LANDLORD AND TENANT—LANDLORD MAY BE LIABLE FOR THEFT AFTER SUITABLE NOTICE OF DEFECTIVE LOCK—*Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 346 A.2d 76 (1975).

On March 24, 1971, the apartment of Olga and Nathan Braitman was entered by an unknown thief and $6,100 worth of personal property was stolen.[1] Approximately one week prior to the break-in, the Braitmans had complained to the management of the Overlook Terrace Corporation, their landlord, that although the "slip lock" on the front door was functional, the "dead bolt" lock was not.[2] Several more complaints were made in the week before the illegal entry.[3] Despite this notice, and assurances that the repair would be made, the landlord did not attempt to fix the lock.[4] The police investigating the incident "found no signs of forced entry." One police officer, however, tested the locks and determined that the dead bolt lock was inoperable and that he could easily "jimmy" the slip lock open.[5]

Subsequently, the Braitmans instituted suit against the landlord, alleging negligence and breach of contract.[6] The trial court found that Overlook "had a duty to provide reasonable security" and that the failure to repair the lock was the proximate cause of the Braitmans' loss.[7] The trial court also determined that the theft was foresee-

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[1] Braitman v. Overlook Terrace Corp., 68 N.J. 368, 370, 372, 346 A.2d 76, 77, 78 (1975).

[2] *See id.* at 371–72 & n.2, 346 A.2d at 77–78. The Braitmans made their first report on March 16, 1971, the day they moved into the newly constructed apartment complex in West New York. *Id.* at 370–71 & n.1, 346 A.2d at 77. The dead bolt lock was operated by the same key as the slip lock. When operative, turning the key would cause a "bolt to slide horizontally into a flange located in the door frame." *Id.* at 371 n.2, 346 A.2d at 77. A police officer testified at trial that "the [dead] bolt lock would have to be 'picked' " and that this would necessitate tools and professional expertise, whereas the slip lock could be opened by sliding a piece of celluloid between the lock and the jamb. *Id.* at 372–73, 346 A.2d at 78.

[3] *Id.* at 371–72, 346 A.2d at 77–78.

[4] *Id.* at 371, 346 A.2d at 77.

[5] *Id.* at 372, 346 A.2d at 78.

[6] *See* Brief and Appendix for Defendant-Appellant at 2A, Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d 76 (1975).

[7] Braitman v. Overlook Terrace Corp., 132 N.J. Super. 51, 54, 332 A.2d 212, 213 (App. Div. 1974), *aff'd*, 68 N.J. 368, 346 A.2d 76 (1975). The trial court reached this decision despite the fact that the defendant had taken other security measures to protect the tenants. For instance, a security guard had been posted, an intercommunications system installed, and an automatic lock prevented entry through the service door. 132 N.J. Super. at 54, 332 A.2d at 213.

able, in light of a recent rash of burglaries in similar high-rise apartments in the area,[8] and awarded the value of the stolen property as damages.[9]

The appellate division affirmed, but found that a duty to protect tenants from crime could not be grounded solely on the landlord-tenant relationship.[10] Instead, it concluded that a landlord has a duty to take reasonable precautions to prevent such criminal intervention. Since the defendant "unreasonably enhanced" the hazard or risk of theft by failing to provide an adequate lock, he could be held liable for a foreseeable theft by a third party.[11]

The Supreme Court of New Jersey granted certification specifically to review the scope of a landlord's duty to provide security devices to protect the premises of his tenants.[12] In *Braitman v. Overlook Terrace Corp.*,[13] the court, in affirming the appellate division, endorsed the foreseeability approach to the duty issue and held that, upon proper "notice of the defect," a tenant may recover damages "due to theft" if he can show that the landlord's failure to supply adequate locks "unreasonably enhanced the risk of loss."[14]

It is a general rule that an individual is under no duty to act affirmatively to protect another from criminal acts.[15] The duty that one may owe to another is, however, "ultimately a question of fairness"; and the interests of society, the nature of the parties' relationship, the severity of the possible harm, and other factors may overcome the general rule.[16] For example, the courts have determined that com-

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[8] Braitman v. Overlook Terrace Corp., 132 N.J. Super. 51, 54, 332 A.2d 212, 213 (App. Div. 1974), *aff'd*, 68 N.J. 368, 346 A.2d 76 (1975). The records clerk of the West New York Police Department testified that "a number of break-ins" had occurred in other buildings in the vicinity with security systems similar to the defendant's. 68 N.J. at 373, 346 A.2d at 78.

[9] Braitman v. Overlook Terrace Corp., 68 N.J. 368, 373, 346 A.2d 76, 79 (1975).

[10] Braitman v. Overlook Terrace Corp., 132 N.J. Super. 51, 55, 57, 332 A.2d 212, 214, 215 (App. Div. 1974), *aff'd*, 68 N.J. 368, 346 A.2d 76 (1975).

[11] Braitman v. Overlook Terrace Corp., 132 N.J. Super. 51, 55–56, 332 A.2d 212, 214 (App. Div. 1974), *aff'd*, 68 N.J. 368, 346 A.2d 76 (1975).

[12] Braitman v. Overlook Terrace Corp., 68 N.J. 368, 370, 346 A.2d 76, 77 (1975).

[13] 68 N.J. 368, 346 A.2d 76 (1975), *aff'g* 132 N.J. Super. 51, 332 A.2d 212 (App. Div. 1974).

[14] *Id.* at 381–83, 346 A.2d at 83–84.

[15] *See* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970); 55 MINN. L. REV. 1097, 1097 (1971). *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.7 (1956) [hereinafter cited as HARPER & JAMES].

[16] Goldberg v. Housing Authority, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 326–27 (4th ed. 1971) [hereinafter cited as PROSSER]; Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153, 1161 (1971).

mon carriers are under a duty to protect their passengers from harm at the hands of criminals.[17] Similarly, innkeepers and proprietors of businesses open to the public are under an affirmative duty to protect their patrons.[18] The general theory underlying these and other "special relationships" that the courts have recognized as exceptions to the general rule[19] is that through the relationship, one party has partially relinquished the power to protect himself by submitting to the control of another, and, therefore, he relies upon protection from the other party.[20] In most jurisdictions, the landlord-tenant relationship is not considered one of these special relationships justifying the imposition upon the landlord of a duty to protect his tenants.[21] This rule developed for several historical reasons.

Since the beginning of the sixteenth century, the leasehold has been considered a transfer of an interest in real property.[22] In the

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Professors Harper and James have noted that the decision to impose an affirmative duty to act to protect others is one of policy. This policy decision is reached by balancing

> the burden it would put on defendant's activity; the extent to which the risk is one normally incident to that activity; the risk and the burden to plaintiff; the respective availability and cost of insurance to the two parties; the prevalence of insurance in fact; the desirability and effectiveness of putting the pressure to insure on one rather than the other, and the like.

2 HARPER & JAMES, *supra* note 15, § 18.6, at 1052. *See also* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1033–35 (1928); 63 COLUM. L. REV. 766, 767–68 (1963).

[17] *See, e.g.*, Harpell v. Public Serv. Coordinated Transp., 20 N.J. 309, 316–17, 120 A.2d 43, 46–47 (1956); RESTATEMENT (SECOND) OF TORTS § 314 A (1965).

[18] *See, e.g.*, Brewer v. Roosevelt Motor Lodge, 295 A.2d 647, 651 (Me. 1972) (innkeeper-guest); Genovay v. Fox, 50 N.J. Super. 538, 549–50, 143 A.2d 229, 234–35 (App. Div. 1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959) (business-invitee); PROSSER, *supra* note 16, § 56, at 339–40; RESTATEMENT (SECOND) OF TORTS § 314 A (1965).

[19] *See, e.g.*, Lillie v. Thompson, 332 U.S. 459, 460–61 (1947) (employer-employee); Sylvester v. Northwestern Hosp., 236 Minn. 384, 386, 53 N.W.2d 17, 19 (1952) (hospital-patient); McLeod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 319–20, 255 P.2d 360, 362 (1953) (school district-pupil). For a compilation of recognized and emerging special relationships see Goldberg v. Housing Authority, 38 N.J. 578, 583–87, 186 A.2d 291, 294–96 (1962); PROSSER, *supra* note 16, § 56, at 341–42; 55 MINN. L. REV. 1097, 1097–98 (1971).

[20] Comment, *The Landlord's Emerging Responsibility For Tenant Security*, 71 COLUM. L. REV. 275, 277 (1971); Note, *supra* note 16, at 1162; 16 VILL. L. REV. 779, 781 (1971). Dean Prosser notes that the duty to affirmatively act to protect others "has been imposed where the relation is of some actual or potential economic advantage to the defendant, and the expected benefit" outweighs the burden on the defendant. PROSSER, *supra* note 16, § 56, at 339.

[21] *See, e.g.*, Trice v. Chicago Housing Authority, 14 Ill. App. 3d 97, 99, 302 N.E.2d 207, 208–09 (1973); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 157, 207 S.E.2d 841, 844 (1974); Note, *supra* note 16, at 1163.

[22] 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1], at 177–78 (rev. ed. P.

English agrarian society where landlord-tenant law developed, the concern of both the lessor and lessee was with the land itself,[23] and for the most part, the expectations of both parties were met with the transfer of possession and the payment of rent.[24] At common law, therefore, there was no need for any further interaction between the landlord and the tenant, and in fact, a continuing relationship was not desired.[25] Hence, the rule which evolved was that, in the absence of a contrary contractual obligation, the landlord was not liable to his tenants for injuries resulting from defects in the leasehold.[26]

The rigidity of this broad tort immunity and the changing nature

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Rohan 1975) [hereinafter cited as POWELL]. For a concise presentation of the early legal status of the leasehold see Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 23–31.

[23] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); 1 AMERICAN LAW OF PROPERTY § 3.11, at 203 (A. Casner ed. 1952); Grimes, *Caveat Lessee*, 2 VALPARAISO U.L. REV. 189, 192 (1968). It has been noted that to understand the landlord-tenant relationship, this accent on the land must be kept foremost:

> In order to understand landlord-tenant law one must forget the modern urban complex with its towering office buildings, its sprawl of huge apartments, and its teeming slums. The place to start is with the countryside, *i.e.*, the grass, trees, and grazing sheep. We are back to the land now, and land is really what *land*lord-tenant law is still all about. That may seem curious to the man who gets off the elevator fifteen stories up in the air to go to an apartment where even a dandelion could not grow, but such is the fact. The land is the thing. It is the fields, orchards, pastures and streams and their possession and use that are important. To comprehend the law it is helpful to envision the tenant leaning on a fence at twilight, watching his fields and awaiting the call to dinner. It is against this simple background that landlord and tenant law took the shape it has essentially retained to this day.

Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225, 226–27 (1969) (emphasis in original).

[24] Quinn & Phillips, *supra* note 23, at 227–28.

[25] *Id.* at 228, 231.

> Inherent in the conveyance of a possessory estate for a term was the duty of the landlord to leave the tenant in possession for the term of the lease without interference. It was in return for this estate and the continuing right to quietly possess the land that the tenant covenanted to pay the rent.

Id. at 229 n.5. *Cf.* 2 POWELL, *supra* note 22, ¶ 225[1], at 228; 1 H. TIFFANY, LANDLORD AND TENANT § 3, at 6–9 (1912).

[26] Comment, *supra* note 20, at 278. *See* PROSSER, *supra* note 16, § 63, at 399–400. This doctrine is known as *caveat emptor*. It developed in landlord-tenant law from the rationale that a tenant had the opportunity to inspect the premises prior to entering into the lease and therefore he takes the property "as is." Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 n.32 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Note, *Products Liability—Landlord's Implied Warranty of Habitability Does Not Give Rise to Strict Tort Liability for Tenant's Personal Injuries*, 5 SETON HALL L. REV. 409, 412 & n.24 (1974). For a detailed analysis of the *caveat emptor* doctrine see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

of society[27] produced some exceptions to the no-duty rule.[28] For example, the common law recognizes a landlord's responsibility for injuries occurring to the tenant and others as a result of some defect or unsafe condition in the common areas over which the landlord retained exclusive control.[29] Liability also attaches for injuries sustained from concealed dangerous conditions in the premises which the landlord was aware of at the time of the transfer and failed to disclose to the tenant.[30]

Further exceptions to tort immunity began to creep into the law; however, the most radical departure from traditional landlord-tenant concepts has been the recent trend to apply the law of contracts to leaseholds.[31] Thus, the dependent nature of the tenant's covenant to pay rent and the landlord's covenant to provide habitable living space has been recognized,[32] and in many jurisdictions a tenant may em-

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[27] In Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the court noted that modern urban dwellers are no longer primarily interested in land but rather,

> they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Id. at 1074 (footnote omitted). *See also* Berzito v. Gambino, 63 N.J. 460, 468, 308 A.2d 17, 21 (1973); Quinn & Phillips, *supra* note 23, at 231.

[28] Powell recognizes six factual situations as exceptions to the no-duty rule:

> (1) In cases of fraudulent concealment of a dangerous condition existing at the time of leasing;
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> (2) In cases based upon negligence as to parts of the premises remaining under the lessor's control;
>
> (3) Incidents involving negligence in the making of repairs;
>
> (4) Situations involving the lessor's failure to perform his agreement to repair;
>
> (5) Instances involving the lessor's failure to discharge his statutorily imposed duty to repair;
>
> (6) Cases wherein the lessee seeks recoupment for liabilities imposed upon the lessee on behalf of injured third parties.

2 POWELL, *supra* note 22, ¶ 234[2], at 332–33 (footnotes omitted). *See also* Love, *supra* note 22, at 29–31; Comment, *supra* note 20, at 278.

[29] PROSSER, *supra* note 16, § 63, at 405–08. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 480–81 (1970); Taneian v. Meghrigian, 15 N.J. 267, 277–78, 104 A.2d 689, 694 (1954).

[30] 2 POWELL, *supra* note 22, ¶ 234[2][a], at 333–34; Love, *supra* note 22, at 50–52.

[31] Love, *supra* note 22, at 109. *See generally* ABA Comm. on Leases, *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP., PROBATE & TRUST J. 550 (1971); Donahue, *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974); Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972).

[32] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Marini v. Ireland, 56 N.J. 130, 145–46, 265 A.2d 526, 534–35 (1970). One commentator has noted:

ploy the full range of contractual remedies when this implied warranty of habitability[33] has been breached.[34]

The recent recognition of the implied contractual duties of the landlord, however, has not generally been accompanied by an expansion of the landlord's tort liability.[35] For example, in 1973, the Supreme Court of New Jersey, in *Dwyer v. Skyline Apartments, Inc.*,[36] declined to impose tort liability on the landlord on either the ground of a breach of the implied warranty of habitability or the theory of

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> There is now a distinct trend in the United States toward characterizing a lease as a contract containing an implied warranty of habitability (or fitness) which is interdependent with the covenant to pay rent and enforceable by contract remedies.

Love, *supra* note 22, at 97 (footnote omitted).

[33] The implied warranty of habitability has been defined as

> a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.

Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970).

[34] The tenant faced with a breach has several options open to him under contract. He may terminate the lease and abandon the premises, or sue for damages flowing from the breach whether he remains on the premises or not. Love, *supra* note 22, at 109. Specific performance is also an available remedy as is reformation of the lease. *Id.* at 109–10. Finally, he may argue his right to rent abatement, either in defense to a suit for possession for non-payment of rent, or by way of "a declaratory judgment reducing the amount of rent due under the lease in direct proportion to the" reduction of value of the premises due to the breach. *Id.* at 110.

Other remedies available to the tenant include an action for constructive eviction, and "the self-help remedy of" making the repairs and deducting the cost from the rent due. *Id.* at 34–37, 108, 110–11. *See generally* Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69 (1951).

In New Jersey, tenants are statutorily authorized to withhold rent and deposit it "with a court appointed administrator" when their dwellings fail to "satisfy minimum standards of safety and sanitation." *See* N.J. STAT. ANN. § 2A:42–85 (c) (Supp. 1975–76).

[35] *See, e.g.*, Trice v. Chicago Housing Authority, 14 Ill. App. 3d 97, 99, 302 N.E.2d 207, 209 (1973); Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 54–55, 301 A.2d 463, 466 (App. Div.), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973); Love, *supra* note 22, at 112 & n.508.

At least one court has recognized a relationship between the warranty of habitability and tort liability. In Sargent v. Ross, 113 N.H. 388, 396, 308 A.2d 528, 533 (1973), the New Hampshire supreme court noted that the abrogation of tort immunity "springs naturally and inexorably from" the recognition of the warranty of habitability. The court added that in finding the implied warranty of habitability, it had "discarded the very legal foundation and justification for the landlord's immunity in tort for injuries to the tenant or third persons." *Id.* at 397, 308 A.2d at 534. *See generally* Recent Development, Sargent v. Ross: *Abrogation of Landlord's Tort Immunity*, 1974 DUKE L.J. 175.

[36] 123 N.J. Super. 48, 301 A.2d 463 (App. Div.), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973).

strict liability.[37] Moreover, when the tenant has suffered injury from a third-party criminal act, courts have been reluctant to find any exception to the landlord's immunity either in tort or in contract.[38]

The rationale behind this reluctance was well expressed in *Goldberg v. Housing Authority*,[39] where the Supreme Court of New Jersey was confronted with the issue of whether a landlord must provide police protection at a housing project.[40] In *Goldberg*, the plaintiff was beaten and robbed while making an afternoon milk delivery at an apartment complex owned by the Newark Housing Authority.[41] Although the Authority provided "special policemen" in the evening and throughout the night, none were on duty at the time of the incident.[42]

The Authority argued that it had no duty to protect persons on its property from crime.[43] The appellate division disagreed, holding that since the design and maintenance of the building had increased the likelihood of crime, the Authority owed "a duty to provide such protection . . . as was necessary under the circumstances."[44] The trial court was therefore found to be justified in submitting to the jury the question of whether the lack of police protection was the proximate cause of the plaintiff's injuries.[45]

The supreme court, speaking through Chief Justice Weintraub, reversed the lower court, holding that the Authority had no duty to

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[37] 123 N.J. Super. at 54–56, 301 A.2d at 466–67. The *Dwyer* court argued that the implied warranty of habitability encompassed only the limited areas of rent and eviction, and in no way "was . . . intended to overturn existing principles of law applicable to tort actions." *Id.* at 54–55, 301 A.2d at 466. For a discussion of *Dwyer* see Note, *supra* note 26.

[38] *See, e.g.*, Trice v. Chicago Housing Authority, 14 Ill. App. 3d 97, 99–100, 302 N.E.2d 207, 208–09 (1973).

[39] 38 N.J. 578, 186 A.2d 291 (1962).

[40] *Id.* at 580, 186 A.2d at 291. The court agreed with the appellate division's finding that although the Housing Authority was a public corporation, "its liability for negligence must be adjudged on the principles of law applicable to the private owner of property." *Id.* at 581, 186 A.2d at 292.

[41] *Id.* at 579, 186 A.2d at 291.

[42] *Id.* at 593–94, 186 A.2d at 299 (Jacobs, J., dissenting).

[43] Goldberg v. Housing Authority, 70 N.J. Super. 245, 253, 175 A.2d 433, 437 (App. Div. 1961).

[44] *Id.* at 255, 175 A.2d at 438. Then Judge, now Justice Sullivan found the Authority liable

> since it created and maintained a housing project which, because of its size, physical composition and method of operation, was beyond the pale of regular municipal police surveillance, and yet because of these same factors was susceptible to criminal activities.

Id.

[45] *Id.*

provide police protection.[46] The mere fact that crime was foreseeable was not, in the court's opinion, sufficient to establish a duty requiring one private party to protect another, since "[e]veryone can foresee the commission of crime virtually anywhere and at any time."[47] Nor was the landlord-tenant relationship one of those special relationships that warranted the imposition of a duty.[48]

In explaining its decision, the *Goldberg* court noted that the duty question was "one of fairness in the light of the nature of the relationship, the nature of the hazard, and the impact of such a duty on the public interest."[49] One factor which weighed against the imposition of a duty upon the Authority was that the duty to provide police protection was upon the government.[50] More importantly, the court noted that the vagueness of the proposed duty argued against its imposition: "[H]ow can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?"[51] Finally, the court noted that if a duty were imposed, the burden of financing it would fall unfairly upon the poor, since the bill for providing the police protection would be passed on to them in the form of rent.[52] Although other courts have cited *Goldberg* for the broad proposition that a landlord is under no duty to protect his tenants from criminal acts,[53] the *Braitman* court chose to read the decision as merely holding that responsibility for police protection lies with the government, not landlords.[54] It also noted that the *Goldberg* court had specifically left open the question presently before the court in *Braitman* by stating that a " 'landlord may be liable for theft if he carelessly enables a thief to gain entrance to the apartment of the

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[46] 38 N.J. at 592, 186 A.2d at 298–99.

[47] 38 N.J. at 583, 186 A.2d at 293. "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it." *Id.* (emphasis in original).

[48] *See id.* at 588–91, 186 A.2d at 296–98.

[49] *Id.* at 588, 186 A.2d at 296.

[50] *Id.* at 588–89, 186 A.2d at 296.

[51] *Id.* at 589, 186 A.2d at 297.

[52] *Id.* at 591, 186 A.2d at 297–98. The *Goldberg* decision has been extensively noted, and criticized on various grounds, including a failure to recognize that the Authority was created for the sole purpose of providing adequate housing for the poor, an essential element of which is proper police protection. *See, e.g.*, Note, *Tort Doctrines and Risk Bearing—Goldberg v. Housing Auth. of Newark*, 18 RUTGERS L. REV. 161, 164–68 (1963); 63 COLUM. L. REV. 766, 771–73 (1963); 77 HARV. L. REV. 563, 563–64 (1964).

[53] *See, e.g.*, Cornpropst v. Sloan, 528 S.W.2d 188, 193 (Tenn. 1975); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 157, 207 S.E.2d 841, 844 (1974).

[54] 68 N.J. at 379–80, 346 A.2d at 82.

tenant.' "[55]

Having thus distinguished *Goldberg*, the court turned its attention to the question left open by Chief Justice Weintraub. The court agreed with the appellate division's finding that the landlord-tenant relationship alone does not impose a duty of protection upon the landlord.[56] It noted, however, "that there has been a recent judicial trend toward expanding the scope of duty on the part of landlords with respect to tenant security."[57]

Indicative of this trend is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[58] In *Kline*, a tenant was assaulted and robbed in the hallway of the defendant's apartment building.[59] The landlord was aware of a rash of similar crimes which had been committed "against the tenants in and from the common hallways,"[60] however, no additional security measures had been taken.[61] On appeal from the trial court's finding of no duty, the District of Columbia Circuit reversed, holding that urban landlords are under a duty to take reasonable precautions to protect their tenants from foreseeable criminal acts taking place on the premises.[62]

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[55] *Id.* at 380, 346 A.2d at 82 (quoting from Goldberg v. Housing Authority, 38 N.J. 578, 588, 186 A.2d 291, 296 (1962)).

[56] 68 N.J. at 374, 346 A.2d at 79. *See* 132 N.J. Super. at 55, 332 A.2d at 214.

[57] 68 N.J. at 374, 346 A.2d at 79 (citing 2 POWELL, *supra* note 22, ¶ 234[2][g], at 350).

[58] 439 F.2d 477 (D.C. Cir. 1970). For a list of student writings concerning *Kline* see Love, *supra* note 22, at 124 n.590.

[59] 439 F.2d at 478.

[60] *Id.* at 479. The court commented that even if the landlord did not have actual notice of prior crimes, the fact that there had been twenty police reports regarding crimes in the building constituted constructive notice. *Id.* at 479–80 n.3.

[61] *See id.* at 479. Security had, in fact, been reduced. In 1959 when the plaintiff entered into her first lease, there was a doorman and an employee on duty in the lobby. In addition, there were two garage attendants in the parking area, and the rear door was locked in the evening. By 1966, when the assault took place, there was neither a doorman nor full-time coverage of the lobby, the number of garage attendants had been decreased, and the rear door was many times left unlocked. *Id.*

[62] *Id.* at 483. The dissent in *Goldberg* has been credited as having formed the foundation of the *Kline* decision. *See* 2 POWELL, *supra* note 22, ¶ 234[2][g], at 350.5; Note, *supra* note 20, at 283. In that dissent, Justice Jacobs, joined by Justices Proctor and Schettino, argued that the plaintiff's complaint had been improperly confined to the single issue of police protection when it actually comprised an assertion that the Authority was negligent in failing to properly supervise the common areas. 38 N.J. at 607–08, 186 A.2d at 306–07. Since the Authority had created a housing complex "which, by virtue of its size, composition and mode of operation present[ed] special dangers," *id.* at 603, 186 A.2d at 304, and since it was fully aware of extensive criminal activity on the premises, the dissent would have placed the Authority under a duty to take reasonable precautions to prevent such criminal acts:

> Under the circumstances it seems clear to me that a jury could readily find, that

The no-duty rule and the considerations supporting it were specifically rejected as being unrealistic when "applied to the conditions of modern day urban apartment living."[63] Instead, the court found a duty arising from three distinct sources. First, the "logic" inherent in a recognition that the landlord is in a superior position to take the precautions necessary to deter criminal activity called for the imposition of a duty.[64] Second, a duty arose from the implied covenant that the landlord would maintain security at least at the level it had been when the tenant moved in.[65] Finally, the court analogized the landlord-tenant relationship to that of innkeeper-guest—one of the common law "special relationships."[66] Whatever the source of the duty,[67] the standard of care was "reasonable care in all the circumstances."[68]

The *Kline* approach to the duty problem has not been generally accepted by other jurisdictions.[69] The underlying rationale of the decision, that "[t]he landlord is no insurer of his tenants' safety, but he

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> a reasonably prudent person, situated as was the defendant, would have foreseen and recognized an unreasonable risk or likelihood of harm or danger to invitees such as the plaintiff, from criminal or wrongful acts of others, and would have taken reasonable protective precautions through the enlargement of its own special police force or in other appropriate manner.

Id.

[63] 439 F.2d at 481.

[64] *Id.* at 483–84. The court argued that "the landlord is the only one in the position to take the necessary acts of protection required." *Id.* at 484. Even the police, the court noted, were "neither equipped, manned, nor empowered to" provide the necessary protection in apartment buildings. *Id.*

[65] *Id.* at 485. The court based the contractual obligation on the rationale established in an earlier landlord-tenant decision.

[66] *Id.* at 485. The court pointed to Judge Wright's recognition in Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 n.33 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), that at common law the only multiple dwelling units were inns. 439 F.2d at 482.

[67] The court did not specifically state on which theory the duty was founded, but merely noted that it does not matter whether it is based in tort or contract. 439 F.2d at 486.

[68] *Id.* at 485 (footnote omitted). For a discussion of the *Kline* standard of care see Note, *supra* note 16, at 1177–94.

[69] Several courts have either distinguished *Kline* or limited its rationale to recovery for tort injuries. *See, e.g.*, Trice v. Chicago Housing Authority, 14 Ill. App. 3d 97, 100, 302 N.E.2d 207, 209 (1973) (*Kline* applicable only when tenant initially relies on security provisions which are later reduced); Compropst v. Sloan, 528 S.W.2d 188, 194–95 (Tenn. 1975) (*Kline* limited to urban apartment setting); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 159, 207 S.E.2d 841, 845 (1974) (*Kline* applicable only to large apartment buildings where landlord knows of crimes and reduces security). The *Kline* decision has even been distinguished in the District of Columbia. *See, e.g.*, Dietz v. Miles Holding Corp., 277 A.2d 108, 110 (D.C. Ct. App. 1971) (*Kline* rationale unavailable as defense to action for possession); Williams v. William J. Davis, Inc., 275 A.2d 231, 231–32 (D.C. Ct. App. 1971) (same).

certainly is no bystander," has, however, met with some approval.[70]

The Supreme Court of Michigan took another approach to the question of the duty to protect tenants from criminal acts. In *Johnston v. Harris*,[71] a tenant was assaulted and robbed in the foyer of his dimly-lit, unlocked apartment building.[72] At trial the tenant produced a lighting expert who testified to the relationship between dim lighting and night crime. The tenant also demonstrated that the area he lived in had a high crime rate.[73] The trial court directed a verdict for the defendant and the appellate court affirmed, finding that although the tenant had presented a prima facie case that the landlord had breached his duty "to provide adequate lighting and door locks," the tenant's injuries were not proximately caused by the landlord's breach.[74]

The Supreme Court of Michigan reversed, basing its decision on foreseeability.[75] The court read the tenant's pleadings as containing "the interwoven assertion that [defendant] was negligent in creating a condition conducive to criminal assaults," and that the landlord's failure to provide proper lighting and locks so enhanced the likelihood of criminal activity as to "set a trap."[76] These allegations, in the court's opinion, set out a theory similar to the situation contemplated by three sections of the *Restatement (Second) of Torts*.[77] Section 302 B brands as negligent any act or omission that "the actor realizes or should realize . . . involves an unreasonable risk of harm to another," even though the possible harm is from third-party criminal acts.[78] Sections 448 and 449 provide that such criminal acts, if reasonably foreseeable, shall not be deemed superseding causes, cutting off liability for the actor's negligence.[79] In light of the *Restatement* provi-

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[70] 439 F.2d at 481. Some courts have referred approvingly to *Kline* yet have been unwilling to go so far as to impose an absolute duty of care on the landlord. *See, e.g.*, Warner v. Arnold, 133 Ga. App. 174, 179, 210 S.E.2d 350, 353–54 (1974); Sherman v. Concourse Realty Corp., 47 App. Div. 2d 134, 139–40, 365 N.Y.S.2d 239, 244–45 (1975).

[71] 387 Mich. 569, 198 N.W.2d 409 (1972).

[72] *Id.* at 572, 198 N.W.2d at 409.

[73] *Id.*

[74] *Id.* at 572–73, 198 N.W.2d at 409–10.

[75] *Id.* at 573, 576, 198 N.W.2d at 410–11.

[76] *Id.* at 573–74, 198 N.W.2d at 410.

[77] *Id.*

[78] RESTATEMENT (SECOND) OF TORTS § 302 B (1965).

[79] *Id.* §§ 448, 449. Section 448 provides:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his neg-

sions, the court held "that actionable negligence may lie in these circumstances," and remanded the case for trial.[80] Therefore, by focusing on foreseeability of the risk of harm, the *Johnston* court was able to resolve both the question of a duty to prevent harm from criminals and the difficult proximate cause issue.[81]

A lack of proximate causation has often been cited as the factor which insulates landlords from liability for third-party criminal activities against their tenants.[82] Basically a policy question, the causation issue has two aspects when criminal intervention is involved. First, it must be determined if there is a causal connection between the injury sustained and the landlord's act or omission;[83] and second, the court must decide whether the intervening criminal act severs the continuum between act and injury.[84]

In *McCappin v. Park Capital Corp.*,[85] a New Jersey appellate

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ligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Section 449 provides:

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

[80] 387 Mich. at 575–76, 198 N.W. 2d at 411.

[81] It is unclear whether the *Johnston* court based its decision on the prima facie showing of the breach of a preexistent duty to maintain the common areas, or whether the duty was found through reference to the foreseeability of criminal intervention. Three years later, the same court reexamined its holding in *Johnston*, and seemingly clarified its position.

In Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W. 2d 843 (1975), a secretary of one of the tenants of a professional building was assaulted in an elevator by a mental patient who was visiting a mental health clinic operated by another tenant. *Id.* at 398–99, 224 N.W.2d at 845. The court held that the landlord's retention of the common areas and concomitant duty to keep those areas reasonably safe was sufficient to establish a duty to protect tenants and invitees "from unreasonable risk of physical harm," including harm from third-party criminal acts. *Id.* at 407, 224 N.W.2d at 849.

[82] *See, e.g.*, Panglorne v. Weiss, 86 N.J.L. 286, 287–88, 90 A. 1024, 1024–25 (Ct. Err. & App. 1914); Smith v. ABC Realty Co., 71 Misc. 2d 384, 384, 386 N.Y.S.2d 104, 105 (App. T. 1972), *rev'g* 66 Misc. 2d 276, 322 N.Y.S.2d 207 (N.Y.C. Civ. Ct. 1971).

[83] This aspect of causation is known as causation in fact, and it is essentially a question of determining whether the defendant's conduct was a cause of the harm. Dean Prosser defines causation in fact as the requirement "that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." PROSSER, *supra* note 16, § 41, at 236. *See* 2 HARPER & JAMES, *supra* note 15, § 20.2.

[84] *See, e.g.*, Warner v. Arnold, 133 Ga. App. 174, 176, 210 S.E.2d 350, 352 (1974); Sherman v. Concourse Realty Corp., 47 App. Div. 2d 134, 139–40, 365 N.Y.S.2d 239, 243–44 (1975); 2 HARPER & JAMES, *supra* note 15, § 20.5, at 1141–46.

[85] 42 N.J. Super. 169, 126 A.2d 51 (App. Div. 1956).

court applied the proximate cause reasoning to prevent recovery. In that case, the keys to all of the apartments in the tenant's building had been placed on a keyboard in the basement of the building near an open corridor.[86] Sometime during a three-day period a sum of money disappeared from the tenant's bureau drawer.[87] After discovering the loss, she noticed that several keys, including the one to her apartment, were missing from the keyboard.[88] At trial, the tenant contended that the landlord was liable for her loss since his act of placing the keys in an open corridor was

> an invitation of entry to all who chose to accept it, and that their use by an unauthorized person, even for criminal purpose, was reasonably foreseeable.[89]

The appellate division reversed the trial court's award of damages, but did not discredit the theory that the landlord could be liable for criminal acts invited through his negligence.[90] The court held, however, that plaintiff had failed to prove proximate cause, since she was unable to establish "when or by whom" her key was removed. It noted that "the loss may have occurred while the plaintiff's key was still on the keyboard or, indeed, may have occurred without the use of such key."[91]

Even when a direct causal link between the landlord's acts or omissions and the tenant's injuries had been established, courts traditionally viewed the criminal act as an independent cause which superseded the landlord's original negligence.[92] This rule has, how-

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[86] *Id.* at 171, 126 A.2d at 52. When the plaintiff entered into the lease, the keyboard was located in the superintendent's apartment. *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 172, 126 A.2d at 52.

[90] *Id.* at 172–73, 126 A.2d at 52–53.

[91] *Id.* at 173, 126 A.2d at 53. The court in Panglorne v. Weiss, 86 N.J.L. 286, 90 A. 1024 (Ct. Err. & App. 1914), reached a similar conclusion. In that case, a tenant sought recovery from her landlord for property allegedly taken after the landlord removed the tenants lock in order to repair it. *Id.* at 287, 90 A. at 1024. Since the tenant was unable to show that the theft had occurred as a result of the landlord's action, the court denied recovery: "For aught that appears, the loss may have happened after the plaintiff left and before the lock was removed." *Id.*

[92] At common law, the so called "last human wrongdoer" rule severed liability when an intervening act occurred. *See* Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 124 (1937); Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 640 (1940). Such an intervening force has been defined as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." RESTATEMENT (SECOND) OF TORTS § 441 (1) (1965). *See* PROSSER, *supra* note 16, § 44, at 271. *See generally* 2 HARPER &

ever, been abandoned, and it is now accepted that in many circumstances criminal intervention is so probable that a party has a duty to refrain from activities which set the stage for such intervention.[93]

It was under just such a theory that the appellate division in *Braitman* determined liability. Analyzing the problem in a manner similar to the approach of the Michigan supreme court in *Johnston*, the lower court reasoned that a landlord is liable for his tenant's injuries if there is "a showing of negligence constituting a proximate cause of the loss."[94] The required showing could be made "by demonstrating that according to the common experience of mankind the resulting injury was a reasonably foreseeable consequence of the negligent act."[95]

The supreme court specifically agreed with the lower court's approach which premised its finding of a duty on the foreseeability of criminal acts.[96] The court dismissed the proximate cause issue which had troubled the *McCappin* court by accepting at face value the appellate division's determination "that there was sufficient evidence before the trial court to support" its finding that Braitman's loss was the result of a thief slipping the lock.[97]

JAMES, *supra* note 15, § 20.5, at 1141–46; McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 178–83 (1925).

[93] *See, e.g.*, Lillie v. Thompson, 332 U.S. 459, 462 (1947); Genovay v. Fox, 50 N.J. Super. 538, 550–51, 143 A.2d 229, 235 (App. Div. 1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959); 2 HARPER & JAMES, *supra* note 15, § 20.5, at 1143–45.

[94] 132 N.J. Super. at 55–56, 332 A.2d at 214.

[95] *Id.* at 55, 332 A.2d at 214. The court noted that although a duty could not be based solely upon the landlord-tenant relationship, "a landlord does owe a duty to take reasonable steps to protect a tenant from foreseeable criminal acts committed by third persons." *Id.* In so holding, the court cited Mayer v. Housing Authority, 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), *aff'd mem.*, 44 N.J. 567, 210 A.2d 617 (1965). In *Mayer*, the court held that *Goldberg* was not controlling in the situation where a tenant's son was struck by a thrown stone while playing at the Housing Authority's baseball field. 84 N.J. Super. at 415, 420, 202 A.2d at 441, 443. Since the harmful act fell just short of being criminal, *Mayer* has been recognized as an expansion of the landlord's duty, and a relaxation of the severe *Goldberg* standard. *See* 2 POWELL, *supra* note 22, ¶ 234[2][g], at 350.4–.5; Comment, *supra* note 20, at 283.

[96] 68 N.J. at 381, 346 A.2d at 83.

[97] *Id.* Despite the willingness of both courts to accept the trial court's findings on causation, there appears to have been very little in the way of testimony to support such a conclusion. An officer from the West New York Police Department testified that there were no signs of forced entry and that the "slip" lock could be opened with a piece of celluloid; however, there was apparently no testimony, opinion or otherwise, that the entry was actually made by slipping the lock. *See* 68 N.J. at 372–73, 346 A.2d at 78. The appellate division was not at all troubled by the paucity of evidence of causation. It distinguished *McCappin* and Panglorne v. Weiss, 86 N.J.L. 286, 90 A.2d 1024 (Ct. Err. & App. 1914), noting that "[p]roof of such causality need not be established to a certainty," and plaintiff need show only "the probability or likelihood" that the landlord's

The court also agreed with the reasoning in *Zinck v. Whelan*,[98] a case the appellate division relied upon in reaching its decision.[99] In *Zinck*, the defendant's son had parked an automobile on a dark street and left the key in the ignition. Some boys, noticing that the automobile was unlocked, stole it and were involved in a head-on collision with the plaintiffs who subsequently sued the defendant for negligence.[100] The appellate division determined that the theft of the automobile and the subsequent accident were both foreseeable,[101] and therefore the defendant was under a duty to take precautions against such activity.[102] The court noted that "the key to duty, negligence and proximate cause" in such a situation was whether a reasonable man would foresee that by leaving the keys in an unlocked car, he was enhancing the risk of harm to others.[103]

The *Braitman* court had no difficulty in finding the requisite foreseeability. It noted that in view of the previous incidents of similar crimes in the vicinity, demonstrated by the police records presented at trial, "a reasonable man would have recognized the possibility of the enhanced risk that a defective lock would create."[104]

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act caused the loss. 132 N.J. Super. at 56, 332 A.2d at 214–15; *accord*, Sherman v. Concourse Realty Corp., 47 App. Div. 2d 134, 136–37, 365 N.Y.S. 239, 241–42 (1975). For a discussion of *Panglorne* see note 91 *supra*. On the issue of the quantum of proof necessary to show causation in fact see PROSSER, *supra* note 16, § 41, at 241–44.

[98] 120 N.J. Super. 432, 294 A.2d 727 (App. Div. 1972).

[99] 68 N.J. at 381, 346 A.2d at 83. *See* 132 N.J. Super. at 56, 332 A.2d at 214.

[100] 120 N.J. Super. at 435, 294 A.2d at 728.

[101] *See id.* at 446–50, 294 A.2d at 734–36. Foreseeability was established by reference to several studies demonstrating that the accident rate for stolen vehicles was significantly higher than normal, and the existence of a media campaign to stop drivers from leaving keys in the ignition. *Id.* at 446–48, 294 A.2d at 734–36. For a study of the use of statistics to establish foreseeability in such cases see Peck, *An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909.

[102] *See* 120 N.J. Super. at 445, 448, 294 A.2d at 734, 736. Having found a duty, the appellate division reversed the trial court's grant of summary judgment and stated that the issues of negligence and proximate causation should have been submitted to the factfinder. *Id.* at 449–50, 294 A.2d at 737.

[103] *Id.* at 445, 294 A.2d at 734. A similar result has been reached in other cases involving automobile keys left in cars. *See generally* 14 S.D.L. REV. 115 (1969). Dean Prosser, however, considers this the minority view, *see* PROSSER, *supra* note 16, § 44, at 283–44, and the *Zinck* rationale was recently rejected by another panel of the New Jersey appellate division, *see* Hill v. Yaskin, 138 N.J. Super. 264, 267, 350 A.2d 514, 515 (App. Div. 1976).

Other courts have recognized the relationship between the key removal cases such as *Zinck* and the situation where a tenant is injured by a criminal act. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 484 (D.C. Cir. 1970); Warner v. Arnold, 133 Ga. App. 174, 176–77, 210 S.E.2d 350, 352 (1974); Goldberg v. Housing Authority, 38 N.J. 578, 589, 186 A.2d 291, 296 (1962).

[104] 68 N.J. at 382, 346 A.2d at 84. In determining foreseeability there must be proof

Therefore, the court held that "after suitable notice of the defect," a residential tenant could recover damages upon a showing that the landlord "unreasonably enhanced the risk of loss due to theft by failing to supply adequate locks to safeguard the tenant's premises."[105]

Although the foreseeability theory was sufficient to resolve the issue before the court, it nevertheless proceeded to examine a second, statutory source from which a duty emanates. The New Jersey Hotel and Multiple Dwelling Law[106] provides that the Commissioner of the Department of Community Affairs may promulgate regulations to protect the safety, welfare, and health of the occupants of such dwellings.[107] At the time the Braitmans' apartment was broken into, one of the regulations provided that all new apartment dwellings be equipped with a " 'dead bolt or auxiliary latch bolt to prevent manipulation by means other than a key.' "[108]

In New Jersey, as in other jurisdictions, tenants can premise tort liability upon a breach of a statutory duty such as that established by the New Jersey regulations.[109] The jurisdictions vary, however, as to

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beyond a mere possibility of criminal intervention. The foreseeable result must be probable. Since knowledge is a fundamental aspect of foreseeability, *see* 2 HARPER & JAMES, *supra* note 15, § 16.5, at 907–08, proof of criminal activity in immediate areas or under similar circumstances is a necessary element of the plaintiff's case. *See* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970); Smith v. General Apartment Co., 133 Ga. App. 927, 927, 213 S.E.2d 74, 77 (1975); Johnston v. Harris, 387 Mich. 569, 573, 198 N.W.2d 409, 410 (1972).

[105] 68 N.J. at 383, 346 A.2d at 84.

[106] N.J. STAT. ANN. § 55:13A-1 *et seq.* (Supp. 1975–76).

[107] *Id.* § 55:13A-7. Any regulations promulgated under the act "shall have the force and effect of law." *Id.* § 55:13A-9.

[108] 68 N.J. at 384, 346 A.2d at 85 (quoting from N.J.A.C. § 5:10-6.6(d)(7) (1968)) (footnote omitted).

[109] *See, e.g.*, Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 945–47 (D.C. Cir. 1960); Michaels v. Brookchester, Inc., 26 N.J. 379, 385–86, 140 A.2d 199, 203 (1958); Altz v. Leiberson, 233 N.Y. 16, 18–19, 134 N.E. 703, 704 (1922); Love, *supra* note 22, at 70–72; Note, *Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem*, 22 CASE W. RES. L. REV. 739, 746–48 (1971).

The theory advanced is that legislative enactments such as housing codes create a standard of conduct "from which it is negligence to deviate," PROSSER, *supra* note 16, § 36, at 190 (footnote omitted), if the plaintiff is within the class of individuals sought to be protected and the harm is the type sought to be protected against. *See id.* § 36; RESTATEMENT (SECOND) OF TORTS § 286 (1965). As Judge Cardozo has noted in the landlord-tenant context:

> The legislature must have known that unless repairs in the rooms . . . were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.

Altz v. Leiberson, 233 N.Y. 16, 19, 134 N.E. 703, 704 (1922).

the weight to be given in a civil action to the breach of the statutory duty.[110] New Jersey courts have held that "the violation of a statutory duty of care is not conclusive on the issue of negligence in a civil action but it" may be considered as evidence of negligence.[111]

For example, in *Michaels v. Brookchester, Inc.*,[112] a tenant was injured when a hinge on a cabinet door gave way, causing the door to strike her.[113] Although the tenant apparently had not raised the issue, the court considered the impact of the duty to maintain the premises in good repair imposed by the predecessor to the present housing code.[114] The court noted that the act did "not create a statutory cause of action."[115] Instead it was

> deemed to establish a standard of conduct, and to permit the intended beneficiaries to rely upon a negligent failure to meet that standard in a common law action for negligence.[116]

The *Braitman* court reaffirmed the position taken in *Michaels*, noting that the Braitmans were within the class of intended beneficiaries of the regulation and that the landlord's breach of the duty "was the efficient cause of their loss."[117] Therefore, the "plaintiffs would have been entirely justified in invoking the Multiple Dwelling Law and the regulations promulgated thereunder as evidence of defendant's negligence."[118] This source of duty, when applicable, may be more useful to tenants than the foreseeability theory. In situations where a statutory duty exists, the tenant would not have the burden

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[110] Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 946 (D.C. Cir. 1960). *Compare* Annis v. Britton, 232 Mich. 291, 294–95, 205 N.W. 128, 129 (1925) (violation of statute is negligence per se), *with* Johnson v. Carter, 218 Iowa 587, 593, 255 N.W. 864, 867 (1934) (violation of statute has no relevance to private civil action), *and* Michaels v. Brookchester, Inc., 26 N.J. 379, 386, 140 A.2d 199, 203 (1958) (violation of statute is evidence of negligence). *See generally* Love, *supra* note 22, at 69–76.

[111] 68 N.J. at 385, 346 A.2d at 85. *See, e.g.*, Daniels v. Brunton, 7 N.J. 102, 108, 80 A.2d 547, 550 (1951); McNamara v. Mechanics Trust Co., 106 N.J.L. 532, 534–35, 150 A. 365, 366 (Ct. Err. & App. 1930).

[112] 26 N.J. 379, 140 A.2d 199 (1958).

[113] *Id.* at 382, 140 A.2d at 200.

[114] *See id.* at 385–87, 140 A.2d at 203.

[115] *Id.* at 386, 140 A.2d at 203.

[116] *Id.*

[117] 68 N.J. at 385–86, 346 A.2d at 86.

[118] *Id.* at 386, 346 A.2d at 86 (footnote omitted). In their concurring opinion in *Braitman*, Justices Clifford and Schreiber argued that the landlord's breach of the statutory duty alone was sufficient to establish negligence. Because the landlord had failed to provide a functioning lock as the regulation "required, the violation of that obligation is beyond peradventure, and under these circumstances conclusively established negligence." *Id.* at 389, 346 A.2d at 88.

establishing a duty by reference to foreseeability, and the landlord would be liable unless, by way of a defense, he could show that his failure to comply with the statute was not negligent under the circumstances.[119]

Three members of the court were not satisfied with the limited holding and therefore issued "a word of caution," suggesting that in the future the court might "impose upon the landlord the contractual duty of taking reasonable precautions to safeguard his tenants from crimes committed in his apartment buildings."[120] They left open the question of whether the duty would be based upon the landlord's implied warranty of habitability or upon a recognition of the landlord's superior ability "to take the necessary precautions."[121] Either theory would have the same effect: The focus of judicial inquiry would shift from foreseeability of criminal conduct as a basis for duty to a consideration of whether the landlord breached the standard of care he owes to his tenants.[122] Although the tenant would be relieved of the burden of proving a duty, he would still be required to prove the other elements of negligence, including foreseeability as it relates to proximate causation.[123]

By utilizing a foreseeability approach to the duty and proximate causation problems, the *Braitman* court was able to permit recovery

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[119] In Evers v. Davis, 86 N.J.L. 196, 90 A. 677 (Ct. Err. & App. 1914), the court noted the effect of a violation of a statutory duty:

> Thus a defendant, although he cannot be heard to say that it was not his duty to obey the statute, may show what he did in his effort to obey it, leaving it to the jury to say whether such effort was what a reasonably prudent person would have done in view of the statute.

Id. at 205, 90 A. at 681. *Accord*, McNamara v. Mechanics Trust Co., 106 N.J.L. 532, 534–35, 150 A. 365, 366 (Ct. Err. & App. 1930).

[120] 68 N.J. at 386–87, 346 A.2d at 86–87 (footnote omitted). Chief Justice Hughes and Justice Sullivan joined Justice Pashman in these additional "observations."

Justices Clifford and Schreiber saw "no need to search for or rely upon any doctrine which expands the landlord's duty with respect to tenant security," and therefore did not join the three other justices. *Id.* at 388, 346 A.2d at 87. In addition to noting the breach of the statutory duty to provide locks, *see* note 118 *supra*, they argued in a separate concurrence that the landlord's assurances that he would repair the Braitmans' lock constituted an implied covenant to do so, and that the subsequent failure to fulfill this contractual duty established both duty and liability. 68 N.J. at 389, 346 A.2d at 88.

[121] 68 N.J. at 387–88, 346 A.2d at 87.

[122] The court noted that to establish a duty on the implied warranty of habitability would "require a reconsideration of" Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 54–55, 301 A.2d 463, 466-67 (App. Div.), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973). 68 N.J. at 388 n.16, 346 A.2d at 87. For a discussion of *Dwyer* see note 37 *supra*.

[123] *Cf.* Sargent v. Ross, 113 N.H. 388, 398, 308 A.2d 528, 534 (1973). For a discussion of the landlord's responsibility under a reasonable care standard see Note, *supra* note 16, at 1180–94.

without directly tampering with the traditional landlord-tenant relationship. Foreseeability, however, is generally understood not as a vehicle for creating a duty, but rather as a concept which "defines and limits the scope of a preexistent duty that is based upon the relationship of the parties."[124] Although, as the court pointed out, the result in the case before it would be the same whether a duty is based on foreseeability or on the relationship of the parties,[125] the foreseeability approach as applied by the court omits the careful balancing of interests which should be engaged in before a duty of protection is established.[126]

The foreseeability approach is also inherently vague. Although the holding is limited to losses suffered as a result of missing or defective locks after notice to the landlord, the court's foreseeability rationale has few natural limits.[127] It would certainly seem broad enough to encompass the duty to provide secure doors and windows

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[124] Note, *supra* note 16, at 1178 (footnote omitted). It is generally recognized that "foreseeability . . . alone will not justify the imposition of a duty." Comment, *supra* note 20, at 277. *See, e.g.*, Trice v. Chicago Housing Authority, 14 Ill. App. 3d 97, 100, 302 N.E.2d 207, 209 (1973); Goldberg v. Housing Authority, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962).

[125] 68 N.J. at 382–83, 346 A.2d at 84.

[126] Dean Prosser has noted that to find that an individual's nonfeasance is negligent, a court must "find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." PROSSER, *supra* note 16, § 56, at 339. This approach was recognized in Mayer v. Housing Authority, 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964), *aff'd mem.*, 44 N.J. 567, 210 A.2d 617 (1965), where the court analyzed the duty a housing authority had to a child injured on one of its playgrounds:

> "Duty arises out of a relation between the particular parties that in right reason and essential justice enjoins the protection of the one by the other against what the law by common consent deems an unreasonable risk of harm, such as is reasonably foreseeable . . . ."

84 N.J. Super. at 420, 202 A.2d at 444 (quoting from Wytupeck v. Camden, 25 N.J. 450, 461, 136 A.2d 887, 893 (1957)) (citations omitted).

[127] As Chief Justice Weintraub pointed out in *Goldberg*, the commission of crime is foreseeable almost any time and anywhere. 38 N.J. at 583, 186 A.2d at 293. Although the Chief Justice has been criticized for equating foreseeability with possibility rather than probability, *see* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970), the fact remains that most New Jersey tenants would have little trouble showing that a landlord knew or should have known of the occurrence of crime in the area, and that the failure to provide a particular security device would enhance the risk of loss. As the dissent in Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972), noted, under the foreseeability standard, landlords

> will now be required to maintain additional lighting, guards, enclosures, alarms, locks and *take every other precaution to avoid reasonably foreseeable conditions* which attract criminals to carry out their nefarious deeds.

Id. at 576, 198 N.W.2d at 411–12 (emphasis added). It is unlikely, however, that such extreme measures would be deemed "reasonable." *See* note 129 *infra*.

as well as locks, since it is foreseeable that the absence of these minimum security precautions would greatly enhance the hazard of loss.[128] Beyond that point, the landlord is left to speculate, with *Goldberg* holding that he need not provide police protection, and *Braitman* holding that he must provide locks as the boundaries. Between the two extremes lie a myriad of security devices or precautions which landlords may or may not be required to provide, with little in the way of analysis to guide them.[129]

A more workable formula would be to establish a duty on the basis of the landlord-tenant relationship and apply the concomitant standard of reasonable care under the circumstances. Although the reasonable care standard is also vague, it has the advantage of being familiar and to an extent, predictable. Finally, recognition of the landlord's contractual duty to take reasonable precautions to protect his tenants from criminal activities would reflect the expectations and needs of the urban dweller and have the salutory effect of modernization of the landlord's tort liability to keep pace with the recent updating of his contractual liability.[130] Concepts developed in agrarian England have little relevance to urban America, and the three Justices' "word of caution" should become a reality.

Peter Sheridan

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[128] In their "observations" the three Justices included "sufficiently sturdy doors" and "secure windows" as well as locks as a minimal requirement for an adequate dwelling. 68 N.J. at 386–87, 346 A.2d at 86. *Cf.* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[129] Despite the court's foreseeability approach to duty, the standard of care would, in all probability, be the same as in other special relationships, *i.e.*, "whether or not the landlord, as a man of ordinary prudence, knows or should know that his acts or omissions involve an unreasonable risk of harm to his tenants at the hands of criminal intruders." Note, *supra* note 16, at 1179 (footnote omitted).

[130] As the New Hampshire supreme court has noted:

> We think that now is the time for the landlord's limited tort immunity to be relegated to the history books where it more properly belongs.

Sargent v. Ross, 113 N.H. 388, 396, 308 A.2d 528, 533 (1973).

> "Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term."

439 F.2d at 485 (quoting from Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970)).

The dissent in *Kline* rejected the majority's contract analysis since the plaintiff was on a month to month tenancy. Therefore, each term constituted a new contract at the beginning of which the tenant was fully aware of the measures in force to protect the building, leaving "no basis for any damage claim based on contract." 439 F.2d at 492 (MacKinnon, J., dissenting). *See also* 55 MINN. L. REV. 1097, 1105 (1971).