COMMENTS

BUSINESS INVITERS' DUTY TO PROTECT INVITEES FROM CRIMINAL ACTS

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On the evening of November 11, 1977, Helen Butler was shopping for groceries at the Acme Market in Montclair, New Jersey. After completing her shopping, she left the supermarket and proceeded to her automobile in the Acme's parking lot. She placed her packages on the bumper of her car and opened the trunk. Suddenly, she was thrown violently to the ground, and her pocketbook was stolen. Ms. Butler subsequently instituted an action against Acme alleging that the injuries she sustained in the attack were a result of the supermarket's negligence in failing to provide her with a reasonably safe place to shop.¹

Historically, courts have been unwilling to find that businesses had a duty to protect customers like Ms. Butler from criminal acts occurring on their premises. As the frequency of this type of criminal activity increases, however, courts are facing the situation more often and are becoming more responsive to the factors that militate against continued application of a no-duty rule. Despite this trend, a number of jurisdictions continue to refuse to recognize any duty to protect. Even those courts that have abandoned the no-duty rule have not done so entirely. They simply have conditioned the duty upon the existence of a variety of circumstances, some quite vague, and others quite specific and arbitrary.

This Comment surveys and analyzes recent developments in this area of law and concludes that courts should adopt an unqualified duty-to-protect rule² that would require all business inviters³ to take

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¹ See *Butler v. Acme Markets, Inc.*, 177 N.J. Super. 279, 283-84, 426 A.2d 521, 523 (App. Div. 1981), *aff'd*, 89 N.J. 270, 445 A.2d 1141 (1982).

² The notion that under some circumstances there should be a duty to protect invitees is not new. In Bazyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727 (1979), the author argues for the adoption of such a rule. The duty proposed by

reasonable steps under the circumstances to prevent the occurrence of crime on their premises.⁴

Bazylar would, however, be contingent upon the determination by the trial judge that "a foreseeable risk of attack existed on the landowner's premises." *Id.* at 752. In contrast, the duty proposed here would be contingent upon a finding that the plaintiff was, at the time of the attack, the defendant's invitee. *See infra* text accompanying note 132. The duty proposed in this Comment differs from that proposed by Bazylar in another important respect: it could not be discharged by the use of a warning to patrons regarding the risks of crime on the premises. *See Bazylar, supra*, at 750 n.153. Bazylar wrote his article at a time when few courts were willing to deviate from the common law rule that there is no duty to protect another from the deliberate criminal acts of a third party. As a result he was forced to look outside the business inviter/invitee context to find judicial support for the duty he proposed. Since 1979, though, many courts have recognized the force of arguments similar to those put forth by Bazylar and other commentators, and the no-duty rule is disappearing. This Comment analyzes the effectiveness and desirability of the recently developed alternatives to the no-duty rule and proposes the adoption of a rule that avoids its problems.

³ The terms business "inviter" and "invitee" are used throughout. For purposes of this discussion, the business inviter is a person who occupies or possesses land that is controlled for a business purpose. *See* RESTATEMENT (SECOND) OF TORTS § 328E (1965). The business invitee is a person who is "invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.* § 332(3). The invitee can best be thought of as a business visitor or customer. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 61, at 419 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

In certain situations, particularly when the possessor is not the owner of the property, identification of the inviter may be difficult. For example, individual merchants may rent space in a mall to conduct their business. Are they then responsible for the areas outside the store that are used by their customers? Generally the answer to this question can be found in the applicable landlord/tenant law. In Pennsylvania, for example, when the owner of real estate leases premises to tenants but retains possession and control of the common areas to be used by business invitees of the various tenants, the obligation to keep the areas safe for such invitees, absent a contrary provision in the leases, is imposed on the landlord. *See Morgan v. Bucks Assocs.*, 428 F. Supp. 546, 549-51 (E.D. Pa. 1977).

This Comment does not concern itself with the nuances involved in the common law distinctions between trespassers, licensees, and invitees and the differential duties owed them by possessors of land. None of the cases discussed presents a situation where the court had difficulty determining the status of the plaintiff. On the common law distinctions, see generally RESTATEMENT (SECOND) OF TORTS §§ 329-332 (1965) (defining trespasser, licensee, and invitee). These distinctions have been criticized and some courts have flirted with the idea of abandoning them entirely. *See PROSSER & KEETON, supra* note 3, § 62, at 432-34.

⁴ The duty to take reasonable steps extends to all those areas of the inviter's premises that are within the scope of the invitation extended to invitees. The scope of this duty includes all areas of the premises upon which the inviter gave the invitees reason to believe that their presence was desired for the purpose for which they came. *See* RESTATEMENT (SECOND) OF TORTS § 332 comment *l* (1965). Entrances to the property, exits, parking lots, the interior of buildings, and other areas provided for invitees can be within this scope. *See PROSSER & KEETON, supra* note 3, § 61, at 424-25 & nn.80-81. This Comment's focus on parking lots is a function of the frequency of criminal activity taking place there. References to "open areas" are intended to encompass those areas within the scope of the invitation that are not capable of precise identification.

Part I of the Comment outlines the extent of the problem of "patron victimization" and suggests that incidents like the one involving Helen Butler are far too common to ignore. Part II discusses the rules that courts are currently using to guide the resolution of suits brought by injured invitees against the business inviter. Asserting that these existing rules are unresponsive, in varying degrees, to the crime and victimization problems, Part III criticizes both the rationale and the results of such rules. In addition, this part discusses the policy arguments on both sides and responds to concerns commonly expressed by those who favor retention of the common law no-duty rule. The Comment concludes that adoption of an unqualified duty-to-protect rule is warranted.

I. THE NATURE AND EXTENT OF THE BUSINESS INVITEE VICTIMIZATION PROBLEM

The existence and threat of crime has become, for most Americans, a fact of life. In the urban environment in particular, residents and visitors must deal with crime on a daily basis.⁵ Outlying suburbs, small towns, and rural areas have also experienced tremendous increases in crime rates since 1969.⁶ Although there has been a decrease in recent years in the per capita occurrence of crimes listed in the FBI's crime index,⁷ the crime rate in the United States is still much higher than in other Western industrial societies.⁸ In response to the encourag-

⁵ See W. SKOGAN & M. MAXFIELD, *COPING WITH CRIME* 28 (1981).

⁶ A review of the Federal Bureau of Investigation's Crime Index—which measures the reported occurrence of seven crimes (murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor vehicle theft) per 100,000 inhabitants—indicates that no region or state has been unaffected by the general and dramatic increase in crime. In 1984, no state had a lower total number of crimes per 100,000 than it had in 1970. Compare FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* 66-71 (1970) [hereinafter cited as FBI CRIME REPORTS 1970] with FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* 44-51 (1984) [hereinafter cited as FBI CRIME REPORTS 1984]. In fact, many states without large urban areas, including Arkansas, Iowa, Maine, Mississippi, North Dakota, and Oregon, experienced increases in criminal incidents per 100,000 inhabitants of 100% or more between 1970 and 1984. Compare FBI CRIME REPORTS 1970, *supra*, at 72-79 with FBI CRIME REPORTS 1984, *supra*, at 52-59. Finally, between 1969 and 1982, cities with populations ranging from 50,000 to 99,999 have experienced an increase in the "violence offense rate" (measuring the occurrence of murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault per 100,000 inhabitants) of 141.9%, while cities with populations of less than 10,000 have experienced an increase of 161.6%. See AMERICAN VIOLENCE AND PUBLIC POLICY 234 table 11 (L. Curtis ed. 1985).

⁷ See FBI CRIME REPORTS 1984, *supra* note 6, at 41.

⁸ See Weiner & Wolfgang, *The Extent and Character of Violent Crime in America: 1969-1982*, in AMERICAN VIOLENCE AND PUBLIC POLICY, *supra* note 6, at 32-35 (discussing crime patterns throughout the 1970's showing that the United States

ing news of recent decreases in crime rates, commentators have noted that, given the high rates of criminal violence remaining, the rates "need not be on the upswing for the nation to be legitimately concerned about their level."⁹ Victimization surveys and public opinion polls show that citizens are aware, and in many instances quite fearful, of the crime problem. Surveys conducted by the Gallup Organization and the National Opinion Research Center show that approximately forty-five percent of the citizens polled could think of a place in their neighborhood "where [they] would be afraid to walk alone at night."¹⁰ Individuals commonly respond to this fear by staying at home.¹¹

This common response is not without reason. Both victimization surveys and police reports show that the majority of crimes take place outside the home. For example, approximately sixty percent of all robberies and forty percent of forcible rapes occur in public places.¹² This reality is reflected in survey results showing that downtown and underground parking areas are among the areas citizens consider most dangerous.¹³

As might be expected, areas where commercial activity takes place have been hit especially hard by the crime problem. Commercial crime is more prevalent than household and personal victimization, and the crime rate for retail stores and proprietary parking structures is higher than for other businesses.¹⁴ The parking lot seems to present unique opportunities for crime. Customers are typically in possession of money and recently purchased items. In this respect, the would-be assailant in search of valuables need not take a chance on the unknown assets of some passerby.¹⁵ Furthermore, remote and poorly lit areas of parking

suffered homicide and robbery rates nearly three times those sustained by other Western nations); *see also* W. SKOGAN & M. MAXFIELD, *supra* note 5, at 13 (summarizing victim surveys and crime reports that reveal the high rate of crime in the United States in comparison with other Western countries).

⁹ Weiner & Wolfgang, *supra* note 8, at 34.

¹⁰ W. SKOGAN & M. MAXFIELD, *supra* note 5, at 13 (citing NATIONAL OPINION RESEARCH CENTER, NATIONAL DATA FOR THE SOCIAL SCIENCES: GENERAL SOCIAL SURVEY CUMULATIVE CODEBOOK 1972-1977 (1978); AMERICAN INSTITUTE OF PUBLIC OPINION RESEARCH, GALLUP OPINION INDEX (published monthly)).

¹¹ *See* W. SKOGAN & M. MAXFIELD, *supra* note 5, at 13; *see also* J. CONKLIN, THE IMPACT OF CRIME 105, 107-13 (1975) (stating that "[p]eople often react to their fear of crime by avoiding contact with others" and by minimizing the chance of victimization).

¹² *See* Weiner & Wolfgang, *supra* note 8, at 30-31.

¹³ *See* W. SKOGAN & M. MAXFIELD, *supra* note 5, at 186.

¹⁴ *See* Bazylar, *supra* note 2, at 727-28 (citing LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE NATION'S FIVE LARGEST CITIES 32 (1975) (finding that commercial robberies were four to five times more prevalent than personal or household robberies)).

¹⁵ This problem would seem to be particularly acute in bank parking lots. In

lots present little danger of discovery. Courts and security experts have recognized the challenges that these areas pose for the safety of business patrons.¹⁶ Security experts have commented that "[t]here are very few open areas, in industrial complexes, or elsewhere, which can be considered secure, particularly during the hours of darkness."¹⁷

In the past, the typical retail merchant did business from a street-side shop. The only access to that shop was from the main entrance adjacent to the street or sidewalk. Patrons were required to park in the street or in large public lots provided for them by the city. Indeed, this is still the typical pattern in most, if not all, large cities. Recently, however, merchants have begun moving to shopping centers and enclosed malls with sizable private parking lots.¹⁸ Some large establishments, such as sports arenas and hospitals, also have large parking lots and other open areas outside the building that present similar problems. Although it is not always clear in any given instance who is ultimately responsible for these areas,¹⁹ there is some agreement that those responsible for their condition have not been responsive to the dangers these

Drake v. Sun Bank & Trust Co., 377 So. 2d 1013 (Fla. Dist. Ct. App. 1981), the plaintiff's decedent was kidnapped from a bank parking lot and later murdered. *See id.* at 1014. The plaintiff alleged in the complaint that the bank knew that its customers often carried cash while using the parking lot yet failed to provide adequate security to protect them. *See id.* at 1015. The court held that this allegation was not enough to make the crime "foreseeable" without proof that the bank had advance warning of the attack or that similar incidents had occurred in the parking lot. *See id.* at 1015. A similar claim seems likely to arise in connection with automatic teller machines available to customers after banking hours. Is the user the invitee of the bank? If so, in jurisdictions that reject a no-duty rule, the bank may be required to take reasonable steps to protect the customer from the criminal acts of third parties.

¹⁶ *See, e.g.,* Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 130, 695 P.2d 653, 660, 211 Cal. Rptr. 356, 364 (1985) ("In its very operation of a parking structure, defendants may be said to have created 'an especial temptation and opportunity for criminal misconduct,' . . .") (quoting *Gomez v. Tigor*, 145 Cal. App. 3d 622, 628, 193 Cal. Rptr. 600, 604 (1983) (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS 174 (4th ed. 1971))); *see also* D. HUGHES & P. BOWLER, THE SECURITY SURVEY 118 (1982) (Outside parking facilities are included among the areas that cannot be considered secure "without active patrolling by a security force.").

¹⁷ D. HUGHES & P. BOWLER, *supra* note 16, at 118.

¹⁸ *See* Cherry, *Liability of Business Property Owners for Injury to Customers in Parking Lots by Criminal Attacks from Third Parties*, 13 REAL EST. L.J. 141, 141 (1984).

¹⁹ *See, e.g.,* Morgan v. Bucks Assocs., 428 F. Supp. 546, 549-51 (E.D. Pa. 1977) (Under Pennsylvania law, where a real estate owner leases space to tenants but retains possession and control of common areas, the owner has the obligation to keep the common areas safe.); *see also supra* note 3 (discussing *Morgan* and the application of landlord/tenant law to identification of the inviter); PROSSER & KEETON, *supra* note 3, § 63, at 440 ("When different parts of a building . . . are leased to several tenants, the approaches and common passageways normally do not pass to the tenant, but remain in possession of the landlord.").

areas pose.²⁰ Too often planners, for example, have ignored the margin of safety that can be gained by designing buildings with security concerns in mind.²¹

Given the effectiveness of many security measures, including the most simple and inexpensive,²² business inviters should be encouraged to take those steps that are reasonable under the circumstances. To the extent that they will not do so voluntarily, the law can further society's interests by offering that encouragement in the form of an actionable duty to protect. The following section of this Comment discusses the rules that courts have developed in response to the problem as it has been presented to them.²³ The rationale for these rules and the results that they produce are analyzed in the final section.

II. JUDICIAL RESPONSES TO THE BUSINESS INVITEE VICTIMIZATION PROBLEM

Considerable disagreement exists as to whether the inviters' generally recognized duty to exercise reasonable care for invitees' safety²⁴ includes the duty to exercise reasonable care to protect them from the criminal acts of third parties.²⁵ Courts have exhibited a general reluctance to tamper with the traditional common law doctrine that there is

²⁰ See D. HUGHES & P. BOWLER, *supra* note 16, at 3-4; Bazylar, *supra* note 2, at 729-30 & n.14; see also O. NEWMAN, *ARCHITECTURAL DESIGN FOR CRIME PREVENTION* 11 (1973) (noting the "conspicuous absence of consideration given to security by architects" of residential housing projects, and insisting that such considerations can be given without restricting the architect's "compositional imagination" or ability to provide for the "functional needs of residents").

²¹ See D. HUGHES & P. BOWLER, *supra* note 16, at 3-4.

²² See *infra* notes 84-89 and accompanying text.

²³ Legislatures in many states have responded to the problems suffered by victims by passing legislation that provides funds for crime victims to cover medical expenses, lost work time, and property loss and damage. See *Crime Victims Compensation Trust Fund: Hearings on H.R. 2470 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 10 (1983) (statement of Neil Hartigan, Attorney General, Illinois) (noting that over one-half of the states have crime victim compensation programs) [hereinafter cited as *Hearings*]; see also Comment, *Negligence Liability for the Criminal Acts of Another*, 15 J. MAR. L. REV. 459, 462 n.17 (1982) (citing sources that discuss state compensation programs). Citizens have responded in many ways, including staying indoors after dark and forming "citizen" or "town" watches to involve the community in crime prevention through self-policing. See J. CONKLIN, *supra* note 11, at 107-13, 194-209.

²⁴ See PROSSER & KEETON, *supra* note 3, § 61, at 425.

²⁵ For purposes of analyzing the business inviters' obligation to their invitees, areas privately owned and provided by them for the use of their patrons are part of the business premises. See *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981); PROSSER & KEETON, *supra* note 3, § 61, at 424. Of course, a parking lot may be a business in and of itself, in which case the users of the lot are clearly invitees of the lot's owner.

no duty to protect another from the deliberate criminal attack of a third person. The reasons for this reluctance include the notion that the criminal act is an intervening cause of harm, the difficulty in foreseeing criminal acts, the vagueness of the standard of care required to meet the duty, the economic consequences, and the fear of conflicting with the policy that the protection of citizens is the duty of government.²⁶ These concerns have resulted in a proliferation of rules that either deny the existence of a duty altogether or limit its application to certain situations.

A. No-Duty Rules

Some courts have held that a plaintiff who is the victim of a criminal attack while on the defendant's premises cannot recover because the business inviter simply has no duty to protect its patrons from criminal acts. These courts often express an alternative rationale for denying a recovery: that the criminal act itself, and not a lack of security, is the proximate cause of the damages sustained by the plaintiff. Other courts hold that as a matter of law there is insufficient evidence to establish causation when the plaintiff can offer only circumstantial proof of the cause of the injury. Since the results are the same in these cases, they are all discussed under the no-duty rubric.

Courts taking these positions typically explain their holdings in terms of "fairness" or a reluctance to make a business inviter the insurer of invitees' safety. The Supreme Court of Oklahoma, for example, used both explanations in *Davis v. Allied Supermarkets, Inc.*²⁷ The court sustained the defendant supermarket owner's demurrer to the plaintiff's allegations that the failure to provide adequate lighting and personnel was the cause of a purse snatching that resulted in her injury. Relying on an earlier case involving the employer/employee relationship, in which the court had stated simply that it was "unable to see that an employer has a general duty to protect his employees from the assaults of criminals,"²⁸ the *Davis* court held that the same rule applied to the business inviter/invitee relationship.²⁹ The fear of insurer liability has been instrumental in the refusal of other courts to

²⁶ See *Nappier v. Kincade*, 666 S.W.2d 858, 860 (Mo. Ct. App. 1984) (citing *Cornpropst v. Sloan*, 528 S.W.2d 188, 195 (Tenn. 1975)).

²⁷ 547 P.2d 963 (Okla. 1976).

²⁸ *Id.* at 964 (quoting *McMillin v. Barton-Robison Convoy Co.*, 182 Okla. 553, 555, 78 P.2d 789, 790 (1938)).

²⁹ See *Davis*, 547 P.2d at 964. The court did refer to the plaintiff's arguments that the crime problem demanded some reasonable response by business inviters. Although the court recognized the problem, it saw no reason to depart from its previous holding. See *id.* at 965.

find that a duty to protect exists.³⁰ The *Davis* court, which decided the case on the absence of a duty to protect, noted, alternatively, that the proximate cause of the plaintiff's damages was the independent, intervening criminal act of a third party.³¹

In *Shaner v. Tucson Airport Authority*,³² the court refused to impose a duty where there was no evidence of how a kidnapping on the defendants' airport parking lot had occurred. Mr. Shaner, the decedent's husband, alleged that inadequate lighting and security were responsible for the kidnapping and subsequent murder of his wife. Despite evidence that the security in and around the lot was insufficient,³³ the court directed a verdict for the defendants. The court reasoned that Mr. Shaner did not establish a reasonable probability that this insufficiency was a substantial factor in bringing about the decedent's abduction. Without evidence of what actually went on in the parking lot, the jury would be "left to sheer speculation" on the cause of Mrs. Shaner's death.³⁴ Although it is unclear what evidence would have allowed the case to go to the jury, the court seemed to want evidence that a specific lapse in security was responsible for the crime.³⁵ The court avoided a

³⁰ See, e.g., *Shaner v. Tucson Airport Auth.*, 117 Ariz. 444, 448, 573 P.2d 518, 522 (Ct. App. 1977) ("To hold otherwise in this case would make [defendants] insurers of the safety of [the victim] which would be an impermissible imposition of liability."); *Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 509 (D.C. 1976) ("[I]t does not follow that the common law of negligence imposes an obligation upon private enterprises to provide armed guards to insure the safety of persons invited to do business with them.").

³¹ See *Davis*, 547 P.2d at 965.

³² 117 Ariz. 444, 573 P.2d 518 (Ct. App. 1977).

³³ See *id.* at 446, 573 P.2d at 520. The record showed that the parking lot was so poorly lit that it was necessary to shine a flashlight to see inside a car. No security personnel were assigned specifically to the lot. Security personnel checked the lot only if they were needed to help start a patron's car, if they were driving by on an adjacent road, or if they happened to look out on the lot from the airport terminal's second floor. See *id.*

³⁴ *Id.* at 448, 573 P.2d at 522.

³⁵ *Shaner* indicated that when there are no witnesses to the incident and the plaintiff cannot testify liability will not be imposed. See *id.* A similar result was reached in *Mitchell v. Pearson Enters.*, 697 P.2d 240 (Utah 1985). The Supreme Court of Utah held that the defendant hotel operator was entitled to summary judgment in a wrongful death action in which the plaintiff claimed that inadequate security was responsible for the murder of the decedent in his hotel room:

[T]here is no direct evidence linking Mitchell's death with the alleged inadequate security measures at the Hilton . . . Mitchell himself obviously was unable to testify, and there were apparently no eyewitnesses other than the unknown murderer. The fact that there was no evidence of forced entry into Mitchell's room could be probative of entrance by a person using an unauthorized master or room key. However, it could also be probative of entrance, at Mitchell's invitation, by a friend or colleague. Any supposition, therefore, as to the manner of entrance to Mitchell's room or the identity of the assailant would be totally speculative. A jury cannot be permitted to engage in such speculation.

discussion of the no-duty rule, but its finding that causation could not be established under the circumstances is functionally equivalent to a finding that the airport owed no duty to the decedent.³⁶

B. Duty Contingent upon the Existence of Special Facts or Circumstances That Establish Foreseeability

The majority of courts that have considered inviters' liability are unwilling to say that a business inviter never has a duty to take reasonable steps to protect invitees from criminal acts. However, such courts universally hold that the duty arises only in specific situations.

The first group of cases to be considered narrowly limits the existence of the duty. Unless the inviter's premises attract or provide a unique climate for crime, or the defendant inviter knew or had reason to know that criminal acts posing imminent probability of harm to an invitee were occurring or were immediately about to occur, no duty to protect arises.³⁷ Though courts in other jurisdictions with less restrictive limited-duty rules typically use the same "knew or had reason to know" language,³⁸ the jurisdictions discussed in the following paragraphs interpret that standard much more narrowly.

Although courts frequently state that a duty to protect arises if a business provides a "unique climate for crime," few cases turn on or even discuss this issue. Therefore, analyzing the content of the showing that the plaintiff must make is impossible.³⁹ Of more importance to an understanding of the law is the meaning given to the phrase "knew or had reason to know," since courts that espouse a limited-duty rule con-

Id. at 246.

³⁶ See *infra* text accompanying note 83 (suggesting the need for permitting plaintiffs to rely on some circumstantial evidence).

³⁷ See, e.g., *Cornpropst v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975) (finding that a shopping center owner was not liable for injuries sustained by a shopper who was the victim of a sudden assault by an unidentified third party).

³⁸ See *infra* notes 56-65 and accompanying text (discussing the "prior similar acts" standard).

³⁹ Comment f of section 344 of the RESTATEMENT (SECOND) OF TORTS (1965), however, does have a "character of business" provision. See *infra* notes 66-72 and accompanying text (discussing the *Restatement* approach and the courts that have accepted it). A case arguably relying heavily on the "character" of the defendant's business is *Comastro v. Village of Rosemont*, 122 Ill. App. 3d 405, 461 N.E.2d 616 (1984). In *Rosemont*, the plaintiff was attacked in the parking lot of a public arena in which AC/DC, a "heavy metal" band, had been performing. Relying on evidence that the village, the arena's owner, had sufficient advance warning that previous AC/DC concerts attracted rowdy drinkers and drug users, the court found that the village owed a duty "to its business invitees to take reasonable steps and exercise the degree of care and vigilance practicable under the circumstances to prevent injury." *Id.* at 409, 461 N.E.2d at 619.

dition the existence of a duty to protect on "foreseeability."⁴⁰

In *Cornpropst v. Sloan*,⁴¹ the court held that the plaintiff, who was assaulted in the parking lot of the defendant's shopping center, did not state a cause of action against the shopping center when she alleged that, by virtue of other crimes on or in the vicinity of the premises, the defendant knew, or should have known, that she would be exposed to acts of violence and faced a potential danger.⁴² The court held that as a matter of law there would be no liability imposed on the owners of the shopping center for the sudden criminal act of a "temporarily or permanently depraved person" who gave no notice indicating an intention to commit an assault.⁴³

The opinion in *Cornpropst* and decisions in jurisdictions with similar rules indicate that unless the specific crime is imminent and the defendant is aware of its imminence there will be no duty to protect invitees. These courts refrain from imposing a duty on business inviters when the plaintiff claims that prior criminal acts put the defendant on notice or when the act that harmed the plaintiff is deemed "spontaneous." In either case the court will say that the defendant was not on notice: in the former because the prior occurrence of criminal acts does not imply that a new crime is imminent, and in the latter because the criminal act happened too quickly for the defendant to be expected to respond.

In *Henley v. Pizitz Realty Co.*,⁴⁴ the Supreme Court of Alabama applied this foreseeability formula to deny the plaintiff recovery against the owners and operators of a parking garage for injuries sustained when she was forced into her car and, after being instructed to leave the garage, raped. She produced evidence that, in the ten years prior to her abduction, one battery, six break-ins, two robberies, and seven thefts had occurred in the garage.⁴⁵ In affirming the summary judgment for the defendants, the court said that these prior occurrences did not make the attack on the plaintiff foreseeable. The court stated that the evidence of prior criminal activity "failed to establish that the defendant knew or had reason to know that 'acts [were] occurring or

⁴⁰ As Prosser and Keeton have noted, duty is frequently dealt with in terms of proximate cause. PROSSER & KEETON, *supra* note 3, § 54, at 358. The decisions under discussion generally present the issue in terms of duty, though on occasion the phrases are used interchangeably, and the court discusses proximate cause as an alternative rationale for denying recovery. See *Davis*, 547 P.2d at 965.

⁴¹ 528 S.W.2d 188 (Tenn. 1975).

⁴² See *id.* at 198.

⁴³ See *id.* at 197.

⁴⁴ 456 So. 2d 272 (Ala. 1984).

⁴⁵ See *id.* at 273.

In *Kelly*, the court stressed that the shooting was sudden and spontaneous and that the defendant had notice of it only seconds prior to its occurrence. These facts were vital to the court's alternative holding that the defendant could not have been negligent as a matter of law.⁵¹ Lack of notice to the defendant store owner as a result of the spontaneous nature of the incident was also the basis for the decision in favor of the store owner in *Munn v. Hardee's Food Systems*.⁵² Sparked by derogatory racial comments made outside the building and out of the presence of the defendant's employees, the events leading up to the fatal shooting of the plaintiff's decedent were characterized as "spontaneous."⁵³ The record was deemed "insufficient to show that the [defendant] knew or had reason to know that such acts were occurring or about to occur."⁵⁴

This standard vests in the trial judge a significant amount of power to deny the plaintiff's claim as a matter of law. The circumstances leading up to the event must have given the defendant actual notice that the plaintiff was in danger of an attack by a known third party or parties. If the notice was too close in time to the actual event, the court may find that the defendant owed the plaintiff no duty because the notice received did not provide the defendant an adequate

be said that the defendant owed no duty. See *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 55, 155 A.2d 90, 96 (1959). The other school is best represented by section 496C of the RESTATEMENT (SECOND) OF TORTS (1965), which provides that a defendant who has breached a duty of care may defend on the ground that the plaintiff fully understood the risk caused by the defendant's conduct but voluntarily chose to be exposed to it. The defense would be available even if the plaintiff's actions were reasonable.

If, as suggested by Michael Bazyler, the inviter's duty could be satisfied by simply warning the invitee of the possible dangers of crime on the premises, see Bazyler, *supra* note 2, at 750 n.153, the issue would be moot. There would be no duty owed to a person who assumed the risk, because that person already possessed knowledge of the danger. Alternatively, if it were held that the duty was breached, section 496C would be available as a defense. See James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

However, the two views will produce different results where, as suggested here, the defendant's duty goes beyond warning and includes taking additional precautions for the plaintiff's safety. A rejection of implied assumption of risk as a defense to the breach of this duty would be an assertion that the dangers of a failure to provide adequate security are unreasonable even to those who are aware of such dangers. This would seem to be the appropriate response in the inviter/invitee situation. See *infra* notes 114-22 and accompanying text (discussing policy reasons that favor an unqualified duty to protect). The recognition of implied assumption of risk as a defense is inconsistent with the policies that support the imposition of a duty to protect that extends beyond warning. See James, *supra*, at 193-94.

⁵¹ See *Kelly*, 417 So. 2d at 561.

⁵² 274 S.C. 529, 266 S.E.2d 414 (1980) (per curiam).

⁵³ See *id.* at 531, 266 S.E.2d at 415.

⁵⁴ *Id.*

opportunity to respond.

Another group of courts has interpreted the foreseeability requirement more broadly, holding that prior acts can be sufficient to give rise to a duty on the part of the business inviter to protect invitees from criminal acts. The question of proximate cause is left to the jury.⁵⁵ This less restrictive interpretation of proximate cause is, of course, contingent upon the requisite showing of foreseeability. This burden can be satisfied by evidence of prior similar acts on the defendant's premises.

Although the "prior similar incidents" rule⁵⁶ does expand the concept of foreseeability as defined by the *Cornpropst*, *Henley*, and *Kelly* courts, it too imposes strict guidelines on the evidence that the plaintiff must present to give rise to a duty to protect. In *McCoy v. Gay*,⁵⁷ for example, the plaintiff customer was attacked in the parking lot of the defendant's cocktail lounge and sought to demonstrate the defendant's knowledge of a dangerous condition with evidence of two prior crimes that occurred on the premises but not in the parking lot. While the court agreed that evidence of a prior similar incident tending to show a dangerous condition and knowledge of that condition is admissible, the opinion stressed that the conditions of the incidents compared must be substantially similar.⁵⁸ In affirming a directed verdict for the owners of the cocktail lounge, the court held that because the prior acts had not occurred in the parking lot the customer's evidence had no relevance or probative value to the issue of the owner's knowledge of a dangerous condition there.⁵⁹

⁵⁵ See, e.g., *Butler v. Acme Markets, Inc.*, 177 N.J. Super. 279, 426 A.2d 521 (App. Div. 1981), *aff'd*, 89 N.J. 270, 445 A.2d 1141 (1982). In *Butler*, the plaintiff's evidence of prior crimes and of the defendant's employment of security guards indicated an awareness of the problem and satisfied the court "that an inference could be drawn by the jury that reasonable security measures would have served as a deterrent to criminal attacks upon customers in defendant's parking lot, and that defendant's failure to take such measures . . . was a substantial contributory factor in the assault on plaintiff." *Id.* at 289, 426 A.2d at 526; see also *McCoy v. Gay*, 165 Ga. App. 590, 591, 302 S.E.2d 130, 131 (1983) ("Ordinarily . . . [the defendant] would be insulated from liability by the intervention of an illegal act However, the . . . rule has been held inapplicable if the defendant . . . had reasonable grounds for apprehending that such criminal act would be committed.") (quoting *McClendon v. Citizens & S. Nat'l Bank*, 155 Ga. App. 755, 756, 272 S.E.2d 592, 593 (1980)).

⁵⁶ See, e.g., *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 123-30, 695 P.2d 653, 658-61, 211 Cal. Rptr. 356, 360-64 (1985) (discussing recent California cases that followed the "prior similar incidents" approach).

⁵⁷ 165 Ga. App. 590, 302 S.E.2d 130 (1983).

⁵⁸ See *id.* at 592, 302 S.E.2d at 131.

⁵⁹ See *id.* at 593-94, 302 S.E.2d at 132-33. The court treated in similar fashion the plaintiff's evidence of a shooting in the parking lot 10 years before the incident. The evidence was dismissed as irrelevant because there was not a sufficient foundation for showing that the conditions complained of by the plaintiff—inadequate lighting and the

Courts applying this rule have a significant amount of discretion to decide how "prior" or "similar" incidents must be in order to be relevant to the foreseeability issue. A number of examples are instructive. Police response to ten prior alarms at the defendant's bank was held to be insufficient to show that the defendant was aware that a customer might be robbed at gunpoint in the parking lot, because none of the prior alarms was related to a parking lot robbery.⁶⁰ Evidence that the business premises were in a high crime area did not give rise to a duty to protect, absent allegations of specific prior crimes on the premises.⁶¹ A complaint alleging that the defendant restaurant owner should have been required to provide adequate security to its patrons was insufficient when it alleged that the restaurant was frequented in the early morning hours by intoxicated persons who typically acted in a dangerous manner. To give rise to the duty, the plaintiff would have had to allege that specific crimes occurred on the premises, that specific individuals committed violent acts on the premises, or that the individual attacker had previously been on the premises and had acted violently.⁶²

In one of the more restrictive interpretations of the rule, an Illinois court held that the plaintiff, who was stabbed while in a mall parking lot, could not withstand summary judgment despite proof of prior acts that included numerous shoplifting incidents, four automobile thefts, and twenty thefts from automobiles.⁶³ The court stated that knowledge of crimes against property is not sufficient to give rise to a duty to protect customers against physical assaults: "To hold otherwise would place liability on shopping centers regardless of the foreseeability."⁶⁴

absence of full-time security personnel—existed at the time of the shooting 10 years earlier. In the court's words, "[T]here was an insufficient showing of similarity between the physical conditions surrounding the prior shooting in the parking lot and the assault on [the] appellant" *Id.* at 593, 302 S.E.2d at 132.

⁶⁰ See *McClendon v. Citizens & S. Nat'l Bank*, 155 Ga. App. 755, 756, 272 S.E.2d 592, 593 (1980).

⁶¹ See, e.g., *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718 (Mo. Ct. App. 1983). The *Meadows* court declared that the duty is a product not of foreseeability but of fairness. See *id.* at 721. However, an exception to the court's no-duty rule was the existence of special facts tending to indicate that the failure to protect could expose an invitee to an unreasonable risk of harm. The court stated that a general allegation that the premises were in a high crime area did not constitute "special facts." *Id.*

⁶² See *Nappier v. Kincade*, 666 S.W.2d 858, 862 (Mo. Ct. App. 1984). The plaintiff in *Nappier* was given leave to amend the complaint. See *id.* Although the court seemed to approve section 344 of the RESTATEMENT (SECOND) OF TORTS (1965), that section, as will be discussed below, is incompatible with a "prior similar acts" approach. See *infra* notes 66-72 and accompanying text.

⁶³ See *Taylor v. Hocker*, 101 Ill. App. 3d 639, 641, 428 N.E.2d 662, 664 (1981).

⁶⁴ *Id.* at 642, 428 N.E.2d at 665.

The prior similar incidents rule does not constitute a complete bar to recovery, however, and there are cases in which the plaintiff has been able to withstand a motion for summary judgment.⁶⁵

Finally, a number of jurisdictions have accepted an interpretation of foreseeability that takes into account factors other than the occurrence of prior similar acts on the business inviter's premises. In these jurisdictions fewer cases are kept from the jury, which is then required to decide whether the measures taken by the defendant to protect business invitees were reasonable under the circumstances.

One impetus for the change has been section 344 of the *Restatement (Second) of Torts*. The *Restatement* sets forth the rule as follows:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

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

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.⁶⁶

Comment f to this section makes it clear that the duty is contingent upon some notice:

[The possessor] may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some

⁶⁵ See, e.g., *Brown v. National Supermarkets, Inc.*, 679 S.W.2d 307 (Mo. Ct. App. 1984) (The plaintiff, who was shot while on supermarket premises, stated a proper cause of action in a complaint alleging that in the two years prior to the incident there were 16 robberies with a firearm, 7 other robberies, and 136 other reported crimes on the store's premises); *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 369 A.2d 38 (Law Div. 1976) (The defendant's motion for summary judgment was denied when evidence showed that at least five previous assaults had occurred on the defendant's premises immediately prior to the plaintiff's assault and rape.); *Daily v. K-Mart Corp.*, 9 Ohio Misc. 2d 1, 458 N.E.2d 471 (1981) (The enumeration of prior criminal incidents taking place on the defendant's premises allowed the plaintiff to avoid summary judgment.).

⁶⁶ *RESTATEMENT (SECOND) OF TORTS* § 344 (1965).

particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

In comparison with the other limited-duty approaches discussed thus far, comment f—in particular, the phrase “know or have reason to know”—significantly increases the circumstances that may constitute adequate notice.⁶⁷

Acceptance of the *Restatement* approach makes it easier for plaintiffs to prove facts that give rise to a duty to protect and to get to the jury on the question of breach of that duty. Results like the one in *Taylor v. Hocker*,⁶⁸ in which the court held that property crimes do not give rise to a duty to protect patrons against assaults, would not occur in jurisdictions accepting the *Restatement* approach.⁶⁹ For example, in *Morgan v. Bucks Associates*,⁷⁰ the plaintiff was assaulted as she walked to her car in the parking lot of a mall. In the year prior to the assault, there had been seventy-seven car thefts and fifteen attempted car thefts from this parking lot. Quoting the *Restatement*, the court rejected the defendants' argument that it had a duty to protect against cars being stolen but not attacks on patrons:

The numerous criminal activities that occurred on the parking lot, i.e., the car thefts, were sufficient for the jury to determine that the defendant knew or had reason to know, “that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor,” and that defendant's past experience was “such that he should reasonably anticipate careless or criminal conduct on the part of third persons.”⁷¹

⁶⁷ The phrase “know or has reason to know” is the touchstone of the duty. However, compare its content in this context to the cases applying a more restrictive approach. See *supra* notes 37-54 and accompanying text.

⁶⁸ 101 Ill. App. 3d 639, 428 N.E.2d 662 (1981).

⁶⁹ See *id.* at 642, 428 N.E.2d at 665; see also *supra* notes 63-64 and accompanying text (discussing *Taylor*).

⁷⁰ 428 F. Supp. 546 (E.D. Pa. 1977).

⁷¹ *Id.* at 551 (quoting RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965)). The *Restatement* rule was also adopted in *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981). The plaintiff, who was assaulted, presented evidence of 31 criminal incidents on the shopping mall owner's premises in the year before her assault. Five of those incidents had been assaults similar to hers. Although not forced by the facts to do so, the court adopted the more expansive interpretation of the foreseeability requirement: “It is axiomatic that to establish the element of foreseeability, the plaintiff need not prove that the defendant foresaw the injury in the exact form in which it occurred.” *Id.* at 642, 281 S.E.2d at 40. The case attracted much commentary at the time. See Note, *Merchant's Duty to Protect its Customers from Third-Party Criminal Acts*—*Foster v. Winston Salem Joint Venture*, 18 WAKE

Decisions like *Morgan* indicate that general criminal activity occurring on a business's premises can be enough to give rise to the duty to protect in a *Restatement* jurisdiction. One court has indicated that under the *Restatement* approach criminal activity in close proximity to a hotel's premises should make the business inviter aware of facts prompting an investigation into the extent of crime in the area and a determination of what security measures are necessary to protect patrons within the perimeter of the hotel's premises.⁷²

The California Supreme Court has gone one step further. In *Isaacs v. Huntington Memorial Hospital*,⁷³ the court rejected the prior similar incidents rule and pushed the language and rationale of section 344 to its limits when it held that the duty that a business inviter owes to an invitee should be determined by the "totality of the circumstances."⁷⁴ The plaintiff in *Isaacs* was shot while in the parking lot of a hospital that was located in a "high crime area." Several thousand assaults and numerous thefts and incidents of harassment had occurred in an area near the parking lot. These facts, together with the knowledge that emergency room facilities are particularly dangerous and that parking lots provide opportunities for criminal misconduct that do not exist elsewhere, were enough to establish a duty to protect against criminal acts.⁷⁵ The court also stressed the minimal burden that such a duty imposes on the defendant and the value to society of imposing it.⁷⁶ Though the California rule will make it easier for plaintiffs injured in high crime areas to take their cases to the jury, the *Isaacs* court stopped short of imposing an absolute duty on business inviters to take reasona-

FOREST L. REV. 114 (1982) (generally criticizing the decision to go further than necessary and accept the *Restatement*, and expressing concern that the merchants of North Carolina were left without a concise standard on which to base their future actions) [hereinafter cited as Note, *Merchant's Duty to Protect*]; Note, Foster v. Winston-Salem Joint Venture: *Duty of Mall Owners to Take Measures to Protect Invitees from Criminal Acts*, 60 N.C.L. REV. 1126 (1982) (discussing the court's opinion and concluding that in some situations recognizing the duty to protect would impose costs on society as a whole that would outweigh its benefits) [hereinafter cited as Note, *Duty of Mall Owners*]. The *Restatement* approach and the rationale of *Foster* were applied to the innkeeper/guest relationship in *Urbano v. Days Inn of America, Inc.*, 58 N.C. App. 795, 295 S.E.2d 240 (1982).

⁷² See *Walkoviak v. Hilton Hotels Corp.*, 580 S.W.2d 623, 625-26 (Tex. Civ. App. 1979); see also *Brown v. J.C. Penney Co.*, 297 Or. 695, 688 P.2d 811 (1984) (Whether a reasonably prudent person in the position of the defendant parking lot owner would have employed security people to protect invitees "if he knew, or in the exercise of reasonable care should have known, that there were a large number of reports . . . of crimes in the immediate area" was an issue for the jury.).

⁷³ 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

⁷⁴ See *id.* at 131, 695 P.2d at 661, 211 Cal. Rptr. at 364.

⁷⁵ See *id.* at 131, 695 P.2d at 661-62, 211 Cal. Rptr. at 364-65.

⁷⁶ See *id.* at 132, 695 P.2d at 662, 211 Cal. Rptr. at 365.

ble precautions to protect their invitees from the criminal acts of third parties.⁷⁷

Despite cases like *Morgan* and *Isaacs*, which recognize a variety of factors suggesting that the common law no-duty rule should be discarded, there is universal ambivalence about abandoning the rule entirely. This ambivalence has led to a confusing and unsatisfactory array of exceptions to the common law rule. The time has come to do away with the rule and its modifications entirely and to impose an unqualified duty on business inviters to take reasonable steps to protect their invitees from criminal acts. The existing rules are in some instances wholly contrary to tort law doctrine and in others nothing but arbitrary barriers to recovery. In addition to these problems with the existing rules, there are compelling policy reasons for imposing a duty to protect. Moreover, despite fears that have been expressed to the contrary, business inviters should have little trouble identifying the steps required to meet the duty; they will not be made the insurers of their invitees' safety, and their use of private security personnel will not mean the end of law and order.

III. REASONS FOR REJECTING THE EXISTING RULES AND ACCEPTING AN UNQUALIFIED DUTY TO PROTECT

A. *The Undesirability of the Existing Rules*

The rules set forth above are subject to criticism for a variety of reasons. When analyzed, a number of the rules reveal a failure to conform to widely recognized tort law doctrine. Others reveal a tendency to produce arbitrary and unpredictable results as a result of the power they vest in the trial judge to determine the issue of "foreseeability." All of the existing rules fail, to some degree, to recognize the prevalence of the invitee victimization problem, the deterrent effect of adequate and properly implemented security systems, and the propriety of im-

⁷⁷ The court stated that criminal acts must be foreseeable to the inviter before a duty will be imposed and that other factors must also be weighed in determining whether there is a duty. See *id.* at 131 n.7, 695 P.2d at 662 n.7, 211 Cal. Rptr. at 365 n.7. In addition to foreseeability, these factors include:

"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."

Id. at 125-26, 695 P.2d at 658, 211 Cal. Rptr. at 361 (quoting *Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968)).

posing liability on the business inviter in these situations.

1. The No-Duty Rules

As discussed above, some courts hold that the plaintiff cannot produce evidence sufficient to meet the burden of proof required on the issue of the causal relationship between the defendant's conduct and the harm the plaintiff has suffered.⁷⁸ These courts include those that hold that presenting only circumstantial evidence of how the crime occurred is fatal to a finding of cause in fact,⁷⁹ as well as those that find, as a matter of law, that the criminal acts are a superseding cause of the plaintiff's harm.⁸⁰ These latter rules apply traditional proximate cause analysis. It is important, however, to remember that proximate cause and duty are related concepts: both are legal conclusions about the limits of a defendant's liability based in large part on considerations of policy.⁸¹ To the extent that these concepts are similar, the policy reasons for imposing the duty discussed below also support the argument that a defendant's lack of security can be the proximate cause of a criminal attack on an invitee.

Cause in fact, however, is strictly a problem of proof. The plaintiff must produce evidence from which a reasonable jury could conclude that it is more likely than not that the defendant's conduct was a substantial factor in bringing about the result.⁸² Absent the availability of direct testimony from the victim or a witness concerning the facts of the incident, the plaintiff must rely on circumstantial evidence to establish causation. Failure to admit evidence of this nature arbitrarily denies a recovery to any plaintiff who is the victim of an unwitnessed attack and

⁷⁸ See *supra* notes 27-36 and accompanying text.

⁷⁹ See *Shaner v. Tucson Airport Auth.*, 117 Ariz. 444, 448, 573 P.2d 518, 522 (Ct. App. 1977); see also *supra* notes 32-36 and accompanying text (discussing *Shaner*).

⁸⁰ See *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963, 965 (Okla. 1976); see also *supra* notes 27-31 and accompanying text (discussing *Davis*).

⁸¹ See, e.g., PROSSER & KEETON, *supra* note 3, § 42, at 274 ("It is quite possible, [and often helpful,] to state every question which arises in connection with 'proximate cause' in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?"). Indeed, in *Davis v. Allied Supermarkets, Inc.*, 547 P.2d 963 (Okla. 1976), the court decided the case on the duty issue but admitted that even if it could be said that a duty to protect did exist, it would reach the conclusion that the plaintiff's case should be dismissed on the basis of proximate-cause analysis. See *id.* at 965; see also *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) ("[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.").

⁸² See PROSSER & KEETON, *supra* note 3, § 41, at 269.

who is, for some reason, unable to testify.⁸³

A court should recognize, or at least admit evidence tending to show, that security measures, if properly implemented, can reduce criminal activity by eliminating criminal opportunity.⁸⁴ For example, one study indicated that increased street lighting in a community reduced incidents of crime by forty percent.⁸⁵ The actual design of a physical environment can deter crime as well. This design objective can be applied to a single building or an entire urban area, where safety and security can be built into streets, buildings, and parks.⁸⁶ Designs that allow the inhabitants of an environment to keep watch on potential crime targets as they go about their normal patterns of activity, that place barriers in the paths of would-be assailants, and that force traffic into an area that is easily controlled, are capable of reducing the occurrence of crime and vandalism by as much as fifty percent.⁸⁷ Security experts have also recognized the effectiveness of formal surveillance by police and citizens' blockwatches.⁸⁸ In an effort to put some of this knowledge to work, cities have been encouraged to adopt security codes for buildings and other environs or to alter existing building codes to include security standards.⁸⁹

Proof of the effectiveness of security measures together with the

⁸³ See *supra* notes 32-36 and accompanying text (describing the difficulty facing the plaintiff in *Shaner v. Tucson Airport Auth.*, 117 Ariz. 444, 573 P.2d 518 (Ct. App. 1977), in bringing an action to recover damages resulting from his wife's murder). This situation invariably arises when the invitee is killed as a result of the attack. On circumstantial proof of causation, see J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 132-34 (2d ed. 1981).

⁸⁴ See A. BILEK, J. KLOTTER & R. FEDERAL, *LEGAL ASPECTS OF PRIVATE SECURITY* 206 (1981); C. JEFFERY, *CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN* 224 (1971); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *A NATIONAL STRATEGY TO REDUCE CRIME* 62 (1972) [hereinafter cited as NATIONAL ADVISORY COMM'N]; O. NEWMAN, *supra* note 20, at 3-4.

⁸⁵ See NATIONAL ADVISORY COMM'N, *supra* note 84, at 64. On the relationship of pedestrian street traffic to frequency of street crime, see J. CONKLIN, *supra* note 11, at 10.

⁸⁶ See C. JEFFERY, *supra* note 84, at 224.

⁸⁷ See O. NEWMAN, *supra* note 20, at 3-11.

⁸⁸ See B. POYNER, *DESIGN AGAINST CRIME: BEYOND DEFENSIBLE SPACE* 7 (1983). Although critical of some of Oscar Newman's theories, see O. NEWMAN, *supra* note 20, and the research methods employed in many studies of the efficacy of security measures, Barry Poyner recognizes that benefits can be realized by limiting access to areas, designing "natural surveillance" into an environment, and using formal surveillance techniques, particularly in areas with specific concentrations of crime. See B. POYNER, *supra*, at 7-14. In *Brown v. J.C. Penney Co.*, 297 Or. 695, 706-09, 688 P.2d 811, 817-19 (1984), the court recounted the testimony of a number of witnesses who stated that the rate of criminal activity in and around the mall decreased as the number of security personnel assigned to the area was increased.

⁸⁹ See NATIONAL ADVISORY COMM'N, *supra* note 84, at 64. *But see* Bazyler, *supra* note 2, at 753 n.159 (It is impossible to determine the specific steps that should be taken in all situations.).

knowledge of the prevalence of crime in our society should be enough to allow the plaintiff to meet the burden of production on the issue of cause in fact. This circumstantial evidence establishes that as a matter of ordinary experience failure to take steps to prevent crime from occurring on business premises may be expected to result in an attack on an invitee. With this burden met, the factfinder may conclude that there is a causal relationship between the inadequate security and the attack.⁹⁰

Under such a standard, intervening causes of harm would not discharge a defendant's liability for breach of a duty. If the intervening act could reasonably be anticipated, the defendant may be negligent for failure to guard against it.⁹¹ Decisions finding that criminal acts are always superseding causes of harm ignore any notice the defendant may have received and sanction failures to respond reasonably to a known risk. The "reasonable person" in our society should not be entitled, given the prevalence of crime, to assume that third parties will not commit criminal acts that might result in harm to invitees. As courts have suggested, "foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct."⁹²

A reasonable person should have the security of invitees in mind and should exercise care to guard against the risks posed by criminal activity. Upon proof of failure to exercise this degree of care, the defendant could be held responsible for the harm suffered by an invitee. Section 449 of the *Restatement* recognizes the propriety of such an approach: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which make 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."⁹³

If courts actually applied the standard that a duty to protect arises when a defendant's premises provide a unique climate for crime,⁹⁴ evi-

⁹⁰ See PROSSER & KEETON, *supra* note 3, § 41, at 270.

⁹¹ See *Butler v. Acme Markets, Inc.*, 177 N.J. Super. 279, 288, 426 A.2d 521, 525 (App. Div. 1981), *aff'd*, 89 N.J. 270, 445 A.2d 1141 (1982); PROSSER & KEETON, *supra* note 3, § 44, at 303. Moreover, the question of whether a negligent act is a proximate cause of an injury generally presents an issue for determination by the jury. See *Walkoviak v. Hilton Hotels Corp.*, 580 S.W.2d 623, 628 (Tex. Ct. App. 1979).

⁹² *Gomez v. Tigor*, 145 Cal. App. 3d 622, 629, 193 Cal. Rptr. 600, 604 (1983) (quoting *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal. 3d 49, 57, 665 P.2d 947, 952, 192 Cal. Rptr. 857, 862 (1983)).

⁹³ RESTATEMENT (SECOND) OF TORTS § 449 (1965).

⁹⁴ See *supra* note 39 and accompanying text.

dence suggesting that business premises attract crime should result in an imposition of the duty. All commercial establishments attract crime to some extent, and all business inviters should, therefore, protect their patrons from the inevitable results. Malls,⁹⁵ parking lots and other open areas,⁹⁶ and all night convenience stores⁹⁷ have been cited as particularly "attractive." With respect to these high risk areas, one court has observed that "the peculiar attraction . . . for the criminal may necessitate some minimal human or mechanical means of protecting patrons." Yet the courts following a no-duty standard fail to recognize the relationship between injuries to invitees and the attractiveness of the inviter's location to the criminal.

2. Duty Contingent upon the Existence of Special Facts or Circumstances That Establish Foreseeability

Following a strict interpretation of the "knew or had reason to know" standard, other courts require that the plaintiff prove special facts in order to establish a duty to protect. Courts that strictly construe this standard refuse to hold defendants responsible for harm suffered as a result of "spontaneous" criminal activity.⁹⁸ Such a rule is undesirable for a number of reasons. First, it is clear that almost every criminal act occurs without actual warning. This standard could, therefore, be applied to deny recovery in almost every situation. Furthermore, this standard actually encourages business property owners to refrain from actively investigating potentially dangerous situations because as long as they are not aware of them they are not obligated to provide any protection. Ignorance can be bliss.

The rationale for the special facts rule is that it would be unfair to subject defendants to liability for failure to react to situations of which they are not aware. However, the same lackadaisical attitude toward security that is responsible for the attack may also be responsible for defendants' failure to receive actual notice of the probability of attack. This rule also refuses to admit evidence of prior acts on the issue of

⁹⁵ See Note, *Merchant's Duty to Protect*, *supra* note 71, at 123.

⁹⁶ See *supra* notes 14-18 and accompanying text.

⁹⁷ See *Cohen v. Southland Corp.*, 157 Cal. App. 3d 130, 140-41, 203 Cal. Rptr. 572, 578 (1984).

⁹⁸ *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 129, 695 P.2d 653, 660, 211 Cal. Rptr. 356, 363 (1985) (quoting *Gomez v. Titor*, 145 Cal. App. 3d 622, 629-32, 193 Cal. Rptr. 600, 607 (1983)).

⁹⁹ No duty to protect invitees arises unless the defendant knew, or had reason to know, that criminal acts were occurring, or immediately about to occur, that posed imminent probability of harm to an invitee. See *supra* notes 41-54 and accompanying text.

foreseeability¹⁰⁰ and thereby ignores the impact that prior incidents and the general prevalence of criminal activity should have on the conduct of a reasonably prudent person. Instead it deals with each incident in isolation, as if it were the first of its kind. In effect, those courts maintaining a special facts approach recognize a cause of action only for failure to exercise due care in reacting to a crime occurring on the premises. They do not recognize a cause of action for failure to take adequate steps to prevent criminal activity.¹⁰¹

The prior similar incidents rule¹⁰² is also subject to criticism for a number of reasons, not the least of which is its denial of compensation to the first victim. The business inviter is given one free crime before liability is imposed.¹⁰³ Not only does such a rule run contrary to the policy of compensating injured parties, but it also discourages business inviter participation in preventive security schemes. Theories of environmental design for crime prevention are based on an acceptance of the existence of criminal behavior.¹⁰⁴ If business inviters are not required to take reasonable steps to provide security until after one of their patrons has been attacked, much valuable time will have been lost in implementing environmental design changes. Business inviters will be permitted to disregard the safety of their invitees until an injury has occurred. Only then will they have to investigate the efficacy of the available options, such as lights and security patrols.¹⁰⁵

The prior similar acts rule also produces extraordinarily arbitrary results. Courts are free to determine for themselves how similar, how close in time, and how near in location prior incidents must be for a duty to arise.¹⁰⁶ The rule can be applied to exclude evidence of prior crimes that occurred in the vicinity of a business, but not on its prem-

¹⁰⁰ See *supra* notes 44-50 and accompanying text.

¹⁰¹ The distinction between these two duties is described in J. PAGE, *THE LAW OF PREMISES LIABILITY* § 4.11, at 89-91 (1976).

¹⁰² See *supra* notes 56-65 and accompanying text.

¹⁰³ See *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 127, 695 P.2d 653, 658, 211 Cal. Rptr. 356, 361 (1985).

¹⁰⁴ See O. NEWMAN, *supra* note 20, at 4.

¹⁰⁵ One environmental design expert has argued that just as buildings that are unsafe as potential health or fire hazards should be and often are condemned, buildings unsafe as potential settings for criminal activity should be condemned until the problem is corrected. See C. JEFFERY, *supra* note 84, at 207-08.

¹⁰⁶ See, e.g., *Mullins v. Pine Manor College*, 389 Mass. 47, 55 n.12, 449 N.E.2d 331, 337 n.12 (1983) (comparing a case in which acts of trespass and vandalism gave rise to a duty to protect to one in which more severe acts were found insufficient to give rise to a duty). Compare *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 156, 369 A.2d 38, 42 (Law Div. 1976) (finding five previous assaults on premises sufficient notice) with *McClendon v. Citizens & S. Nat'l Bank*, 155 Ga. App. 755, 756, 272 S.E.2d 592, 593 (1980) (finding 10 prior alarms at bank insufficient notice).

ises, despite the defendant inviter's awareness of their occurrence.¹⁰⁷ It may also be used arbitrarily to divide a business inviter's premises into wholly separate areas, so that criminal activity in one area is not evidence of the likelihood of criminal activity in another.¹⁰⁸ Finally, as discussed, one court has found that property crimes and crimes against the person are not "similar," so that evidence of the prior occurrence of one does not give rise to a duty to protect against the other.¹⁰⁹

This latter "division of interests" approach has been criticized for allowing the allegedly negligent party to avoid liability when the actual damage that occurs differs only slightly from the damage that could be anticipated.¹¹⁰ This approach can be further criticized because the reasonable business inviter's response to a rash of property crimes may effectively prevent the occurrence of crimes against the person as well. Improved lighting, for example, should reduce the amount of criminal activity on the premises in general, not just the occurrence of one specific type of crime.

Moreover, the determination of whether a particular act is "foreseeable" properly involves consideration of a number of factors. The simple fact that a particular event has not occurred before does not make it one that should not reasonably be anticipated.¹¹¹ A court should also consider the potential gravity of the harm.¹¹² The existence

¹⁰⁷ See *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983); see also *supra* note 61 (discussing *Meadows*).

¹⁰⁸ See *McCoy v. Gay*, 165 Ga. App. 590, 593-94, 302 S.E.2d 130, 132-33 (1983); *McClendon v. Citizens & S. Nat'l Bank*, 155 Ga. App. 755, 756, 272 S.E.2d 592, 593 (1980); see also *supra* text accompanying notes 57-60 (discussing *McCoy* and *McClendon*).

¹⁰⁹ See *Taylor v. Hocker*, 101 Ill. App. 3d 639, 642, 428 N.E.2d 662, 665 (1981); see also *supra* text accompanying note 64 (discussing *Taylor*).

¹¹⁰ A comment to the *Restatement* rejects the division-of-interests approach:

[T]he fact that the interest to which harm results is a different interest, or a different kind of interest, from that which was threatened with harm, will not prevent the actor from being liable, so long as the interest in fact harmed is one entitled to legal protection against negligence The plaintiff is not subjected to fragmentation in terms of risk of harm to his foot, his hand, his eye, his chattels, or his land.

RESTATEMENT (SECOND) OF TORTS § 281 comment j (1965); see also Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449, 467 (1930) ("Obviously a single distinction between bodily security on one hand and property security on the other would be too broad.").

¹¹¹ See *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 127, 695 P.2d 653, 659, 211 Cal. Rptr. 356, 362 (1985); *Mullins v. Pine Manor College*, 389 Mass. 47, 55, 449 N.E.2d 331, 337 (1983). Prosser and Keeton write that "[f]oreseeability of consequences . . . is only one of the factors which are important in determining negligence. Into the scales with it there must also be thrown the gravity of the harm if it is to occur, and against both must be weighed the utility of the challenged conduct." PROSSER & KEETON, *supra* note 3, § 43, at 298.

¹¹² See PROSSER & KEETON, *supra* note 3, § 43, at 298.

of a duty has traditionally depended as well on convenience of administration, the capacity of the parties to bear the loss, the prevention of future injuries, the culpability of the defendant, and other considerations that are the product of changing social conditions.¹¹³ A proper weighing of these factors leads to a rejection of a special facts or prior similar acts approach.

B. *Policy Reasons for Accepting an Unqualified Duty to Protect*

A rule establishing an unqualified duty to protect would be easier to understand and administer than any one, or some variation of one, of the existing limited-duty rules. Once it is established that the requisite business inviter/invitee relationship exists, the question whether the duty was breached would be one for the trier of fact. Jurors, as members of the community, are best able to determine what is reasonable under the circumstances. Indeed, this is one reason for the tremendous amount of power that tort law vests in their judgment.¹¹⁴

Economic theory reveals that the benefits of imposing an unqualified duty to protect would outweigh its costs to society. Under the theory of enterprise liability, losses resulting from a business activity are to be imposed on that activity.¹¹⁵ The market can then effectively allocate the community's resources; the prices of goods and services will include the costs of liability and thus reflect the true costs of making them available.¹¹⁶ These costs can then be passed on to consumers through

¹¹³ See *id.* § 54, at 359; see also Comment, *supra* note 23, at 470-71 (suggesting additional policy considerations, including foreseeability of harm, certainty of the plaintiff's injury, and consequences to the community).

¹¹⁴ For further description of the functions of judge and jury in this context, see *infra* notes 132-34 and accompanying text.

¹¹⁵ See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 506-07 (1961); 1 S. SPEISER, C. KROUSE & H. GANS, *THE AMERICAN LAW OF TORTS* § 1:30, at 96-103 (1983). The doctrine of enterprise liability is usually referred to in the context of strict liability even though the loss-spreading rationale applies also to liability for negligent acts committed by a business. This Comment does not propose strict liability as a solution to the problem of patron victimization; a business will be held liable for criminal acts committed by third parties against patrons only if there is a threshold determination that the business was negligent in providing safe premises.

¹¹⁶ See 1 S. SPEISER, C. KROUSE & H. GANS, *supra* note 115, at 96-97 (discussing Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976)). This rationale is evident in the dissent in *Cornpross v. Sloan*, 528 S.W.2d 188 (Tenn. 1975):

The modern phenomenon of merchandising and marketing through community shopping centers has opened a new vista into the concept of tort liability of the owners, occupiers or possessors of public business premises. . . . The primary incentive to the utilization of these shopping areas is the availability of adequate and free parking facilities, which the

higher prices.¹¹⁷ The price of the goods or services offered then reflects the cost of security measures, judgments against the inviter, and liability insurance. Even though these costs are being passed on, the business inviter will want to minimize such costs in order to remain competitive in the market. It is therefore unlikely that the business inviter will choose to pay liability judgments or insurance premiums rather than establish safer premises. The costs of better lighting and more frequent patrolling, for example, do not compare to the cost of liability in wrongful death actions. In addition, insurers may demand increased security before providing liability insurance to the business inviter. A business inviter, therefore, will want to install security measures, and the cost of such measures will be paid by consumers. If, instead, a business inviter is protected by law from liability, the individual victim must bear the full brunt of the loss.

The magnitude of that loss can be great. Among the emotional and financial hardships commonly suffered by crime victims are the costs of emergency medical treatment, loss of earnings or support, loss of property, and feelings of helplessness, isolation, and anxiety. In some instances the emotional trauma can be severe and long lasting.¹¹⁸ Greater sensitivity to the plight of crime victims has led to increased success in suits against third parties for their criminal acts.¹¹⁹ The establishment of civil liability in suits against the third party may be easy, but the perpetrator is often unknown, or the suit is ineffective due to collection problems.¹²⁰

Society's interest in crime prevention is served in various ways by

public, in general, is invited to use . . . with the expectancy that the tradesmen in the market places will profit by such use. Having thus caused enormous congregations . . . in relatively compact areas, certain duties devolve upon the inviters for the benefit and protection of the invitees.

Id. at 199 (Henry, J., dissenting).

¹¹⁷ See e.g., *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 775 n.20, 478 P.2d 465, 477 n.20, 91 Cal. Rptr. 745, 757 n.20 (1970) ("By assigning liability to the motel in those cases in which no direct evidence establishes causation, we make sure that all motel guests bear their fair share of these damages . . .").

¹¹⁸ See *Feld v. Merriam*, 314 Pa. Super. 414, 424-26, 461 A.2d 225, 230-31 (1983), *rev'd*, 506 Pa. 383, 485 A.2d 742 (1984); *Hearings*, *supra* note 23, at 9-11 (statement of Neil Hartigan, Attorney General, Illinois).

¹¹⁹ See Comment, *supra* note 23, at 461-63 (citing *Lillie v. Thompson*, 332 U.S. 459 (1947) (duty to defendant arising from employer/employee relationship); *Tobin v. Slutsky*, 506 F.2d 1097 (2d Cir. 1974) (duty to defendant arising from innkeeper/guest relationship); *Hanback v. Seaboard Coastline R.R.*, 396 F. Supp. 80 (D.S.C. 1975) (duty to defendant arising from carrier/passenger relationship); *Ramsay v. Morrisette*, 252 A.2d 509 (D.C. 1969) (duty to defendant arising from landlord/tenant relationship)).

¹²⁰ See Comment, *supra* note 23, at 459 n.4.

imposing a duty to protect on the business inviter. Businesses fearing liability will pressure the public sector to step up crime prevention efforts in the community, and because of the influence that businesses can exert by virtue of the economic benefits they confer on the community, this pressure could prove to be effective. High crime rates in a community may also mean reduced patronage for businesses. Since these concerns may influence a decision to relocate, or to choose a community for a new undertaking,¹²¹ public officials should be genuinely concerned about the impact on the local economy that a failure to take steps to prevent crime may have. Finally, cooperation between the public and private sectors in crime prevention is absolutely essential to a truly successful community crime prevention program.¹²²

C. *A Response to Some of the Criticisms of an
Unqualified Duty to Protect*

A duty-to-protect rule has been criticized for being unreasonably vague and incapable of a precise definition that would give business inviters guidance as to what is necessary to meet the rule's requirements.¹²³ Although what constitutes "reasonable steps" in all situations is incapable of a mathematically precise definition, the alert business inviter will be safe to take those steps that in the exercise of good judgment seem necessary, and waive those that do not. Once a group of individuals in a given community begins to respond to the duty, a custom or standard will develop. Conformity with that standard gives rise to an inference that the community believes the behavior is reasonable.¹²⁴ Only in rare circumstances will "reasonable prudence" be determined to be different from "common prudence."¹²⁵ Thus, by simply

¹²¹ See J. CONKLIN, *supra* note 11, at 5-6.

¹²² See, e.g., A. BILEK, J. KLOTTER & R. FEDERAL, *supra* note 84, at 206 ("[A]ll parties, other than the criminal offender, are misserved by the failure on the part of the police administrator and the private security manager to reach out and build a bridge of understanding and trust between the two groups."); Note, *Duty of Mall Owners, supra* note 71, at 1135. *But see* Reichenbach v. Days Inn of America, Inc., 401 So. 2d 1366, 1368 (Fla. Dist. Ct. App. 1981) (Coward, J., concurring) ("[L]aw enforcement rarely prevents a crime and then only when, by chance or by specific information . . . , there is opportunity to take specific action to prevent a particular crime. Innkeepers should not be legally required to do what organized society cannot do.") (footnotes omitted), *petition for review denied*, 412 So. 2d 469 (Fla. 1982); Note, *Merchant's Duty to Protect, supra* note 71, at 123 n.70 (asserting that it is already in the business inviter's interest to keep crime as low as possible on the premises).

¹²³ See Cornpropt v. Sloan, 528 S.W.2d 188, 193-94 (Tenn. 1975); Case Note, *Commercial Landlord's Liability for Criminal Acts of Third Party*, 22 WAYNE L. REV. 1483, 1490-91 (1976).

¹²⁴ See PROSSER & KEETON, *supra* note 3, § 33, at 193-94.

¹²⁵ See The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

conforming to the actions taken by those similarly situated, the inviter can be reasonably certain that the duty is being satisfied. In addition, the conscientious business inviter should find that a wealth of information and guidance is available from experts in the field of crime prevention.

Business inviters have a wide range of options available when responding to a legal requirement that they take reasonable steps to protect their invitees. Although there is case law to suggest that courts and juries may look favorably on the use of a warning,¹²⁶ the duty proposed herein is one of protection—not of warning. Some business inviters may find it appropriate to minimize business after daylight hours. Lighting, fencing, video surveillance, shopper escort services, and security patrols are some of the available options.¹²⁷ In addition, there are a number of design options available to businesses.¹²⁸ Concerns about the proliferation of private security forces have been expressed,¹²⁹ but the availability of the above options will limit the necessity for such private forces. Since negligent acts of private security forces may expose the business inviter to increased liability, businesses will not likely choose to employ private security forces where other options are equally effective.¹³⁰ Furthermore, the concern over the proliferation of private security forces is not shared by all those with knowledge of their operations.¹³¹

Finally, the fear that juries would impose insurer liability is un-

¹²⁶ See *Phillips v. Equitable Life Assurance Co.*, 413 So. 2d 696 (La. Ct. App. 1982) (A warning sign indicating to customers that the premises were patrolled was sufficient to justify a jury's finding that the defendant did not breach the duty to protect.). But see *supra* note 50 (discussing inviter's duty to warn invitees).

¹²⁷ See *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 157-58, 369 A.2d 38, 43 (Law Div. 1976); D. HUGHES & P. BOWLER, *supra* note 16, at 7-10, 44-47.

¹²⁸ See *supra* notes 85-87 and accompanying text.

¹²⁹ See, e.g., *People v. Zelinski*, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979) (finding that store security personnel violated the civil rights of an accused shoplifter); *Johnston v. Harris*, 387 Mich. 569, 577, 198 N.W.2d 409, 412 (1972) (Brennan, J., dissenting) ("The intrusion of private industry into the business of public safety has been one of the most unfortunate phenomena of the 1960's and the 1970's."); *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 645, 281 S.E.2d 36, 42 (1981) (Carlton, J., dissenting) (Protection of patrons requires special training, skills, and a willingness to do "whatever is required to prevent assaults."); *Freedman, Store Ruled Not Liable for Protection of Patrons*, Nat'l L.J., Oct. 28, 1985, at 7, col. 1 ("[T]he presence of armed guards may not deter robberies, and their intervention during a holdup would increase the 'likelihood of exchange of gunfire'" (quoting *Williams v. Cunningham Drug Stores, Inc.*, 379 N.W.2d 458, 460 (Mich. Ct. App. 1985))).

¹³⁰ See A. BILEK, J. KLOTTER & R. FEDERAL, *supra* note 84, at 206.

¹³¹ Arthur Bilek, John Klotter, and R. Keegan Federal argue that private security forces perform quite well in areas in which the police are traditionally weak, such as the creation of prevention and detection mechanisms. They predict an increasing level of professionalism among private security forces as reliance on them increases. See *id.*

warranted. Under the scheme proposed here, the judge would find that if the plaintiff is the defendant's business invitee, the defendant is under a duty to exercise reasonable care under the circumstances to protect the invitee from criminal acts by third parties. The question whether that duty was breached does not go to the jury until the judge has determined that the answer to the question is uncertain.¹³² Even when the question does go to the jury, its members should receive explicit instructions from the judge on the standard that must be applied. Instructions are intended to prevent jurors from applying an individual, rather than a societal, standard.¹³³ The negligence issue is normally referred to as one of fact because it is believed to be appropriate, in the law of torts, for determination by a jury.¹³⁴ There seems to be no reason to doubt the efficacy of this historical distinction between the roles of the judge and the jury in cases involving the business inviter/invitee relationship.

CONCLUSION

The time has come for courts to impose a duty on business inviters to protect their invitees from third parties' criminal acts occurring on business premises. The societal conditions that gave rise to the common law rule no longer exist, and judicial attempts to modify it have failed. The goals of the tort system are better served when a jury decides whether a business inviter acted reasonably under the circumstances than when a judge dismisses a plaintiff's case on summary judgment or directs a verdict for the inviter because of the wooden application of a rule that is the product of judicial ambivalence.

¹³² See PROSSER & KEETON, *supra* note 3, § 37, at 237; RESTATEMENT (SECOND) OF TORTS § 328C(b) & comment b (1965).

¹³³ See PROSSER & KEETON, *supra* note 3, § 37, at 236-37.

¹³⁴ See J. HENDERSON & R. PEARSON, *supra* note 83, at 344.