to lead to even less investment in properties in high crime areas.[556]

1. Meeting the Responsibility: Policing Tenants

In creating landlord responsibilities for criminal activity, the courts and legislatures hoped that landlords would respond by undertaking measures to police their property and tenants. For this hope to be realized, the landlord must be able, legally and practically, to monitor and control their tenants' conduct. Further, the incentives provided must be sufficiently clear and predictable so that landlords will be able to know the degree and kind of preventive measures necessary The current legal standards, however, meet neither of these essential prerequisites.

a. The Landlord's Right to Control Tenants

Landlords might opt to exercise control over tenants through explicit lease terms increasing the landlord's right to inspect the premises and to implement behavioral rules enforceable via summary eviction. However, just as landlords possessed only a minimal common law duty to control tenants, so too the landlords' rights to control tenants have been traditionally restricted.

Historically, leases were considered conveyances of a property interest between strangers; therefore, the landlord had little control over how the tenant used the property.[557] Apart from the law of waste,[558] the common law provided that the tenant was free to use the property as if he were the owner.[559] While some illegal

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556. Disinvestment and abandonment remain the only alternatives for landlords who are unable to raise rents to cover increased costs of liability. *See* Johnson, *supra* note 134, at 250; Haines, *supra* note 514, at 351; Comment, *The Landlords Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275, 297 (1971). *But see* Frederick C. Tuomi, *Troubled Assets Must be Dealt with in 90's*, 32 NAT'L REAL EST. INVESTOR 48 (1990) (suggesting rehabilitation of distressed properties may be very profitable if management can take control of crime problems).

557. *See generally* ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 4.1 (1980) (discussing the historic landlord-tenant relationship and absence of control prerogatives).

558. Waste occurs when the tenant reduces the value of the landlord's reversion interest by damaging or altering the property. *See* 4 GEORGE W THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1270 (1981). Generally, the law provides the landlord a statutory remedy of forfeiture for such waste. *See* John A. Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation*, 45 FORDHAM L. REV. 223, 258 n.115 (1976).

559. *See, e.g.*, People v. Scott, 258 N.E.2d 206, 208 (N.Y 1970) (recognizing that the

uses of the property might rise to the level of waste, a common example being illegal drug laboratories,[560] most illegal uses of the premises endanger the tenants' personal property or safety rather than the physical integrity of the structure. Admittedly, the tenant's behavior can harm the landlord's goodwill; however, such harm is not necessarily actionable under the waste doctrine.[561]

Arguably, the ancient doctrine of forfeiture of leases for felonies[562] carries over into the modern leasing situation. In early times, some jurisdictions recognized this doctrine of forfeiture[563] while others rejected it.[564] Even in those jurisdictions that recognized the doctrine, a crucial issue arose as to the nature of the forfeiture. If the forfeiture was automatic, as a possibility of reverter,[565] the landlord would not be required to give notice to the

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lease grants the tenant the right of exclusive occupation and the tenant may therefore act as an owner would). *See generally* Humbach, *supra* note 558, at 232-33 (examining common lease provisions and noting the prevalence of restrictive provisions which prevent the tenant from using the property as he wishes).

560. *See, e.g.*, Wade Lambert and Richard Hudson, *Allstate Is Told to Pay to Clean House Damages by Drug Dealers*, WALL ST. J., Nov. 24, 1989, at B4. (awarding landlord $28,500 for damages caused by methamphetamine lab in leased property due to the fact that "[t]he cooking of the drug leaves a sickly sweet smell that permeates the dwelling and is difficult to remove. [and because] the dwellings must be left uninhabited until chemical residues are removed."); *see generally* Geraldine Gardner, *Illegal Drug Laboratories: A Growing Health and Toxic Waste Problem*, 7 PACE ENVTL. L. REV. 193, 210-11 (1989) (discussing the landlord's role in cracking down on illegal drug laboratories).

561. *See generally* Humbach, *supra* note 558, at 247-48 (explaining that, while a lessee's actions can harm a lessor's "reputational" interest, such harm is difficult to prove if unaccompanied by physical waste). *But see* Martin v. Medlin, 59 S.E.2d 519, 521 (Ga. Ct. App. 1950) (implying that damages for harm to a property's reputation would be recoverable against tenant using rooming house as a "house of assignation").

562. *See, e.g.*, Resek v. Alaska, 706 P.2d 288 (Alaska 1985) (discussing the history of criminal forfeiture from English common law where "traitors and felons automatically forfeited all their real and personal property to the crown").

563. *See, e.g.*, McNeece v. Wood, 267 P 877, 880 (Cal. 1928) (refusing to order forfeiture based on sublessee's illegal bookmaking and possession of alcohol); Murphy v. Traynor, 135 P.2d 230, 232 (Colo. 1943) (denying forfeiture on basis of single felonious act by lessee's agent); *see also* RESTATEMENT (SECOND) OF PROPERTY § 12.5 cmt. c (1977) (noting that forfeiture valid only where illegal activity has continuity — one illegal act is not sufficient to justify a forfeiture).

564. At common law, the lessee does not forfeit his lease by using the premises for illegal purposes unless there is an express lease provision to that effect. *See, e.g.*, Moore v. Kirgan, 250 S.W.2d 759, 767 (Tex. Ct. App. 1952); Wood v. Ingram, 275 S.W. 397 (Tex. Ct. App. 1924).

565. A possibility of reverter acts to terminate the interest in land extended upon the occurrence of some specified event. For instance, where the leasehold interest was deemed valid only for a specified period of time, upon the lapsing of that period, possession automatically reverts to the landlord. *E.g.*, Keuroglian v. Wilkins, 88 A.2d 581, 583 (D.C.

tenant or to use legal process to evict. Rather, the landlord could treat the tenant as a trespasser and peacefully remove him with impunity.[566]

In most jurisdictions today, however, the landlord's right is a right of entry under which the landlord must give the tenant notice of intent to evict.[567] In fact, some jurisdictions have held this notice requirement to be a matter of due process.[568] Nearly all jurisdictions prohibit self-help evictions and threaten landlords who take such measures with trespass damages, fines and orders for tenancy restoration.[569]

Nonetheless, many jurisdictions have passed legislation that expressly authorizes landlords to terminate tenancies where the tenant's use of the premises is unlawful.[570] Most of these statutes permit forfeiture only for certain specified illegal uses, such as prostitution, illegal substances and gambling.[571] For uses not specifically enumerated in the statute, courts strictly construe the provision against the landlord.[572] Indeed, isolated incidents of alleged

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Mun. App. 1952) (requiring that no notice to quit need be given upon expiration of the term); Trottor v. Lewis, 45 A.2d 329, 333 (Md. 1946) (holding notice unnecessary where tenancy for a definite period of time and landlord may resume possession at once).

566. *But see* Gilbert v. Peck, 121 P 315 (Cal. 1912) (holding that tenant's previous unlawful use did not give the landlord the right to remove the tenant's belongings).

567. *See, e.g.*, United States v. Olsen, 245 F Supp. 641, 644 (D. Mont. 1965) (three day notice required); In re Jay-Norm Corp., 174 F Supp. 866, 868 (D. Cal. 1958) (three day notice required); Kohl v. Pool, 613 P.2d 1078 (Or. App. 1980) (eviction invalid for lack of notice by lessor).

568. *See, e.g.*, Anderson v. Denny, 365 F Supp. 1254, 1260 (W.D. Va. 1973) (holding that the due process requirements of the Fifth and Fourteenth amendments must be satisfied and that eviction from low income housing is "state action").

569. *See, e.g.*, Shaw v. Cassar, 558 F Supp. 303, 315-16 (E.D. Mich. 1983) (awarding tenant compensatory and punitive damages for landlord's violation of "anti-lock laws" and "fair housing laws"); United States v. White, 541 F Supp. 1181, 1183 (D. Ill. 1982) (ordering restoration of tenancy where landlord exercised self help remedy by changing locks); Herrell v. Seyfarth, Shaw, Fairweather & Geraldson, 491 So. 2d 1173, 1175-76 (Fla. Dist. Ct. App. 1986) (requiring compliance with statutory requirement that action for possession be filed); Deroshia v. Union Terminal Piers, 391 N.W.2d 458, 460 (Mich. App. 1986) (holding that landlord may not dispossess tenant by resort to self help); Friends of Yelverton, Inc. v. 163rd Street Imp. Council, Inc., 514 N.Y.S.2d 841 (N.Y. Civ. Ct. 1986) (stating that, in the absence of extraordinary circumstances, self-help eviction without judicial sanction must be avoided).

570. *See generally* 49 AM. JUR. 2D *Landlord and Tenant* § 1044 (1988) (discussing effects of legislation and lease provisions specifying forfeiture for tenant's commission of an illegal act).

571. *Id.*

572. *See, e.g.*, 400 West 58th Street Properties Corp. v. 400 West 58th Street Owners' Corp., 542 N.Y.S.2d 579, 580 (N.Y. Sup. Ct. 1989) (holding lease termination inappropri-

misconduct are generally insufficient grounds for eviction.[573] Furthermore, these statutes typically provide tenant defenses, such as voluntary cessation of the illegal conduct by the tenant or waiver and estoppel by the landlord.[574]

For example, in *Roseman v. Day*, the landlord brought a declaratory judgment action seeking approval of his termination of a lease on the basis of the tenant's illegal drug sales on the premises.[575] While a Massachusetts statute specifically provided for forfeiture when leased property was used for various illegal activities, the sale of drugs was not one of the vices listed.[576] Although there was also evidence that the tenant had violated the state liquor laws on the premises, an act of forfeiture enumerated in the statute, the *Roseman* court held that the landlord's prior indifference to these violations and acceptance of rent in spite of them constituted a waiver and effectively estopped the landlord from terminating the lease on this basis.[577]

Besides these statutory bases for evicting tenants, landlords could also create a right of eviction through lease provisions con-

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ate where tenant illegally occupied portion of building); Harar Realty Corp. v. Michlin & Hill, Inc., 449 N.Y.S.2d 213, 218 (N.Y. Sup. Ct. 1982) (refusing to sanction dispossession of tenant where no substantial injury occurred and where only minor breach of lease was involved); Akos Realty Corp. v. Hixon, 334 N.Y.S.2d 915, 916 (N.Y. Sup. Ct. 1972) (holding that negligent use of washing machine, absent contrary agreement, does not justify eviction); Kaufman v. Hammer, 268 N.Y.S.2d 80 (N.Y. Dist. Ct. 1966) (stating in dicta that one or two acts of vandalism do not justify forfeiture where the lease provided for termination for tenant conduct which the landlord deems "objectionable").

573. *See, e.g.*, Truncali v. Kusstatscher, 306 N.Y.S.2d 174, 176 (N.Y. City Civ. Ct. 1969) (requiring landlord to demonstrate a course of conduct posing a threat to the safety, health, and peaceful enjoyment of other tenants); Moss v. Hirshtritt, 303 N.Y.S.2d 447, 451 (N.Y. City Civ. Ct. 1969) (holding that forfeiture provisions are to be strictly construed and that violations must be more than trivial to justify eviction); Valley Courts, Inc. v. Newton, 263 N.Y.S.2d 863, 865 (Syracuse City Ct. 1965) (holding that tenant's activities as a "busy body" do not support eviction); Twin Elm Management Corp. v. Banks, 46 N.Y.S.2d 952, 953 (N.Y. Dist. Ct. 1943) (holding that piano practice during reasonable hours did not support eviction).

574. *See* 49 AM. JUR. 2D *Landlord and Tenant* § 1043 (1970) (stating that a past illegal use cannot support a present eviction); RESTATEMENT (SECOND) OF PROPERTY, § 12.5 cmt. d (1977) (explaining that a landlord who fails to assert his or her termination rights promptly upon becoming aware of tenant's illegal use, may forfeit those rights); Annotation, *Lease Provisions Allowing Termination or Forfeiture for Violation of Law*, 92 A.L.R. 3d 967, 993-1066 (1979) (stating that a landlord's failure to enforce termination provisions of a lease where tenant violates the law generally constitutes a waiver of the right to terminate).

575. Roseman v. Day, 185 N.E.2d 650 (Mass. 1962).

576. *Id.* at 652.

577. *Id.* at 654.

taining use restrictions permitting termination on very short notice.[578] However, as with statutory eviction provisions, courts generally construe such use restrictions narrowly and allow defenses such as waiver and estoppel.[579] Thus, unless these restrictive lease provisions are carefully drafted and consistently enforced, the landlord's rights remain unclear.

Indeed, even where tenants engage in flagrantly illegal conduct, clearly prohibited by a statutory or lease restriction, and the landlord has neither ignored nor tolerated the violation, difficulties in proving that conduct further limit the effectiveness of such restrictions. If the tenant-perpetrator is a reputed drug dealer, witnesses are often intimidated and unwilling to testify against the tenant. Fear of the tenant may also discourage landlords from aggressive action. As one landlord commented, "I was afraid to keep [the house from which she had evicted tenants] because these drug dealers do such wild and woolly things they might try to get back at me."[580]

Moreover, to promote consistent enforcement, landlords must have the ability to police tenants for illegal activities. While landlords are not subject to constitutional restrictions on their policing activities,[581] there are limits on the extent to which landlords may intrude upon tenants' privacy and quiet enjoyment.[582] Unless the landlord has reserved the right to enter the premises during the term of the lease, the tenant retains the right to bring a trespass ac-

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578. *See generally*, Annotation, *supra* note 574 (discussing the judiciary's treatment of lease provisions which provide for forfeiture upon the use of the leased premises for illegal uses).

579. *See generally*, Annotation, *Waiver of Statutory Demand-for-Rent Due or of Notice-to-Quit Prerequisite of Summary Eviction of Lessee for Nonpayment of Rent*, 31 A.L.R. 4TH 1254 (1991).

580. Gregory S. Reeves, *Landlords Unwittingly Rent to Crack Dealers*, THE KAN. CITY STAR, Nov. 26, 1989, at 1A. (describing several owners who are selling inner city properties after discovering drug-related activities on the property).

581. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 350-51 (2d ed. 1988) ("By their terms the due process and equal protection clauses of the fourteenth amendment, like provisions of the fifteenth amendments restrict only government action.").

This, of course, assumes that the landlord is a private citizen and that there are no "state action" implications.

582. *See generally* Thomas A. Lucarelli, *Application of the Avoidable Consequence Rule to the Residential Leasehold Agreement*, 57 FORDHAM L. REV. 425, 430 (1988) (discussing the landlord's duty to protect a tenant in his quiet enjoyment of the premises); George E. Stevens, *Intrusion into Solicitude and the Tenant's Right to Privacy*, 16 REAL ESTATE L.J. 324, 324 (1988) (analyzing recent cases considering whether a residential tenant has an interest in solitude that is actionable against a landlord).

tion against the landlord for any entry to which the tenant has not consented.[583] Thus, under current law, the landlords' rights to control tenants are not commensurate with their evolving duties to police tenants.

b. Disincentives to Exercise Control

Even if the law regarding the landlord's right to police tenants was clear, there are several reasons why a landlord might be unwilling to undertake this obligation of control. First, the incentives created by the law depend on the probability of successful enforcement. Enforcement of tort actions has been notoriously unpredictable, leaving incentives unclear.[584] Likewise, nuisance actions depend on political factors[585] and forfeiture actions depend on property value.[586] In some jurisdictions, the incentives are contradicto-

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583. *See* Mendes v. Johnson, 389 A.2d 781, 787 (D.C. Cir. 1978) (holding that a landlord desiring to terminate a month-to-month lease must resort to statutory procedures and may not resort to self-help measures without incurring tort liability).

584. The uncertainty of tort liability is significantly related to the flexible standards used to assess liability ("reasonableness" and to determine damages ("pain and suffering") which in turn leaves broad discretion to juries, whose actual decision-making process remains a mystery. When landlord liability is at issue, the risk increases that the outcome will be affected by jury attitudes and assumptions about rental housing, landlords, and tenants.

585. *See, e.g.*, John C. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working*, 42 MD. L. REV. 215, 227 n.25 (1983) ("Although the public prosecutor lacks any profit motive that might lead him to bring weak or marginal cases for their nuisance value, a prosecution can be motivated by ideological, political, and careerist motives and it is an open question as to which set of perverse incentives is more dangerous."); Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 157 (1983) (noting that, as rural areas are developed, the non-farming community may exercise their increasing political influence to ensure the adoption of nuisance ordinances that will control the location and activities of agricultural operations); Mark Sagoff, *The Principles of Federal Pollution Control Law*, 71 MINN. L. REV. 19, 35 (1986) (arguing that even traditional environmental nuisances such as smoke and dust, as opposed to those created by swift technological advances, may raise both political and technical issues with which the common law is not equipped to deal). *But see* Cromwell v. Jackson, 52 A.2d 79, 94 (Md. App. Ct. 1974) ("[I]n nuisance cases, what is a proper place is not a political question, to be determined by political pressure or according to the political views of inhabitants, but a judicial question, dependent upon the relative convenience and inconvenience to inhabitants.").

586. *See, e.g.*, United States v. One 1980 Rolls Royce, VIN #SRL39955, 905 F.2d 89, 91 (5th Cir. 1990) (holding that any increase in property value from the use of drug money is forfeitable); Ian A.J. Pitz, *Letting the Punishment Fit the Crime: Proportional Forfeiture Under Criminal R.I.C.O.'s Source of Influence Provision*, 75 MINN. L. REV. 1225, 1251 (Apr. 1991) (proposing forfeiture of the percentage of the property value used as a source of influence over the enterprise).

ry For example, in those jurisdictions whose tort doctrines depend on the landlord's voluntary undertaking of a program of security,[587] a landlord offering any security measures actually increases his risk of liability by undertaking less than extensive policing programs.[588] This creates an incentive for landlords to refrain from offering *any* security programs.

In addition, controlling tenant conduct is costly and, in those situations in which control will most likely operate to decrease crime, that cost is least likely to be able to be passed on to the tenants. Thus, in many instances, landlords simply cannot afford the necessary control.

2. Meeting the Responsibility: Screening Trouble

Given the difficulties in policing tenants currently in possession, landlords might attempt to screen prospective tenants to eliminate potential "criminals." As in the policing context, however, the landlord's legal right to screen tenants is limited and contradictory and is blocked by significant disincentives.

Once the landlord decides to implement screening measures, he must determine the form and scope of the screen. One approach to screening tenants is to identify certain characteristics as predictors of trouble. However, as indicated by the vast range of tort cases brought against landlords for tenants' criminal activities, it is difficult to select predictors that neither intrude on a tenant's privacy nor discriminate against certain classes of tenants.[589] Moreover, many predictors entail potential liability under the Fair Housing Amendments Act of 1988 ("FHAA").[590]

The FHAA prohibits discrimination in housing, including rental transactions and applies to all public or private landlords except for a few enumerated exemptions.[591] The FHAA protects classes defined by characteristics such as race, color, national origin and sex as well as classes that create a disparate impact.[592]

Even screening tenants for drug addiction sets up potential liability under the FHAA, which specifically prohibits discrimina-

587. See *supra* text accompanying notes 73-94.
588. *See supra* text accompanying note 95.
589. *See supra* text accompanying notes 150-89.
590. 42 U.S.C. §§ 3601-31 (1988 & Supp. I 1989).
591. *Id.* § 3603(b).
592. *Id.* § 3604.

tion of handicapped individuals.[593] A person with a past record of impairment due to drug use or addiction or with a reputation as a drug addict would qualify as "handicapped."[594] The only drug users expressly excluded from coverage are those involved in the "[c]urrent, illegal use of or addiction to a controlled substance."[595] Because of these provisions, a landlord may ask only whether the prospective tenant is a current drug user/addict or has been convicted of manufacturing or distributing illegal drugs.[596] Further, this inquiry must be made of all applicants, not just selected individuals.[597]

With the desirability of tenant screening has come the development of tenant screening agencies which, in turn, have raised the issue of the applicability of the fair credit reporting acts and other consumer protection statutes. Following the design of credit reporting agencies, tenant screening agencies are companies formed to report information on prospective tenants, such as whether the tenant has ever filed a complaint against a landlord.[598] The Federal Trade Commission has taken the position that the Fair Credit Reporting Act ("FCRA")[599] applies to tenant screening services.[600] Consistent with this position, in *Cisneros v. The U.D. Registry, Inc.*, an unreported decision, a California lower court held a tenant screening agency liable for a number of violations of the FCRA.[601] There, the agency began operating in 1977, accruing more than 500,000 landlord inquiries per year and more than one million items of tenant information (mostly concerning evic-

593. 24 C.F.R. § 100.202 (1991).

594. *See id.* § 100.201 (defining "handicap").

595. *Id.*

596. *Id.* § 100.202(c).

597. *Id.*

598. *See* Janlori Goldman, *Where the Public Draws the Line: Consumers are Learning They Can Say 'No' to Invasions of Privacy*, COMPUTERWORLD, Apr. 15, 1991, at 25 (discussing landlords' use of computer information systems to track potential tenants); *Merchants of Data*, 56 CONSUMER RPTS. 356 (May 1991) (discussing landlords' and employers' use of computerized databanks).

599. 15 U.S.C. §§ 1681(a)-(t).

600. *See* David Pallack, *California Trial Court Restricts Tenant Reporting Agency's Practices: Cisneros v. The U.D. Registry, Inc.*, CLEARINGHOUSE REV., June 1990, at 88, 90 (discussing the FTC's position that the FCRA applies to tenant information).

601. Cisneros v. The U.D. Registry, Inc., No. C645123 (Cal. Super. Ct. L.A. Cty., Apr. 27, 1987) (Clearinghouse No. 42,584). For a discussion of this case, see Pallack, *supra* note 600, at 90-95.

tions).[602] The *Cisneros* court held that the agency violated the FCRA by refusing to delete unverified information, to disclose reported information to tenants and to maintain a public office.[603] Increased use of these services and increased tenant screening by landlords is likely to bring more of these suits to the fore.[604] Even if screening of tenants were relatively risk free, the same costs and disincentives accompany screening measures as accompany policing activities.

3. Avoiding Responsibility: See Nothing — Do Nothing

Another option for the landlord is to ignore the incentives created by the legal standards discussed in this article. Landlords may simply take the risk of being subject to nuisance or forfeiture proceedings for illegal activity on the premises and may conclude that refusing to provide security is the best means of avoiding tort liability At least one large apartment management company has taken this approach, disclaiming all security responsibilities.[605] In Houston, DMC Management, which owns and manages 12,000 apartments in Texas, New Mexico and Florida, trains its staff to tell prospective tenants that "security is the responsibility of the tenant and [the] local police."[606]

The problem with this approach is that the risk of liability still remains. Landlords simply cannot afford the risks created by this avoidance strategy, especially landlords leasing smaller buildings, thereby placing the entire building at risk of forfeiture or closure on the basis of a single tenant's activities.[607]

4. Avoiding Responsibility: Shifting Risk of Crime

Another option for the landlord is to reduce or evade the risk of exposure by shifting the risk to others. Landlords might shift the risk back to tenants through lease provisions requiring tenants to indemnify landlords for the tenant's own criminal activities,

602. *Id.* at 89.

603. *Id.* at 90, 92, 95.

604. *See generally* Robert R. Stauffer, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. LEGIS. 239 (1987) (discussing policy concerns with the use of tenant screening services).

605. William Celis III, *Tenant Suits May Broaden The Liability of Landlords*, WALL ST. J., May 20, 1988, at 27.

606. *Id.* at 27.

607. *See supra* text accompanying notes 387-89.

through waiver clauses excusing the landlord from responsibility for the criminal acts of third parties (even if the landlord's negligence enhanced the risk of crime), and through security deposit provisions financing security measures and defraying liability stemming from the tenant's actions.[608] However, the validity of exculpatory lease provisions is questionable. Several courts reviewing these clauses in the context of tenant suits against landlords for criminal activity on the premises have held these clauses void as against public policy.[609] Others have held that the clauses are of limited validity and require strict construction against the landlord.[610] Still others have upheld and enforced these provisions.[611]

Another means to shift risk is to insure against the potential liability.[612] But, the unpredictability of court decisions makes insurance difficult and, while there is no public policy disfavoring such insurance, many insurance companies may exclude this type of exposure from their coverage options. Moreover, insurance is only feasible if the cost can be absorbed effectively by landlords. Once again, in those areas where the risk is highest, the landlord is least likely to be able to afford to insure.[613]

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608. *See, e.g.*, Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1208 (D.S.C. 1990) (suggesting that an express lease exculpation clause could release the landlord from liability).

609. *See, e.g.*, McCutcheon v. United Homes Corp., 486 P.2d 1093, 1097 (Wash. 1971) (holding that to give effect to a landlord's exculpatory clause would violate both tort liability rules and public policy); *see generally* William K. Jones, *Private Revision of Public Standards: Exculpatory Agreements in Leases*, 63 N.Y.U. L. REV. 717 (1988) (discussing the ability to modify rights and duties through the use of exculpatory clauses).

610. Smith v. General Apartment Co., 213 S.E.2d 74, 76 (Ga. Ct. App. 1975) (holding that exculpatory lease provision was effective for ordinary acts of negligence but not for willful or wanton activity).

611. Zurich Gen. Accident & Liab. Ins. Co. v. Mut. Mortgage & Inv. Co., 113 N.E.2d 134, 137 (Ohio Ct. App. 1953) (refusing to hold landlord liable for theft of tenant's car from the premises due to a binding and enforceable exculpatory clause); Wright v. Sterling Land Co., 43 A.2d 614, 616 (Pa. Super. Ct. 1945) (enforcing lease provision which relieved landlord from liability for theft of tenant's car because of waiver of liability regardless of landlord negligence was plainly expressed in the covenant).

612. *See, e.g.*, Wade Lambert and Richard L. Hudson, *Insurer to Pay to Clean Drug-Lab House*, WALL ST. J., Nov. 24, 1989, at B2. (reporting that a judge ordered an insurance company to pay landlord for $28,500 damages caused by methamphetamine lab on leased property).

613. *See supra* text accompanying notes 120-32.

5. Avoiding Responsibility: Shifting Investment Strategies

Given the difficulties and disincentives in the potential landlord responses, the most likely response, especially for landlords in high crime areas, would be simply to sell or abandon the property.[614] In Kansas City, Missouri, for example, several property owners notified by the county prosecutor's office of suspected illegal activities by tenants responded by evicting the tenants and selling the property.[615] Even more counterproductive is the increasing phenomenon of abandonment of apartment buildings in high-crime areas.[616] The result has been an increase in property ownership and management by the government and a decrease in the availability of affordable rental housing.[617]

B. SOCIAL POLICY PERSPECTIVE: PLACING DUTY ON LANDLORDS TO POLICE TENANTS IS NOT GOOD SOCIAL POLICY

From the perspective of landlords, the increasing duty to police leased premises provides uncertain incentives at best. For areas where crime is prevalent, the clearest incentive is likely to be to sell or abandon the property or to use it for purposes other than rental housing. From a broader societal perspective, an increase in landlord liability for criminal activities has questionable value as well. Further, there are significant risks involved in the delegation of policing responsibilities to private parties. Proactive responses by the law, such as enforcing minimum standards of property maintenance and providing economic support for rebuilding communities, combined with effective public law enforcement are the best means

614. *See generally* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 138-53 (1979) (reporting that due to increased maintenance costs that cannot be passed on to tenants in the form of higher rents, studies show that landlords are likely to abandon property when the tenants' right to habitable housing is enforced).

615. Reeves, *supra* note 580, at 12A.

616. Andrew Duffy, *A Stark Lesson for Metro New York's Festering Housing Mess*, TORONTO STAR, Feb. 10, 1991, at B1. Of course, one cannot attribute the entire trend of property abandonment to the increased costs of landlord responsibility for criminal activities. The more immediate causes are declining property values and increased property taxes due to the loss of the industrial base in many parts of the country. *Id.*

617. In 1991, New York's Department of Housing Preservation and Development owned more than 70,000 apartments in 7,000 buildings that were either abandoned by the prior owner-landlords or seized by the city under forfeiture provisions. *Id.*

of battling crime.

In one sense, the increase in private responsibility for the criminal activities of others represents an increased "deputization" of the populace. Americans have always been attracted to the direct participation of private citizens in law enforcement. The feeling of local control and the efficiency of direct action are especially alluring to citizens in crime ridden neighborhoods.[618] Yet as one commentator reviewing the history of American vigilantism movements noted, "we must remember that the actual practice of vigilantism is often at variance with the virtuous vigilante of American folklore."[619] The private enforcement of criminal laws is not the same as citizen cooperation in fighting crime; rather, private individuals are given both the power and the responsibility to directly control the conduct of others. Under the pretext of criminal law enforcement, vigilantism entails significant risks of discrimination and overreaching.

The trend of increasing the responsibility of landlords to police their properties encourages this private approach to crime fighting. From 1969 to 1990, the value of private security industries rose from about $2.5 million to $18 billion annually, and the number of employees grew from fewer than 300,000 to nearly two million.[620] Currently private security service personnel outnumber public law enforcement personnel by more than two to one1.[621] Despite this growth, private security personnel are virtually unregulated and are generally less trained than their public counterparts.[622]

There is direct evidence that landlords have responded to crime with vigilante-type, private security measures. For example, in Brooklyn, private police forces are "hired by landlords to oust drug dealers when the police cannot The company's tools are the same ones employed by its adversaries: violence and intimidation."[623] In one federally subsidized apartment complex, the Fed-

618. *See* WILLIAM TUCKER, VIGILANTE: THE BACKLASH AGAINST CRIME IN AMERICA 341-42 (1985) (discussing community-based methods of fighting crime and the safer feeling derived from these united, participational efforts).

619. Timothy Lenz, *Republican Virtue and the American Vigilante*, 12 LEGAL STUD. F. 117, 133 (1988).

620. Terrence J. Mangan & Michael G. Shanahan, *Public Law Enforcement/Private Security: A New Partnership?*, FBI L. ENFORCEMENT BULL., Jan. 1990, at 18, 19.

621. Dennis Hevesi, *Criminologists Disturbed at Private Police Growth*, N.Y. TIMES, June 17, 1991, at B7.

622. *Id.*

623. Chris Hedges, *In Brooklyn, Private Police as Violent as Their Enemy*, N.Y. TIMES,

eral Housing and Urban Development Office authorized rent levels high enough to pay $655,200 annually to one such security company.[624] These security services effectively operate to rid dangerous and drug-infested properties of crime.[625] However, the cost of this effectiveness is unrestrained power in the hands of private citizens.[626] As one guard commented, "If they spill one pin drop of our blood, we spill gallons of theirs The cops have to play by the rules But no one knows what we do."[627]

Even public enforcement of nuisance and forfeiture laws is more characteristic of private enforcement than is enforcement of other criminal laws. Using public nuisance statutes and state and federal forfeiture statutes as justification, many local prosecutors have begun to formally notify landlords of arrests for or suspicions of criminal activities on leased premises. In Kansas City, Missouri, for example, the Jackson County Prosecutor's Office has adopted a policy of notifying landlords upon receiving information that the rental property is being used for drug transactions.[628] The office sends the landlord a letter, headed with a bold print statement that "THIS LETTER IS YOUR OFFICIAL NOTICE. READ CAREFULLY," and stating that the "Police Department provided this office with reliable information alleging that (address of leased premises) is used for the illegal use, keeping or selling of controlled substances."[629] The letter further requests, again in bold print, that the owner "Please take immediate action to prevent illegal use of the above described premises"[630] and is accompanied by copies of the Missouri nuisance abatement[631] and forfeiture[632] statutes. One hundred and thirty-five such letters were sent in 1989.[633] This notice procedure has proven effective as the Missouri Court of Appeals held it sufficient proof of owner knowledge to justify a padlock order against a leased commercial property that

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June 16, 1991, § 1, at 1.

624. *Id.* at 22.

625. *Id.*

626. *Id.*

627. *Id.*

628. Interview by author. Copies of letters on file with author.

629. *Id.*

630. *Id.*

631. MO. ANN. STAT. § 195.130.

632. *Id.* § 513.607.

633. Reeves, *supra* note 580, at 12A.

had been used as a massage parlor.[634]

Most landlords do not fight these intimidating letters. Instead, they respond by evicting tenants or settling legal actions.[635] Nonetheless, a number of states use these letter procedures.[636] They provide an extremely potent, yet relatively hidden, means of coercing landlords to evict tenants suspected of engaging in illegal activities.[637] However, against those who truly are assisting criminal enterprises, these letter procedures are virtually useless since the owners can simply transfer title[638] or relocate operations.[639]

Interestingly, when faced with tort claims against landlords for the criminal activities of tenants, courts more readily recognize risks of overreaching and invasions of privacy[640] In the tort con-

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634. State v. Irving, 700 S.W.2d 529 (Mo. Ct. App. 1985).

635. In Portland, Oregon, settlements "almost always require the eviction of all the tenants involved in the activity that created the nuisance, along with improvements to the property. Often the city demands the right to review future tenants." *Now Cities Hit Drug Suspects Where They Live*, N.Y. TIMES, Jan. 25, 1991, at B16 [hereinafter *Drug Suspects*]. Similarly, in Suffolk County, New York, "[e]ight owners received a second threatening letter. But that's as far as it went because each time a reply indicated the landlord attempted to evict the tenant or promised to 'abate the problem.'" Young & Slackman, *supra* note 483, at 5.

636. *See Drug Suspects*, *supra* note 635, at B16 (noting that "[m]ost cities' nuisance laws are similar to the one used by Portland, Oregon").

637. When criminal law enforcement efforts focus on vice activities, visibility is especially important as the inducements for police corruption — large sums of money, public ambivalence toward the targeted vice activity, and relatively concealed activities — are prominent. John Dombrink, *The Touchables: Vice and Police Corruption in the 1980's*, 51 LAW & CONTEMP. PROB. 201 (1988).

638. Young & Slackman, *supra* note 483 (describing the ineffectiveness of the Suffolk County, New York, nuisance letter procedure due to the fact that targeted owners react by transferring title). *But see* G & E Business Servs., Inc. v. Warner Robbins, 251 S.E.2d 149 (Ga. Ct. App. 1978) (holding that transfer of title to adult bookstore after nuisance abatement proceedings had begun did not void the subsequent judgment and right to appeal).

639. For example, in *People ex rel. Van de Kamp v. American Art Enters., Inc.*, 177 Cal. Rptr. 776 (Cal. Ct. App. 1982), *rev'd*, 656 P.2d 1170 (Cal. 1983), a landlord was prosecuted under a Red Light Abatement Act for using the property to operate a business specializing in the publication and distribution of sexually explicit photographs. In response to the action, the landlord relocated and leased the premises to an innocent tenant. *Id.* at 777. Fueled by its frustration with the landlord's avoidance by relocation, the trial court ignored the traditional nuisance remedy of eviction, which would effectively operate against the innocent tenant, and instead fined the landlord an amount equal to one year's rent. *Id.* at 777-78. The appellate court affirmed this assessment. *Id.* at 778. While the California Supreme Court did not agree that the statute authorized a fine against the errant landlord, it did not dispute either the fact of the landlord's relocation or the justification for the lower courts' frustration. *American Art*, 656 P.2d 1170.

640. *See supra* text accompanying notes 167 and 180.

text, courts have rejected the assumptions that landlords can effectively control or screen tenants and that a tenant's illegal drug use necessarily increases the threat of violence by that tenant.[641] Ironically, these rejected assumptions form the very basis of nuisance and forfeiture proceedings.

At best, forfeiture and nuisance actions simply relocate crime. Forfeiture, in particular, is not an effective mechanism since it merely transfers management responsibility for the housing to government agencies which may be immune from the policing responsibilities placed upon private landlords.[642] Moreover, forfeitures of residential buildings pose a significant risk of displacement of innocent tenants.[643] In addition, property seizures are expensive to conduct. Illustrative of this, the U.S. Marshals Service, which maintains properties forfeited under the federal acts, has implemented a policy prohibiting seizure of real property with equity of less than $50,000.[644] Even seizure may not resolve the problem, however, since seized properties are eventually resold, often to the same types of investors who were unwilling to maintain the property so as to discourage crime or unwilling to take action against criminal tenants.[645]

More important than the failure of laws aimed at landlords is the existence of a better alternative approach. Indeed, some of the most effective citizen crime fighting tactics involve increasing home ownership by increasing the availability of affordable hous-

641. *See supra* text accompanying notes 162-83.

642. Whether immunity will indeed attach depends upon the capacity in which the government purports to act. "It has long been established that municipalities and other public entities remain immune from negligence claims arising out of the performance of their governmental functions, including police protection." Joseph Kelner & Robert S. Kelner, *Municipal Liability for Inadequate Security*, N.Y.L.J., Mar. 26, 1991, at 3. However, "[w]hen the state acts in a propriety landlord capacity, it is subject to the same principles of tort law as a private landlord." *Id.* at 3.

643. For instance, where the government seizes an entire property where only a portion has been used for illegal activities, those tenants lawfully in place are necessarily displaced. *See, e.g.*, United States v. 141st Street Corp., 911 F.2d 870, 880 (2d Cir. 1990) (ordering 41 unit apartment building forfeited where 15 units were used for narcotics); United States v. Littlefield, 821 F.2d 1365, 1369 (9th Cir. 1987) (finding entire building subject to forfeiture if portion used for illegal purpose).

644. *See* Young & Slackman, *supra* note 483, at 26.

645. *Id.* at 27 (noting that absentee ownership causes neighborhood deterioration but that local policies often encourages absentee ownership as "homes that are seized because of foreclosure or tax liens tend to be sold to speculators '[who tend to] rent to people of devious character or people in dire straits who are prey for those of devious character'").

ing.[646] Far more important to fighting crime than the enforcement of standards requiring landlords to police tenants has been the rigorous enforcement of building codes against landlords, the growth of informal "crime watch" groups[647] and the increase in youth activities.[648]

These pro-active approaches to neighborhood revitalization, while lacking the dramatic and retributive aspects of actions against criminals, are much more effective in decreasing crime. In fact, the condition of the premises itself is the factor most closely linked to a high likelihood of crime. Local anti-crime groups and public housing managers alike indicate that keeping property in good physical repair is the best method to prevent properties from becoming targets for drug dealing, vandalism and other criminal activities.[649] As one commentator noted, "Half of all urban crimes occur in about 3 percent of a city's patrol points. Crime rates rise significantly in areas where street lights and windows are broken, where streets and vacant lots are strewn with refuse and where graffiti artists prevail. The moral: clean it up."[650] Yet, ironically, while forfeiture of property hosting illegal activities is available under a variety of federal, state and local statutes, similar provisions for forfeiture of property due to neglect and disrepair are considered novel.[651]

CONCLUSION

This article has outlined the trends in the law making landlords

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646. A program in Hartford, Connecticut has been singled out by the National Crime Prevention Council as "one of the great success stories in the [United States'] fight against drugs." John Picton, *Ordinary People Pitch in to Fight Crime*, TORONTO STAR, July 14, 1991, at A6. The director of the program urges, "[Y]ou must make housing more affordable and schools more accessible and create more summer jobs for the young and make police more sensitive to the communities." *Id.*

647. These community-based crime groups are composed of volunteer efforts of neighborhood residents and are supported by local cooperation and monies. Elizabeth Ross, *'Fed Up' with Crime and Grime, Inner-City Dwellers Take Charge*, CHRISTIAN SCIENCE MONITOR, Mar. 12, 1991, at 9 (citing Miami's "Coalition for a Drug Free Community" and Kansas City's "Ad Hoc Group Against Crime" as successful community-wide programs).

648. *Id.*

649. Rick DelVecchio, *HUD Aide Praises SF Public Housing Projects*, SAN FRANCISCO CHRONICLE, June 6, 1991, at A19.

650. Morganthau et al., *supra* note 1, at 35.

651. *Cf.* Pamela McClintock, *Council Targets Negligent Landlords*, THE WASH. TIMES, Feb. 13, 1991, at B1 (describing the innovative "Housing, Improve It or Lose It Act of 1991" enacted by the Washington D.C. Council).

increasingly responsible for criminal activities on leased premises. That trend began with the landlord's tort liability for injuries to tenants caused by the premises' physical condition and has extended to landlord liability for tenant injuries caused by a third party's criminal activities on the premises. Today, in virtually every jurisdiction, landlords have some duty to protect their tenants from the criminal activities of strangers.[652]

With that step taken, the next logical progression was to make landlords liable for criminal activities of tenants that victimized other tenants. While courts have severely restricted the situations in which a tenant's dangerousness could be readily predicted, they have adopted the general principle establishing a landlord's duty to police tenants.

In addition to these purely private tort duties, increasingly landlords are being held to quasi-public standards for tenants' criminal activities, such as those based on state nuisance abatement laws and state and federal forfeiture laws. Although both of these types of statutes offer criminal liability, the more efficient *in rem* civil proceedings are a more attractive possibility for landlord liability Public nuisance statutes provide that if tenants are engaged in certain illegal activities on leased property, the courts can order the nuisance abated and the property closed for up to one year. While jurisdictions differ on the extent to which a landlord must be "innocent" of the criminal activity to avoid a closure order, posting a bond in an amount equal to the property's value provides the only sure remedy against the possibility of an *ex parte* seizure order by which a landlord may be deprived of income-producing property while battling a nuisance action.

Primarily used against illegal drug activities, forfeiture statutes provide a vehicle whereby title to property may be forfeited outright to the government. Real property may be subject to forfeiture if it has "facilitated" illegal drug transactions or if it represents the proceeds of such transactions. While the federal drug forfeiture statute provides an innocent owner exception, courts vary in their

652. *See generally* KEETON et al., *supra* note 20, at 442-43 (5th ed. 1984) (stating that "[a] growing number of courts have imposed duties of reasonable protection upon landlords to protect their tenants from criminal attack, provided that such assaults are reasonably foreseeable"); Haines, *supra* note 514, at 354 (reviewing court decisions on this point and concluding that "landlords should have a duty to use reasonable care to protect tenants from foreseeable criminal acts committed by third persons on the leased premises").

interpretation of the meaning of "knowledge or consent" required by that statute.

Overall, the law's development has represented a philosophical shift in how courts and legislatures view the landlord-tenant relationship. Previously, the landlord-tenant relationship was viewed individualistically as one of strangers; currently, however, landlords are held to a more communalistic responsibility to protect and police tenants. To make this shift seem less drastic, courts have used various rhetorical devices such as applying historical analysis, employing the legal fiction of "offending property," and redefining traditional doctrinal labels to make the new liability seem well-established.

This legal trend and inherent philosophical shift are both unwise and ineffective. Because of the high costs of discharging their duty and the numerous possibilities for exposure to other forms of liability, landlords are likely to abandon the landlord business rather than meet the increased responsibilities. Moreover, landlords who do undertake these private policing responsibilities present an undesirable risk of unrestrained vigilantism.

Ironically, the laws creating this trend of treating landlords as cops have been drawn from standards developed to deal with structural conditions. Unlike landlord policing duties which have not been proven to be effective crime fighters, improving the community's structural and economic bases have proven effective. Yet such responses have been rendered impotent by a system that imposes the costs of enforcing standards designed to encourage these responses on those least likely to be able to take action. Thus, treating landlords as cops is not the answer to crime control, but creating incentives for landlords to be responsible property investors and managers may be.