THE IMPLIED WARRANTY OF HABITABILITY, FORESEEABILITY, AND LANDLORD LIABILITY FOR THIRD-PARTY CRIMINAL ACTS AGAINST TENANTS

Corey Mostafa*

Over the past several decades, two of the most significant developments in landlord-tenant law have been the establishment of the implied warranty of habitability and the advent of landlord tort liability for third-party criminal acts against tenants. For the most part, the implied warranty of habitability and landlord liability for third-party criminal acts were created by separate movements. Consequently, the vast majority of courts have predicated landlord liability for third-party criminal acts against tenants on tort law or on contract law principles. However, the Supreme Court of New Jersey in Trentacost v. Brussel *established a landlord duty to protect tenants from third-party criminal acts based on the implied warranty of habitability.*

This Comment argues that the implied warranty of habitability provides a flexible means of establishing landlord liability for third-party criminal acts against tenants. Unlike the tort or contract approaches, the implied warranty of habitability approach is narrowly tailored to landlord-tenant law. However, the implied warranty approach failed to gain the support of courts and commentators in the wake of Trentacost, *in large part because the* Trentacost *court refused to consider foreseeability, thus effectively creating a strict liability standard that was seen as unfair to landlords. This Comment calls for the implied warranty of habitability combined with a foreseeability requirement as an effective, flexible, and fair approach for establishing landlord liability for third-party criminal acts against tenants. The addition of a foreseeability requirement addresses the fairness concerns that undermined the influence of the* Trentacost *implied warranty of habitability approach.*

INTRODUCTION 972
I. THE HISTORY OF LANDLORD LIABILITY TO TENANTS FOR THIRD-PARTY CRIMINAL ACTS 974
A. An Overview of the Common Law Approach 975
B. *Kline v. 1500 Massachusetts Avenue Apartment Corp.* and Its Aftermath 976

---

* Comments Editor, UCLA Law Review, Volume 54. J.D. Candidate, UCLA School of Law, 2007; B.A., University of California, Berkeley, 2004. I would like to thank Professor Kirk J. Stark for his invaluable advice and assistance during the planning, researching, and writing of this Comment. I would also like to thank the board and staff of the *UCLA Law Review* for their excellent editing work. Finally, I am grateful to my parents for their unflagging support.

II. THE IMPLIED WARRANTY OF HABITABILITY AND THE FORESEEABILITY REQUIREMENT 979
A. An Overview of the Implied Warranty of Habitability 980
B. The *Trentacost v. Brussel* Approach to the Implied Warranty of Habitability 982
C. The Addition of a Foreseeability Requirement to the Implied Warranty of Habitability 987
III. APPLICATION OF THE IMPLIED WARRANTY PLUS FORESEEABILITY STANDARD 990
A. The Implied Warranty Plus Foreseeability Standard in Residential Leases 991
B. The Implied Warranty Plus Foreseeability Standard in Commercial Leases 993
C. Application of the Implied Warranty Plus Foreseeability Standard to Terrorist Attacks 995
CONCLUSION 997

INTRODUCTION

Over the past four decades, two of the most significant developments in landlord-tenant law have been the establishment of the implied warranty of habitability[1] and the advent of landlord tort liability for third-party criminal acts against tenants.[2] Both developments have been vital to the changing relationship between landlords and tenants. More specifically, the implied warranty and the creation of landlord liability for third-party criminal acts have been instrumental in transforming the nature and the scope of landlord responsibilities and tenant rights.

For the most part, the implied warranty and landlord tort liability for third-party criminal acts were created by separate movements. However, a handful of court decisions have linked them, predicating landlord tort liability for third-party crimes on the implied warranty of habitability. At least two state appellate courts

1. Arguably, the implied warranty of habitability dates back to 1931. In *Delamater v. Foreman*, 239 N.W. 148 (Minn. 1931), the Supreme Court of Minnesota held that there was an "implied covenant that the premises will be habitable" in a case involving an apartment lease. *Id.* at 149. However, the implied warranty was not created outside of Minnesota until several decades later when "the climate of landlord-tenant law [became] receptive to the development of the implied warranty" of habitability. Caroline Hudson, Recent Development, *Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants From Foreseeable Criminal Activity*, 33 VAND. L. REV. 1493, 1498 (1980); *see* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969).

2. *See* Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970).

have done so explicitly,[3] while several other courts have justified landlord liability on reasoning that appears strikingly close to an implied warranty of habitability.[4]

The landmark case that established a landlord's duty to protect tenants from third-party criminal acts based on the implied warranty of habitability was *Trentacost v. Brussel*,[5] a 1980 Supreme Court of New Jersey opinion. This decision was expected to be especially influential because New Jersey, along with the District of Columbia, had been at the vanguard of landlord-tenant reform since the late 1960s.[6] However, rather than follow *Trentacost*, numerous courts expressly rejected the implied warranty justification for landlord liability for criminal acts against tenants,[7] and legal commentators were equally critical of the *Trentacost* reasoning.[8] For courts and commentators, one of the more problematic features of the *Trentacost* holding was the absence of foreseeability "as a limiting factor on the landlord's liability."[9] The lack of foreseeability as a limiting factor was considered unfair to landlords because, "[i]n essence, the court imposed a strict liability standard on the landlord for violation of the often amorphous implied warranty of habitability."[10]

---

3. *See* Trentacost v. Brussel, 412 A.2d 436 (N.J. 1980) (holding explicitly that a breach of the implied warranty of habitability may result in landlord tort liability for third-party criminal acts against tenants); Kwaitkowski v. Superior Trading Co., 176 Cal. Rptr. 494, 500 (Ct. App. 1981) (holding that defendant-landlord had a duty to a tenant who was injured by a third-party attacker based on the special relationship between landlord and tenant, the foreseeability of the criminal attack, and the "warranty of habitability implicit in the lease contract").

4. For instance, in *Duncavage v. Allen*, 497 N.E.2d 433, 439–40 (Ill. App. Ct. 1986), the court held that a jury could find landlord liability for failure to protect tenants from foreseeable criminal acts based on violations of Chicago building code ordinances. Even the seminal case *Kline*, 439 F.2d 477, arguably predicates landlord liability for criminal acts against tenants in part on the implied warranty of habitability. *Id.* at 485 ("[T]here is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity."). For an opinion that classifies *Kline* within the implied warranty of habitability rubric, see *Feld v. Merriam*, 485 A.2d 742, 749–52 (Pa. 1984) (Zappala, J., concurring).

5. 412 A.2d 436 (N.J. 1980).

6. Hudson, *supra* note 1, at 1507.

7. *See* Deem v. Charles E. Smith Mgmt., Inc., 799 F.2d 944, 946 (4th Cir. 1986); Walls v. Oxford Mgmt. Co., 633 A.2d 103, 107 (N.H. 1993); *Feld*, 485 A.2d at 749–52; Jack v. Fritts, 457 S.E.2d 431, 437–39 (W. Va. 1995).

8. *See* Hudson, *supra* note 1, at 1515–21; Irma W. Merrill, Note, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431, 442–60 (1985); Marvin M. Moore, *The Landlord's Liability to His Tenants for Injuries Criminally Inflicted by Third Persons*, 17 AKRON L. REV. 395, 410–11 (1984).

9. Merrill, *supra* note 8, at 443–44.

10. *Id.* Two sentences in the *Trentacost* opinion appear to establish this oft-criticized rule of law:

> Since the landlord's implied undertaking to provide adequate security exists independently of his knowledge of any risks, there is no need to prove notice of such a defective and unsafe condition to establish the landlord's contractual duty. It is enough that defendant did not take measures which were in fact reasonable for maintaining a habitable residence.

412 A.2d at 443.

This Comment argues that an implied warranty of habitability that includes a foreseeability requirement is a flexible and fair approach for establishing landlord liability for third-party criminal acts against tenants. Part I provides a brief history of landlord liability to tenants for third-party criminal acts. This Part includes an overview of the movement from the common law's caveat lessee to the modern era of increased tenant rights and remedies. Part I also discusses *Kline v. 1500 Massachusetts Avenue Apartment Corp.* and how it established landlord liability for third-party crimes against tenants. Part II gives a brief overview of the implied warranty of habitability and discusses the *Trentacost* decision and reasoning. Part II then analyzes why foreseeability must be considered. Based on that analysis, it proposes an implied warranty of habitability standard with a foreseeability requirement as a flexible and fair approach for landlord liability in cases of third-party criminal acts against tenants. Part III discusses the application of the implied warranty plus foreseeability standard. More specifically, it contends that this standard for landlord liability for third-party criminal acts should not be subject to waiver in residential-lease agreements. Part III further argues that the standard should be applicable to commercial leases in jurisdictions that recognize an implied warranty of suitability or fitness.[11] However, in such cases, the liability standard should be subject to waiver in the lease. Finally, Part III considers the application of this proposed standard for cases in which the third-party criminal act is a terrorist attack. In such situations, Part III suggests that the foreseeability requirement will likely provide a major hurdle to a finding of liability.

I. THE HISTORY OF LANDLORD LIABILITY TO TENANTS FOR THIRD-PARTY CRIMINAL ACTS

The landlord-tenant relationship in general, and liability for third-party criminal acts in particular, have changed from early common law's "hard-headed and hardhearted" stance toward tenants to the more pro-tenant stance of the last few decades.[12] At early common law, a landlord had very few duties to his tenant aside from delivering legal possession of the property, and he certainly had no duty to protect a tenant from third-party criminal acts.[13] Today, landlords owe many more duties to their tenants, and, in a large number of

11. *See, e.g.*, Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969) (establishing an implied warranty of suitability or fitness in commercial leases); Davidow v. Inwood N. Prof'l Group—Phase I, 747 S.W.2d 373 (Tex. 1988) (same).

12. JESSE DUKEMINIER ET AL., PROPERTY 421 (6th ed. 2006).

13. Merrill, *supra* note 8, at 433.

jurisdictions, they can even be held civilly liable for third-party criminal acts against tenants in certain circumstances.[14]

A. An Overview of the Common Law Approach

Very early common law took the caveat lessee (lessee beware) approach to the extreme; the premises were taken as is, unless the lease agreement specified otherwise.[15] The lease, which served a primarily agrarian purpose, was considered a conveyance of land and, aside from the tenant's obligation to pay rent, was treated very similarly to a sale of land.[16] The landlord could even be ejected as a trespasser if he attempted to enter the leased premises.[17] Moreover, "the characterization of the lease as a conveyance gave the tenant the rights and responsibilities of ownership and shielded the landlord from liability absent fraudulent misrepresentation or concealment of a known, latent defect."[18]

Over the past two hundred years, the nature of the landlord-tenant relationship slowly evolved as urbanization changed the focus of the lease from land to shelter.[19] Consequently, courts began viewing the lease as a contract rather than a mere conveyance of an interest in land.[20] Eventually, exceptions to the landlord no-duty-to-tenant rule developed, including a landlord duty to maintain the common areas of a multiunit dwelling, such as lobbies, stairways, elevators, halls, basements, and heating, plumbing, lighting, and gas systems.[21] By the close of the nineteenth century, courts also began implying a warranty of habitability in the lease of a furnished house or apartment for short term, where a tenant would not have enough time to inspect and prepare the premises.[22] The exceptions also included a tenant's constructive eviction defense,

14. *See generally* 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 16B.08[5][a] (Michael Allan Wolf ed., 2005) (detailing the "Duty of Landlord to Protect Tenant from Crime" in various jurisdictions).

15. Hudson, *supra* note 1, at 1496; *see also* William M. McGovern, *The Historical Conception of a Lease for Years*, 23 UCLA L. REV. 501 (1976).

16. 2 POWELL, *supra* note 14, § 16.02[1][a].

17. Christy E. Harris, Project, *Special Project on Landlord-Tenant Law in the District of Columbia Court of Appeals: The Duty of a Modern Landlord to Protect His Tenants From Crime*, 29 HOW. L.J. 149, 150–51 (1986).

18. *Id.* at 151 (footnotes omitted).

19. 2 POWELL, *supra* note 14, § 16.02[1][a].

20. See Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571 (1985), for an extended discussion of how the lease as property conveyance and the lease as contract conceptions have shaped landlord-tenant law.

21. Hudson, *supra* note 1, at 1498.

22. *Id.* at 1496; *see* Ingalls v. Hobbs, 31 N.E. 286, 287 (Mass. 1892) ("We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation . . . ."); discussion *infra* Part II.A (providing an overview of the implied warranty of habitability).

which was based on the right to quiet enjoyment of the leased premises.[23] As a result, "substantial interference by the lessor with the tenant's use and enjoyment of the premises constituted a constructive eviction," and the tenant could abandon the premises and withhold rent or seek damages.[24] Still, until 1970, none of these exceptions created landlord tort liability for third-party criminal acts against tenants. There was no duty to protect tenants from such acts.[25]

B. *Kline v. 1500 Massachusetts Avenue Apartment Corp.* and Its Aftermath

In 1970, the Court of Appeals for the District of Columbia Circuit opened the door to landlord liability for third-party criminal acts in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[26] Sarah B. Kline was a tenant in the 1500 Massachusetts Avenue apartment house, which had nearly 600 apartment units.[27] When Kline moved into the building in 1959, there was a doorman and a lobby employee on duty at the main entrance twenty-four hours a day.[28] There were also two garage attendants stationed at the 15th Street parking garage and building entrance, and the 16th Street entrance was locked after 9:00 p.m.[29] The situation seven years later was far different:

> By mid-1966 . . . the main entrance had no doorman, the desk in the lobby was left unattended much of the time, the 15th Street entrance was generally unguarded due to a decrease in garage personnel, and the 16th Street entrance was often left unlocked all night. The entrances were allowed to be thus unguarded in the face of an increasing number of assaults, larcenies, and robberies being perpetrated against the tenants in and from the common hallways of the apartment building.[30]

Moreover, "[t]he landlord had notice of these crimes and had in fact been urged by . . . Kline . . . to take steps to secure the building."[31] Around 10:00 p.m. on November 17, 1966, Kline was assaulted and robbed just outside her apartment

23. Hudson, *supra* note 1, at 1497.

24. *Id.* See *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969), for a modern application of the constructive eviction doctrine.

25. *See, e.g.*, Tirado v. Lubarsky, 268 N.Y.S.2d 54 (Civ. Ct. 1966) (holding that a criminal attack against the tenant was an unforeseeable event and a superseding cause of tenant's injury, even though the landlord may have failed to fix a defective apartment door lock, which the tenant reported).

26. 439 F.2d 477 (D.C. Cir. 1970).

27. *Id.* at 478–79.

28. *Id.* at 479.

29. *Id.*

30. *Id.*

31. *Id.*

on the first floor above the street level.[32] Only two months earlier, another female tenant had been similarly attacked in the same commonway.[33]

The Court of Appeals for the District of Columbia Circuit ruled that "a duty should be placed on a landlord to take steps to protect tenants from foreseeable criminal acts committed by third parties."[34] Furthermore, the court held that "in the circumstances [of this case] the applicable standard of care was breached."[35] The court found that the landlord was in the best position to guard against the risk of criminal acts against tenants because the landlord, not the tenant, had the power to, inter alia, "take measures to guard the garage entranceways, to provide scrutiny at the main entrance . . . [and] to provide additional locking devices on the main doors."[36]

The court predicated the landlord's duty on tort and contract principles.[37] As a preface to its tort analysis, the court acknowledged that, generally, "a private person does not have a duty to protect another from a criminal attack by a third person."[38] The court further recognized that this no-duty rule had "sometimes in the past been applied in landlord-tenant law, even by this court."[39] Nonetheless, the court declared that "the rationale of this very broad general rule falters when it is applied to the conditions of modern day urban apartment living," and the rule "has no applicability to the landlord-tenant relationship in multiple dwelling houses."[40] Because of previous attacks on tenants in the building's common areas, the court ruled that the criminal act in the present case was foreseeable.[41] Moreover, the court reasoned that the landlord, not the tenant or the public police, was empowered to make the common areas safe by providing reasonable protections against criminal activity.[42] On this point, the court

32. *Id.* at 480.
33. *Id.*
34. *Id.* at 478 (internal quotation marks omitted).
35. *Id.*
36. *Id.* at 480.
37. At least one court interpreted *Kline* as basing the landlord's duty to protect tenants on the implied warranty of habitability. In *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984), Justice Zappala argues in a concurring opinion that the *Kline* court adopted the approach "that a landlord owes a duty—to provide security to protect against criminal acts of third persons—based upon the implied warranty of habitability in residential leases." *Id.* at 749 (Zappala, J., concurring). As evidence, Justice Zappala cites the *Kline* court's statement that "'there is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity.'" *Id.* (quoting *Kline*, 439 F.2d at 485).
38. *Kline*, 439 F.2d at 481; *see* RESTATEMENT (SECOND) OF TORTS § 315 (1965) (stating "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another," absent a special relationship with the third person or the other).
39. *Kline*, 439 F.2d at 481.
40. *Id.*
41. *Id.*
42. *Id.*

cited the common law exception that requires a landlord to use "ordinary care and diligence" to maintain common areas.[43] Thus, the court stated that "it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants."[44] Finally, the court likened the modern landlord-tenant relationship to that of an innkeeper and a guest, in which "the innkeeper is generally bound to exercise reasonable care to protect the guest from abuse or molestation from third parties . . . if the attack could, or in the exercise of reasonable care, should have been anticipated."[45] As a result, the court found that "there is a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment dwelling."[46]

The court began its contract analysis by quoting with approval its recent opinion in *Javins v. First National Realty Corp.*,[47] which, in addition to establishing the implied warranty of habitability, held that "'leases of urban dwelling units should be interpreted and construed like any other contract.'"[48] Since the apartment complex's security measures had declined drastically between when Kline signed the lease and when she was attacked, the court concluded that there was a breach of the implied contract that a tenant would pay the same rent for the same level of security.[49]

In sum, the *Kline* court found that the standard of care a landlord owed his tenants with regard to protection was one of "reasonable care in all the circumstances."[50] The requirements for satisfying this standard would "vary with the individual circumstances" of each case.[51] The court concluded that the standard of care should be the level of security that was provided when Kline first signed her lease in 1959 and that this standard was clearly not met.[52]

Since *Kline*, many jurisdictions have established landlord liability for third-party criminal acts based on either the tort[53] or contract[54] theories as

43. *Id.*
44. *Id.*
45. *Id.* at 482.
46. *Id.* at 483.
47. 428 F.2d 1071 (D.C. Cir. 1970).
48. *Kline*, 439 F.2d at 482 (quoting *Javins*, 428 F.2d at 1075).
49. *Kline*, 439 F.2d at 485. This argument, too, originated in *Javins*, 428 F.2d at 1079.
50. *Kline*, 439 F.2d at 485.
51. *Id.* at 486.
52. *Id.* at 486–87.
53. *See, e.g.*, Smith v. Lagow Constr. & Dev. Co., 642 N.W.2d 187, 193 (S.D. 2002) (holding that the landlord could be held liable if "there was sufficient evidence to make it reasonably foreseeable that [the landlord's] failure to act on [the tenant's] request" to change her door locks "put her at probable high risk of harm from an imminent criminal act").
54. *See, e.g.*, Flood v. Wis. Real Estate Inv. Trust, 503 F. Supp. 1157, 1160 (D. Kan. 1980) ("As a result of this contractual relationship of the landlord and the tenant, an implied warranty arises that the landlord will continue to keep the premises in their beginning condition during the lease term.").

articulated in *Kline*.[55] A number of other jurisdictions, however, have yet to establish such liability.[56]

II. THE IMPLIED WARRANTY OF HABITABILITY AND THE FORESEEABILITY REQUIREMENT

Around the same time courts were beginning to recognize a claim of landlord liability for third-party criminal acts against tenants, they were also developing the implied warranty of habitability. The implied warranty of habitability created new and substantial rights and remedies for tenants. Jurisdictions that recognized the implied warranty of habitability provided tenants with an unwaivable right to "premises that are safe, clean and fit for human habitation . . . throughout the period of the tenancy."[57] If a landlord failed to provide this, tenants had the full range of contract remedies available to them, and potentially the right to damages in tort for "discomfort and annoyance."[58]

Trentacost v. Brussel[59] was the first case to explicitly base landlord liability for third-party criminal acts against tenants on the implied warranty of habitability. However, other courts did not follow *Trentacost*'s lead, in part because that decision refused to consider foreseeability as a factor, and thus, seemingly created a strict liability rule.[60] This Comment argues that the addition of a foreseeability requirement to the implied warranty approach of *Trentacost* holds promise as a flexible and fair standard for establishing landlord liability for third-party criminal acts against tenants.

---

55. *See generally* 2 POWELL, *supra* note 14, § 16B.08 (citing post-*Kline* cases that predicate landlord liability for third-party criminal acts against tenants on contract, tort, and implied warranty of habitability theories); David C. Markatos, *Property Law: The Growing Accountability of Landlords for Third-Party Criminal Attacks*, 1991 ANN. SURV. AM. L. 501 (1992) (same).

56. *See, e.g.*, Cramer v. Balcor Prop. Mgmt., Inc., 441 S.E.2d 317, 319 (S.C. 1994) ("Neither common law nor the South Carolina Residential Landlord-Tenant Act, imposes a duty on a landlord to provide protection to tenants against criminal activity of third parties."); *see also* Timothy J. O'Rourke, *Landlords Have No Affirmative Duty to Protect Tenants From Criminal Activity*, 46 S.C. L. REV. 184 (1994).

57. Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984).

58. *Id.* at 209.

59. 412 A.2d 436 (N.J. 1980).

60. *See id.* at 446–47 (Clifford, J., dissenting in part) (arguing that the *Trentacost* majority's holding "[i]n practical effect . . . amounts to absolute liability").

A. An Overview of the Implied Warranty of Habitability

Over the past few decades, a powerful new right and remedy for tenants was established by either judicial ruling[61] or statute[62] in a large majority of states: the implied warranty of habitability.[63] Under the implied warranty, which usually applies to residential leases, landlords are required to maintain an "adequate standard of habitability."[64] More specifically, the warranty's "objective is safe and healthy housing; substantial compliance is required."[65] Although minor defects are not enough to establish a breach of the implied warranty of habitability,[66] courts have determined that there are a wide variety of conditions that do violate the implied warranty.[67]

If the implied warranty is breached, the tenant has a host of remedies available for breach of contract, including damages and recission or reformation of the lease agreement.[68] If the landlord has notice of defective conditions and fails to have them repaired, a tenant can also make self-help repairs[69] and then offset the cost of such repairs against future rent payments.[70] Additionally, a breach of the implied warranty can serve as an affirmative defense to a landlord's suit for possession for nonpayment of rent.[71] Finally, in most jurisdictions, the implied warranty of habitability cannot be waived in a residential lease agreement.[72]

---

61. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969).

62. Statutory codifications of the implied warranty of habitability take several forms, including housing codes and uniform legislation. 2 POWELL, *supra* note 14, § 16B.04[3]. Specifically, at least fifteen states have adopted the Uniform Residential Landlord and Tenant Act (URLTA), which requires landlords to provide habitable premises. *Id.* § 16B.04[3][a].

63. *Id.* § 16B.04[2][a] (listing Alabama, Colorado, Kentucky, and Wyoming as the only states to have "entirely rejected the warranty"); *see also* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 5.1 (1977) (recognizing the implied warranty of habitability in residential leases).

64. DUKEMINIER ET AL., *supra* note 12, at 437.

65. *Id.*

66. 2 POWELL, *supra* note 14, § 16B.04[2][c]. For example, "discolored floor tiles and defective cabinets and window blinds" in a luxury apartment are insufficient to establish a breach of the implied warranty of habitability. *Id.* (citing Solow v. Wellner, 595 N.Y.S.2d 619 (App. Term 1992)).

67. 2 POWELL, *supra* note 14, § 16B.04[2][c] (citing sewage problems, persistent leaks, flooded basements, excessive noise from adjacent apartments, roach problems, and failure to supply heat and hot water as examples of conditions that courts have considered to be breaches of the implied warranty).

68. *See id.* § 16B.04[2][e] (detailing remedies for breach of the implied warranty, including several successful tort suits for emotional distress and punitive damages).

69. *See* Marini v. Ireland, 265 A.2d 526, 535 (N.J. 1970).

70. *Id.*

71. *Id.*

72. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 (D.C. Cir. 1970) (noting that the "implied warranty of the landlord could not be excluded"); *see* 2 POWELL, *supra* note 14, § 16B.04 (citing "the superior bargaining power of the landlord" and the lack of "meaningful [housing] alternative[s]" for the tenant as the principal reasons for this policy); discussion *infra* Part III.A.

A landmark case in the establishment of the implied warranty of habitability was *Javins v. First National Realty Corp.*[73] In *Javins*, the landlord sued tenants for nonpayment of rent.[74] The tenants admitted they had not paid rent, but cited "1500 violations of the Housing Regulations of the District of Columbia" as a defense.[75] In ruling for the tenants, the court held that:

> [A] warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.[76]

Hence, the court considered the implied warranty of habitability and the landlord's right to receive rent payments as dependent covenants; a breach of the implied warranty could be used as an affirmative defense to nonpayment of rent.[77] "[C]ity dwellers," the court reasoned, "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."[78] Moreover, the court noted that bargaining power between residential tenants and landlords is often grossly unequal, allowing landlords to "place tenants in a take it or leave it situation."[79] Finally, the court held that the housing regulations "require[d] that a warranty of habitability be implied in the leases of all housing that it covers."[80]

Marini v. Ireland[81] was a seminal case in which the Supreme Court of New Jersey established the implied warranty of habitability.[82] In *Marini*, the tenant repeatedly attempted to inform her landlord about a cracked and leaking toilet. After many unsuccessful attempts, the tenant hired a plumber to repair the toilet.[83] When the next month's rent was due, the tenant attached a receipt for the plumbing repair, and offset the cost of the repair from the monthly rent.[84]

---

73. 428 F.2d 1071. Other seminal implied warranty of habitability cases include *Marini v. Ireland*, 265 A.2d 526 (discussed *infra* pp. 981–82), and *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969) (discussed *infra* Part III.B).

74. 428 F.2d at 1073.

75. *Id.*

76. *Id.* at 1072–73.

77. *Id.* at 1082; *see also* 2 POWELL, *supra* note 14, § 16B.04[2][e] (calling this defense "the most important of the remedies provided to the tenant").

78. *Javins*, 428 F.2d at 1074 (footnote omitted).

79. *Id.* at 1079.

80. *Id.* at 1080.

81. 265 A.2d 526 (N.J. 1970).

82. One year before *Marini*, the Supreme Court of New Jersey held there was "an implied warranty against latent defects" in *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 274 (N.J. 1969). For a discussion of *Reste Realty Corp.*, see *infra* part III.B.

83. *Marini*, 265 A.2d at 528.

84. *Id.*

The landlord then sued for possession based on nonpayment of rent, arguing that he had "no duty to make repairs."[85] The Supreme Court of New Jersey disagreed, holding that "the landlord is required to maintain those facilities [vital to the use of the premises] in a condition which renders the property livable."[86] The court reasoned that "[i]t is eminently fair and just to charge a landlord with the duty of warranting that a building or part thereof rented for residential purpose is fit for that purpose at the inception of the term and will remain so during the entire term."[87] Additionally, the court held that a tenant may resort to self-help repair after making "a reasonable attempt" to provide "timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make . . . repairs."[88] Finally, the court ruled that a tenant who followed this self-help protocol was justified in offsetting the cost of repair.[89]

B. The *Trentacost v. Brussel* Approach to the Implied Warranty of Habitability

Prior to 1980, the implied warranty of habitability and landlord liability for third-party criminal acts against tenants were parallel but distinct developments in property law. In 1980, however, the two developments were brought together in *Trentacost v. Brussel*. In that decision, the Supreme Court of New Jersey created a new option for establishing landlord liability for third-party criminal acts against tenants: the implied warranty of habitability.[90]

Florence Trentacost was robbed and assaulted in the common hallway of her Passaic, New Jersey apartment building.[91] The building contained eight dwelling units located over street-level stores with access provided by front and rear entrances; the front entrance did not have a lock.[92] Moreover, considerable evidence was presented at trial regarding criminal and other suspicious activity in the neighborhood.[93] Two months before her attack, Trentacost had reported to the landlord an attempt to break into the building's cellar.[94] She had also

85. *Id.*
86. *Id.* at 534.
87. *Id.*
88. *Id.* at 535.
89. *Id.*
90. Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980). The author of one property law survey argued that the Supreme Court of New Jersey "followed the *Kline* contract rationale to its logical conclusion—viewing tenant security as part of the implied warranty of habitability." Markatos, *supra* note 55, at 520 (footnote omitted).
91. *Trentacost*, 412 A.2d at 438.
92. *Id.*
93. *Id.*
94. *Id.* at 439.

notified him several times about unauthorized persons in the hallways.[95] The question before the court was "whether a landlord who provides inadequate security for common areas of rental premises may be liable for failing to prevent a criminal assault upon a tenant."[96] The court answered in the affirmative.[97]

The court first predicated the landlord's duty to protect on a tort theory, similar to the one used in *Kline* and a number of other cases.[98] In the context of the high-crime neighborhood and the landlord's knowledge that the front entrance had no lock, his failure "to do anything to arrest or even reduce the risk of criminal harm to his tenants . . . effectively and unreasonably enhanced" the "risk of loss resulting from foreseeable criminal conduct."[99] As a result, the court held that the jury's finding of landlord liability for the criminal attack was warranted.[100]

Although the court recognized that it "need go no further to affirm the judgment for the tenant," the court chose to address alternative theories of landlord liability in the remainder of the opinion.[101] Specifically, the court addressed the implied warranty of habitability as a theory for landlord liability for third-party criminal acts against tenants.[102] This approach was previously considered in *Braitman v. Overlook Terrace Corp.*[103] The tenants in *Braitman* had successfully sued their residential landlord "for loss occasioned by theft on the basis of the landlord's failure to supply adequate locks."[104] The seven justices of the Supreme Court of New Jersey unanimously affirmed the judgment for the tenants, relying on negligence principles.[105] However, three justices argued that the implied warranty of habitability could also be used to establish landlord liability.[106] In *Trentacost*, this argument received majority support.[107]

---

95. *Id.*
96. *Id.* at 438.
97. *Id.*
98. *Id.* at 439–41.
99. *Id.* at 440.
100. *Id.* at 441.
101. *Id.* The court quoted one of its previous decisions for the proposition that "[t]here is no constitutional mandate that a court may not go beyond what is necessary to decide a case at hand." *Id.* at 441 (quoting Busik v. Levine, 307 A.2d 571, 578 (1973)).
102. *Trentacost*, 412 A.2d at 441–43.
103. 346 A.2d 76 (N.J. 1975).
104. *Id.* at 77.
105. *Id.* at 76–77, 86.
106. *Id.* at 86–87. Justice Pashman, joined by Chief Justice Hughes and Justice Sullivan, wrote this portion of the opinion. Justice Pashman also wrote for the majority in *Trentacost*. 412 A.2d at 438.
107. 412 A.2d at 445. Apparently, a change in the court's personnel enabled Justice Pashman to recruit a majority of five justices that were in favor of using the implied warranty of habitability to establish landlord liability for third-party criminal acts against tenants. In *Trentacost*, Justice Pashman was again joined by Justice Sullivan, but the other three justices that joined them (Chief Justice Wilentz and Justices Handler and Pollock), *id.* at 437, 445, were not on the court when *Braitman* was decided. *See Braitman*, 346 A.2d at 76.

As discussed in Part II.A, the Supreme Court of New Jersey held in *Marini v. Ireland*[108]—ten years before *Trentacost*—that there was an implied warranty of habitability in residential leases that covered all "facilities vital to the use of the premises."[109] In *Trentacost*, the court further ruled that "provisions for the tenant's security" are among these vital facilities.[110] Thus, the court determined that, "[u]nder modern living conditions, an apartment is clearly not habitable unless it provides a reasonable measure of security from the risk of criminal intrusion."[111] In sum, "the landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises," which include the common areas.[112] The court found that the lack of any sort of lock on the front door to the apartment building signified that the landlord "did nothing to protect against the threat of crime which seriously impaired the quality of residential life in his building."[113] Therefore, the landlord breached the implied warranty of habitability.[114] The court reasoned:

> Since the landlord's implied undertaking to provide adequate security exists independently of his knowledge of any risks, there is no need to prove notice of such a defective and unsafe condition to establish the landlord's contractual duty. It is enough that defendant did not take measures which were in fact reasonable for maintaining a habitable residence.[115]

Thus, the court eliminated foreseeability as an element of liability, which essentially created a strict liability standard.[116] Hence, a landlord would seemingly be liable for a third-party criminal act against a tenant that resulted from a breach of the implied warranty of habitability, regardless of whether he knew or reasonably should have known of the breach or the risk of criminal acts.

The implied warranty of habitability is a more flexible approach for holding landlords liable for third-party criminal acts against tenants than the traditional tort or contract theories. By using the implied warranty of habitability, courts are not constrained by an outdated common law view of the landlord-tenant

108. 265 A.2d 526 (N.J. 1970).

109. *Id.* at 534; *see* discussion *supra* Part II.A.

110. 412 A.2d at 443.

111. *Id.*

112. *Id.* This holding was dissented from by Justice Clifford, who ruled in favor of the tenant, Trentacost, on the negligence theory, but argued that the majority's "novel application of the implied warranty of habitability to the baleful conditions reflected in [modern day] realities is unwarranted and ill-advised." *Id.* at 446 (Clifford, J., dissenting in part). Likewise, Justice Schreiber ruled in favor of Trentacost solely on a traditional tort theory. *Id.* at 445 (Schreiber, J., concurring).

113. *Id.* at 443.

114. *Id.*

115. *Id.*

116. For articles that interpret *Trentacost* in this fashion, see, for example, Markatos, *supra* note 55, at 520–21, and Hudson, *supra* note 1, at 1517–18.

relationship, which is defined by a landlord no-duty-to-tenant rule that has been modified by a series of judicial exceptions.[117] Additionally, the landlord no-duty rule is based on the common law conception of a lease as a real property conveyance,[118] which is anachronous for modern residential leases, especially in multiunit dwellings. For instance, in a modern, multiunit residence, the landlord, not the tenant, has the authority, incentive, and resources to maintain common areas such as hallways, entrances, garages, and locks on apartment doors.[119] Furthermore, the modern residential lease is about shelter and a place to call home, not land or agrarian pursuits, as was the case when the common law view of the lease as a property conveyance originated.[120]

Courts, including the court in *Kline*, have attempted to analogize the landlord-tenant relationship with the innkeeper-guest relationship.[121] Under common law, the innkeeper had a duty of reasonable care regarding the protection of his guest.[122] The innkeeper-guest relationship is a closer fit to the realities of a modern residential lease than the landlord no-duty-to-tenant rule. Tenants must rely on their landlord's "supervision, care, [and] control of the premises" for their personal safety, just as guests must rely on their innkeeper.[123] However, the innkeeper-guest analogy still squeezes the unique landlord-tenant situation into an antiquated common law box. The modern residential tenancy should have a rule for landlord liability that is narrowly tailored to its own features, and the implied warranty of habitability provides such a rule.

The implied warranty of habitability seemed to end the judicial pursuit of exceptions to the common law no-duty rule of caveat lessee, since the warranty abrogated "the rule itself."[124] However, at least with tenant claims against landlords for third-party criminal acts, courts have continued the pursuit of such exceptions. For instance, in *Cooke v. Allstate Management Corp.*,[125] the plaintiff-tenant presented four different tort-based exceptions to the South Carolina common law rule that landlords have no duty to protect tenants from third-party criminal acts.[126] The tenant argued for the following exceptions to the no-duty rule: "Affirmative

117. *See* Hudson, *supra* note 1, at 1496–98 (discussing judicial exceptions to the common law doctrine of caveat lessee); discussion *supra* Part I.A (same).

118. *See* Harris, *supra* note 17, at 150–51.

119. *See* Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477, 480–81 (D.C. Cir. 1970).

120. *See* 2 POWELL, *supra* note 14, § 16.02[1][a].

121. *Kline*, 439 F.2d at 482–83; *see also* Griffin v. West RS, Inc., 18 P.3d 558, 564–66 (Wash. 2001) (Talmadge, J., dissenting) (arguing that landlord-tenant is a special relationship for the purposes of duty, similar to innkeeper-guest and business–business-invitee relationships).

122. *Kline*, 439 F.2d at 482.

123. *Id.*

124. Hudson, *supra* note 1, at 1498.

125. 741 F. Supp. 1205 (D.S.C. 1990).

126. *Id.* at 1209.

Acts," "Concealed danger," "Common area," and "Undertaking"; however, only the affirmative acts argument survived summary judgment.[127] Therefore, in jurisdictions that apply the *Cooke* tort law approach, a landlord will not be held liable for third-party criminal acts against tenants unless the court is convinced that the landlord's actions fit into a set list of exceptions to the no-duty-to-tenant rule.

A tort law approach is not only unwieldy and unduly formalistic, it is also unfair to tenants. In the context of modern, urban, residential leases, habitability for tenants should include a basic level of safety from crime, because "without a minimum of security, their well-being is as precarious as if they had no heat or sanitation."[128] If habitability is defined as "safe and healthy housing" and "something more than merely avoiding slum conditions,"[129] there seems to be something fundamentally uninhabitable about housing that does not even afford "a reasonable measure of security from the risk of criminal intrusion."[130] The implied warranty approach would explicitly reject the default common law rule that landlords have no duty to protect tenants from third-party crime on the premises. Rather, the converse would become the rule, and landlords would be required "to furnish reasonable safeguards to protect tenants" from third-party criminal acts.[131]

Liability via the traditional contract theory also does not provide adequate protection for tenants compared to an implied warranty because it is limited by: (1) the terms of the lease and lease negotiations;[132] or (2) the decline in the level of security between the time of the tenant's signing of the lease and the time of the criminal act against the tenant.[133] In other words, the contract theory is not an available option for a tenant's claim of landlord liability when there is no violation of the lease agreement (or fraudulent misrepresentations during negotiations),[134] or no significant decline in the level of security for the building.

127. *Id.* The affirmative acts argument was based on an unsecured ladder that the landlord left near the tenant's apartment. The ladder may have been used by the tenant's criminal attacker to reach her second-floor apartment. *Id.* at 1210.

128. Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980).

129. DUKEMINIER ET AL., *supra* note 12, at 437.

130. *Trentacost*, 412 A.2d at 443.

131. *Id.*

132. See, for example, *Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573 (Cal. 1986), in which the owner of a condominium unit sued her condominium owners association after she was criminally attacked. Among her claims was a breach of contract claim for failure to install additional outdoor lighting. *Id.* at 586–87. The court ruled that none of the condominium owners association covenants, conditions, or restrictions explicitly mentioned installation of additional lights. *Id.*

133. This is the implied contract to maintain the same level of security for the same amount of rent as discussed in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477, 485 (D.C. Cir. 1970). *See supra* note 49 and accompanying text.

134. *See* Markatos, *supra* note 55, at 522–24 (describing successful claims for landlord liability following criminal attacks against tenants, where the landlords misrepresented the safety or the level of security of the leased premises).

This approach is not flexible enough to cover the manifold situations in which a landlord should be subject to liability for a third-party criminal act. For instance, suppose the lock on the side door of an apartment building is broken from the time a tenant signs the lease through the time the tenant is assaulted in the building hallway. If there was no violation of the lease agreement (or fraud), the landlord is not liable under the contract theory, because there was no decline in the level of security between the signing of the lease and the attack.

In contrast to the tort and the contract theories, the implied warranty of habitability is tailored specifically for the landlord-tenant situation. The theory does not rely on the common law view of leases or the common law exceptions to landlord immunity for third-party criminal acts against tenants. Instead, the implied warranty establishes a general standard of habitability in leases.[135] As the court in *Trentacost* concluded, a requirement of some minimum degree of protection from criminal activity can fit into the habitability framework.[136] In sum, the implied warranty of habitability approach for landlord liability for third-party criminal acts against tenants is more flexible and congruent with the modern realities of residential leases than the tort or the contract theories of *Kline* and its progeny.

C. The Addition of a Foreseeability Requirement to the Implied Warranty of Habitability

As the foregoing analysis suggests, the *Trentacost* implied warranty approach deserves attention as a standard for determining landlord liability for third-party criminal acts. Unfortunately, courts have been reluctant to apply the implied warranty of habitability to cases of third-party criminal acts against tenants.[137] It appears a significant reason for this was the *Trentacost* court's belief that foreseeability was irrelevant to the implied warranty of habitability analysis, which thus created a strict liability standard.[138] This standard has been viewed by a number

135. *See* 2 POWELL, *supra* note 14, § 16B.04.

136. *Trentacost*, 412 A.2d at 443.

137. *See* Deem v. Charles E. Smith Mgmt., Inc., 799 F.2d 944, 946 (4th Cir. 1986); Walls v. Oxford Mgmt. Co., 633 A.2d 103, 107 (N.H. 1993); Feld v. Merriam, 485 A.2d 742, 749–52 (Pa. 1984) (Zappala, J., concurring); Cramer v. Balcor Prop. Mgmt., Inc., 441 S.E.2d 317, 319 (S.C. 1994); Jack v. Fritts, 457 S.E.2d 431, 437–39 (W. Va. 1995).

138. *See supra* notes 7–10, 115–116 and accompanying text. Although the court in *Trentacost* said the landlord "is not an insurer of his tenants' safety," some critics, including Justice Clifford in dissent, noted that the lack of a notice or a foreseeability requirement led to just that result. *Trentacost*, 412 A.2d at 445–47 (Clifford, J., dissenting in part). Some courts have also rejected the *Trentacost* argument that habitability, for purposes of the implied warranty, includes a minimum level of safety and security from third-party criminal acts. *See, e.g.*, *Jack*, 457 S.E.2d at 437–39.

of legal commentators as being unfair to landlords in the context of landlord liability for third-party criminal acts.[139]

Unlike other implied warranty of habitability situations, cases involving an intervening act by a third-party criminal need a foreseeability requirement in order to maintain a sense of fairness in a suit against a landlord. For example, suppose that the lock on the side-entrance door of an apartment building breaks, and the landlord fails to have it repaired for several weeks. This probably would be a breach of the implied warranty of habitability as to security, and the landlord could be held liable for the breach. Thus, a tenant of that apartment building probably would be justified in reducing his rent payment for the period in which the security breach existed. However, suppose also that the apartment building is located in a very low-crime neighborhood, where there were no homicides in the past three years, nor reports of crime in the building during that period. If a tenant is killed in the apartment building in this situation, it would seem highly unforeseeable to the landlord, even if the murder took place during the time of the security breach. While crimes such as vandalism or burglary might have appeared as genuine risks to the landlord, murder would not have. Therefore, it does not seem fair to hold a landlord liable for the actions of a third-party criminal in this situation, because the crime of murder was unforeseeable given the circumstances. This would be all the more true if the landlord was unaware that the lock was broken, and no tenant had attempted to inform him of the lock's condition. If a landlord has neither notice of the broken lock, nor knowledge of a significant risk of criminal acts, it seems unreasonable to hold the landlord liable for a third-party criminal act against a tenant.

The situation would be quite different if the same security breach occurred in a building that experienced several assaults in the past few months, and was located in a high-crime neighborhood of a town with a dozen or so homicides a year. Under those circumstances, a homicide is a much more foreseeable risk of a broken side-door lock. Holding a landlord liable for this crime seems more justified, because it was a genuine and foreseeable risk given the broken lock and the surrounding circumstances.

Thus, adding a foreseeability requirement to the implied warranty of habitability theory leads to a fairer approach that affords remedies to tenants that are appropriate for the circumstances without unduly punishing landlords. While both hypothetical landlords described above would be liable for a breach of the implied warranty as to security, only the second landlord, who should have noticed the foreseeable risk of homicide, would be liable for the

139. *See* Hudson, *supra* note 1, at 1515–21; Markatos, *supra* note 55, at 521–22; Merrill, *supra* note 8, at 446; Moore, *supra* note 8, at 410–11.

criminal act. Thus, a two-pronged test can be used to establish landlord liability for third-party criminal acts against tenants: (1) Did the landlord breach the implied warranty of habitability by failing to provide "a minimum of security"[140] (for example, by failing to provide a lock on a door, by having a completely unlit entrance, or by not ejecting squatters from a vacant apartment); and (2) was the crime that occurred against the tenant a foreseeable risk of this breach?

Several definitions of foreseeability have commonly been applied to claims of landlord liability for third-party criminal acts against tenants.[141] Under the most restrictive interpretation of foreseeability, the landlord must have actual knowledge of the risks of crime.[142] This definition is objectionable because it rewards ignorant landlords, since they cannot be held liable for what they do not know.[143] The actual-knowledge approach to foreseeability also provides disincentives for important landlord activities, such as visiting the premises, inspecting the locks, and requesting local-crime bulletins. Landlords should not be allowed to escape liability for third-party criminal acts by purposefully remaining uninformed about the leased premises and their surroundings.

A less restrictive approach is the prior similar-incidents rule, "which requires that a plaintiff produce evidence of prior similar criminal acts on the landowner's premises to establish foreseeability."[144] However, this approach is also exceptionable because it allows landlords "one free assault" before they have a duty.[145] For instance, suppose that one week after the lock on the front door of an apartment building breaks, a tenant is robbed. Then, after a second week, another tenant is robbed. Under the prior similar-incidents rule, the first robbery victim would probably be unable to prove foreseeability, and thus could not successfully prove that the landlord was liable for the robbery under the implied warranty plus foreseeability approach. However, the second robbery victim would easily be able to prove foreseeability based on the robbery of the first tenant, and would have an excellent chance of proving landlord liability. This result seems quite arbitrary; the first tenant cannot recover against the landlord simply because he had the misfortune of being the first, not the second, robbery victim. In addition, some breaches of the implied warranty, such as a broken front-door lock, would seemingly make even a first instance of a crime such as robbery foreseeable.

---

140. *Trentacost*, 412 A.2d at 443.

141. Melinda L. Reynolds, Note, *Landowner Liability for Terrorist Acts*, 47 CASE W. RES. L. REV. 155, 171 (1996) ("Three more major and two more minor definitions of foreseeability are commonly used.").

142. *Id.*

143. *Id.*

144. *Id.* at 172.

145. *Id.*

Finally, under the totality of the circumstances approach, courts analyze foreseeability in light of all available facts, and on a case-by-case basis.[146] This is the approach that courts should apply for cases involving landlord liability for third-party criminal acts against tenants. The totality of the circumstances approach is ideal because it allows the court to be flexible in assessing the competing factors that exist in each case. To wit, the totality of the circumstances foreseeability test will encompass whether the landlord knew or reasonably should have known about the breach of the implied warranty (such as a broken door lock), whether the landlord knew or reasonably should have known about prior criminal activity in the building and high crime rates in the neighborhood, as well as other factors applicable to the individual case.[147]

Thus, a landlord's breach of the implied warranty of habitability as to security does not necessarily create a foreseeable risk of a *certain* third-party criminal act against tenants (for example, a murder), even if that third-party criminal act actually occurs following the breach. When there is a breach of the implied warranty of habitability, but the crime that occurs is not foreseeable, a landlord should be subject to liability for the breach itself, but not for the third-party criminal act. In contrast, when a landlord's breach does create a foreseeable risk of the crime that occurs, the landlord should be held liable both for the breach and for the third-party criminal act.

III. APPLICATION OF THE IMPLIED WARRANTY PLUS FORESEEABILITY STANDARD

Because the primary purpose of the implied warranty of habitability is to ensure that tenants are not subjected to substandard, unsafe, and unhealthy housing, most jurisdictions have ruled that the warranty cannot be waived in a lease agreement.[148] This same rationale extends to the implied warranty when it is used to establish landlord liability for third-party criminal acts against tenants. Hence, Part III.A of this Comment argues that landlord liability for third-party

146. *Id.* at 173.

147. For instance, courts may consider "environmental criminology studies . . . [which examine the] 'physical structure of the building, lighting, traffic patterns, and social and ecological circumstances linked to the potential for a criminal event.'" *Id.* at 174 (quoting Daniel B. Kennedy, *Inadequate Security and Premises Liability*, TRIAL, June 1991, at 56, 56).

148. *See* Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984) (disallowing waiver of the warranty by "lease or by oral agreement"); DUKEMINIER ET AL., *supra* note 12, at 437 n.48. *But see* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 5.6 (1977) (allowing the landlord and the tenant to agree to a decrease in "the obligations of the landlord with respect to the condition of the leased property," so long as the agreement is not unconscionable or against public policy).

criminal acts, when predicated on the implied warranty of habitability, should not be subject to waiver in residential lease agreements.

Many jurisdictions have not extended the implied warranty of habitability in residential leases to an implied warranty of fitness or suitability in commercial leases,[149] but several have, including Texas.[150] Moreover, at least one case seminal to the establishment of the implied warranty concerns a commercial lease.[151] Part III.B argues that in jurisdictions where the implied warranty is applicable to commercial leases, it should be available to establish landlord liability for third-party criminal acts against commercial tenants. Here, however, it is appropriate to allow landlords and tenants to waive liability in the lease agreement. Finally, Part III.C argues that landlord liability for terrorist attacks can conceivably be grounded on the implied warranty. However, the foreseeability requirement will likely be fatal to many such claims of liability.

A. The Implied Warranty Plus Foreseeability Standard in Residential Leases

The raison d'être for the implied warranty of habitability is to ensure that tenants are not subjected to uninhabitable living conditions in rental units—regardless of what is explicitly contracted in the lease. For this reason, a majority of jurisdictions have ruled that an implied warranty of habitability cannot be waived by written or oral agreement.[152] In *Private Revision of Public Standards: Exculpatory Agreements in Leases*,[153] William K. Jones lists several concerns regarding waiver of the implied warranty of habitability in residential leases.[154] First, tenants will often have inadequate notice of such provisions if they are not highlighted or boldfaced in the lease agreement.[155] Second, exculpatory clauses may affect personal health and safety if they lead to a lackadaisical attitude by landlords regarding maintenance and repair of the premises.[156] Third, it will often be difficult for a tenant to receive insurance coverage for a landlord's negligence.[157] Fourth, perhaps the most significant problem with waiving the implied warranty is the scarcity of affordable

149. DUKEMINIER ET AL., *supra* note 12, at 437.
150. Davidow v. Inwood N. Prof'l Group—Phase I, 747 S.W.2d 373 (Tex. 1988).
151. Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969).
152. DUKEMINIER ET AL., *supra* note 12, at 437 n.48.
153. 63 N.Y.U. L. REV. 717 (1988).
154. *Id.* at 743–45.
155. *Id.* at 743.
156. *Id.* at 744.
157. *Id.* at 744–45.

housing of an adequate quality.[158] If tenants are unable to "seek redress for lapses on the landlord's part . . . the prospect of deterioration [of low-cost housing]—particularly where there is a housing shortage—is very real."[159] Finally, a related problem is the inequity in bargaining power between landlords and prospective tenants. In *Fair v. Negley*,[160] the Superior Court of Pennsylvania reasoned that if waiver of the implied warranty of habitability were permitted, "it would be a rare lease in which the waiver would not appear."[161] The court concluded that "[t]o allow such wholesale, unbargained for waiver would make the implied warranty of habitability meaningless."[162]

The same rationale applies to the implied warranty plus foreseeability standard for landlord liability for third-party criminal acts against tenants; accordingly, this liability standard should not be subject to waiver. The issues of notice, health and safety, insurance coverage, the quality affordable housing shortage, and unequal bargaining power are all equally applicable when the implied warranty is used to establish landlord liability for criminal acts. Even if the clause in the lease that waives the implied warranty plus foreseeability standard is boldfaced, tenants will often be unsure of the potential legal claims they are sacrificing if they are not counseled by an attorney. In addition, waiver of the implied warranty plus foreseeability standard may cause landlords to be unconcerned with breaches of the implied warranty that increase the risk of crime, thus creating a substantial tenant-safety concern. Furthermore, it is doubtful that tenants will be able to find insurance for third-party criminal acts. Moreover, waiver of the implied warranty plus foreseeability standard will only exacerbate the shortage of quality low-cost housing. Knowing they will not be held liable for a third-party crime that results from a breach of the implied warranty, landlords may engage in a race to the bottom: cutting costs and increasing profits by providing fewer and fewer basic security measures. If tenants have a right to a "minimum of security"[163] under the implied warranty of habitability, the right would become quite hollow if landlords were allowed to insert boilerplate language into lease agreements waiving it. Indeed, this type of waiver would probably become ubiquitous in leases for low-cost housing, in which bargaining power between landlord and tenant is often at its most disparate.

If the implied warranty plus foreseeability standard for landlord liability was deemed unwaivable in residential lease agreements, the market for rental

158. *Id.* at 745.
159. *Id.*
160. 390 A.2d 240 (Pa. Super. Ct. 1978).
161. *Id.* at 245.
162. *Id.*
163. Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980).

housing would likely behave as economic theory predicts: Rent would increase.[164] But "[t]enants universally expect some effective means of excluding intruders from multiple dwellings," just as they expect heat and sanitation;[165] therefore, such an expectation must be respected by prohibiting its waiver in residential lease agreements.

B. The Implied Warranty Plus Foreseeability Standard in Commercial Leases

While the implied warranty in lease agreements is most closely associated with residential leases, the Supreme Court of New Jersey's foundational implied warranty case, *Reste Realty Corp. v. Cooper*,[166] actually concerned a commercial lease. In *Reste Realty Corp.*, Joy M. Cooper leased the basement floor of a building, which was, according to the terms of the lease, to be used as commercial offices.[167] Cooper used the space for meetings and training of sales personnel in connection with the business of a jewelry firm.[168] Because the driveway leading to the office building was improperly graded and there was no sealing of the area between the driveway and the building, Cooper's basement office space flooded whenever it rained.[169] Initially, the landlord's resident manager removed the water, but when he died, no one paid any attention to the tenant's complaints, and she had to remove the water herself.[170] In finding that Cooper "had been constructively evicted" and was consequently not liable for unpaid rent, the court also stated there was "an implied warranty against latent defects" that deprive tenants from "beneficial enjoyment" of the leased premises.[171]

Despite this early foreshadowing of an implied warranty of fitness or suitability for commercial leases, a majority of jurisdictions has declined to extend the idea beyond the residential setting.[172] Texas, however, provides a significant

164. *See* Chi. Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 742 (7th Cir. 1987) (Posner, J., concurring).

165. *Trentacost*, 412 A.2d at 443.

166. 251 A.2d 268 (N.J. 1969).

167. *Id.* at 270.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 276–78; *see also* Hudson, *supra* note 1, at 1498 (describing *Reste Realty Corp.* as the "most persuasive foreshadowing of the recognition of the implied warranty of habitability").

172. DUKEMINIER ET AL., *supra* note 12, at 437; *see also* 2 POWELL, *supra* note 14, § 16B.04[2][b] n.40 (listing examples of jurisdictions that have held there is no implied warranty of habitability in commercial leases, including New York and Illinois).

exception to the majority trend. In *Davidow v. Inwood North Professional Group—Phase I*,[173] the Supreme Court of Texas held:

> There is no valid reason to imply a warranty of habitability in residential leases and not in commercial leases. Although minor distinctions can be drawn between residential and commercial tenants, those differences do not justify limiting the warranty to residential leaseholds. Therefore, we hold there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose.[174]

The court went on to hold that, in a commercial lease, the parties can in effect waive the implied warranty of suitability by written agreement.[175]

Jurisdictions that recognize an implied warranty of habitability or suitability in commercial leases should likewise recognize the implied warranty plus foreseeability approach to establishing landlord liability for third-party criminal acts against tenants. However, the implied warranty plus foreseeability standard should be subject to waiver in the lease agreement. Hence, the default rule for a commercial lease would be that a landlord is liable for a breach of the implied warranty of habitability that creates a foreseeable risk of the third-party criminal act that occurs; the parties to the lease would be free to contract around this liability rule.

Perhaps the most significant difference between a commercial lease and a residential lease is that the average commercial tenant will have far greater bargaining power regarding the terms of the lease than the average residential tenant.[176] For this reason, jurisdictions that recognize the implied warranty in commercial leases often justifiably decide that it is subject to waiver.[177] If the implied warranty of habitability or suitability is subject to waiver, the standard of

---

173. 747 S.W.2d 373 (Tex. 1988).

174. *Id.* at 376–77.

175. *Id.* at 377 ("If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.").

176. The importance of equality in bargaining power to the implied warranty analysis is underscored by the District of Columbia Court of Appeals decision in *Espenschied v. Mallick*, 633 A.2d 388 (D.C. 1993). While it did not extend the implied warranty to the commercial lease in question, the court did not rule out the future application of the implied warranty to commercial leases where bargaining power between landlord and tenant is truly unequal. *Id.* at 395.

177. *See, e.g.*, Gober v. Wright, 838 S.W.2d 794, 798 (Tex. Ct. App. 1992) ("[T]he landlord's implied warranty of suitability . . . is limited only by those specific terms in a commercial lease whereby a tenant expressly agrees to repair certain defects. Essential facilities vital to the intended commercial use of the premises remain the responsibility of the landlord, *unless otherwise provided by the parties*.") (emphasis added). *See generally* Anthony J. Vlatas, Note, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases*, 94 COLUM. L. REV. 658, 660 (1994) (advocating for an "implied warranty of general fitness" in commercial leases "absent contrary agreement by the parties").

landlord liability for third-party criminal acts that is predicated on such warranty must naturally be subject to waiver as well.

Nonetheless, the implied warranty plus foreseeability standard for landlord liability for third-party criminal acts is an appropriate default rule. First, commercial landlords generally "have greater knowledge about the leasehold(s) they rent than do prospective tenants, so the latter must rely on the landlord's expertise and good faith"[178] regarding the habitability of the premises and foreseeability of crime that uninhabitable conditions would create. Additionally, an implied warranty of commercial fitness is economically efficient since the landlord, unlike the tenant, has no disincentives to maintain the premises in good repair (since the landlord's property interest is generally of unlimited duration), and the landlord is often a repeat player in the repair-services market (which reduces total transaction and repair costs).[179] This efficiency argument is likewise applicable when the implied warranty of fitness combined with a foreseeability requirement is used to establish landlord liability for third-party criminal acts against commercial tenants. The typically unlimited duration of the commercial landlord's property interest gives him a strong incentive to maintain the premises so that they are free from defective conditions that could foreseeably create risks of criminal acts. Furthermore, the commercial landlord will often be a repeat player in the market for repairs of defective conditions that could foreseeably engender risks of third-party crime.

C. Application of the Implied Warranty Plus Foreseeability Standard to Terrorist Attacks

While terrorist attacks are perhaps the most infrequent of all third-party criminal acts on leased premises, they present a unique case study for landlord liability. Landlord liability for terrorist attacks is also a topic of current litigation.[180] The implied warranty plus foreseeability approach for establishing landlord liability for criminal acts against tenants should be available for terrorist attacks. However, two factors will likely militate against successful claims for

178. Vlatas, *supra* note 177, at 675.

179. *Id.* at 690–95. *But cf.* Jones, *supra* note 153, at 733–38 (arguing that exculpatory agreements in commercial leases are economically efficient).

180. *See, e.g.*, David Lombino, *Port Authority Is Held Liable in Bombing That Killed Six in 1993 Attack on WTC*, N.Y. SUN, Oct. 27, 2005, at 1 (reporting that a jury concluded that the Port Authority of New York and New Jersey, which owned New York's World Trade Center at the time, was 68 percent liable for the 1993 terrorist attack on the World Trade Center); Samuel Maull, *Jury to Deliberate Question of Negligence in 1993 WTC Bombing Civil Case*, ASSOCIATED PRESS, Oct. 26, 2005, at 1 (stating that the Port Authority believed "nothing would have deterred resourceful, determined terrorists" from attacking the World Trade Center in 1993).

landlord liability for terrorist acts. First, as discussed in Part III.B, commercial landlords and tenants should have the option of contracting around the implied warranty of habitability plus foreseeability standard for landlord liability in cases of third-party criminal acts against tenants. It seems likely that major commercial landlords will zealously negotiate with prospective tenants for waiver of such a standard, because if it were not waived, the landlords would probably need substantial terrorism insurance policies. In this way, landlords would largely immunize themselves from litigation similar to the current lawsuits against the Port Authority of New York and New Jersey regarding the 1993 World Trade Center bombing.[181] While this may be the current strategy for commercial landlords, "most lease provisions in effect today were likely not drafted with a terrorist attack in mind."[182]

The second major factor militating against landlord liability for terrorist acts against tenants is the foreseeability requirement. Terrorist acts, even post–September 11, are highly unforeseeable. While the occurrence of terrorist acts in general might be foreseeable, specific terrorist acts in specific places can rarely be foreseen. Furthermore, breaches of the implied warranty of habitability or fitness as to security will oftentimes make theft, assault, or vandalism foreseeable, but this is seldom the case with terrorism.

However, some claims for landlord liability for terrorist attacks will satisfy the foreseeability burden. The 1993 World Trade Center attack may be one such case. The terrorists carried out the attack by leaving a "van packed with explosives . . . in an underground parking garage beneath the twin towers."[183] Eight years earlier, a "security report commissioned by the Port Authority . . . warned [that] the underground garage was a likely target for attack."[184] According to the plaintiffs, the "Port Authority did not undertake appropriate security measures because of high costs and inconvenience."[185] If this were proven to be true, it would be the type of evidence that could sufficiently establish foreseeability for a claim of landlord liability for the terrorist attack.

181. *See* Lombino, *supra* note 180; *see also* Reynolds, *supra* note 141, at 158 ("After the World Trade Center bombing over 174 suits were filed against the Port Authority . . . .").

182. Thomas C. Homburger & Timothy J. Grant, *A Changing World: A Commercial Landlord's Duty to Prevent Terrorist Attacks in Post–September 11th America*, 36 J. MARSHALL L. REV. 669, 683 (2003).

183. Lombino, *supra* note 180, at 1.

184. *Id.*

185. *Id.*

CONCLUSION

The implied warranty of habitability approach to landlord liability for third-party criminal acts, as established in *Trentacost*, failed to gain traction in subsequent legal decisions. Courts and commentators were not comfortable creating a strict liability regime or rendering landlords as insurers. For these reasons, foreseeability must be a factor in determining liability. The implied warranty approach to landlord liability for third-party criminal acts, when combined with a foreseeability requirement, provides an effective, flexible, and fair standard, as well as a powerful tool for the modern tenant. This form of liability should not be waivable in a residential lease, in which the tenant's bargaining power vis-à-vis the landlord is often minimal, or even nonexistent. Where a jurisdiction recognizes an implied warranty in commercial leases, the implied warranty plus foreseeability approach should be equally applicable. In such commercial leases, the liability standard should be subject to waiver, as equality in bargaining power between landlord and tenant is much more likely to exist in a commercial setting. The approach can even be used to establish landlord liability for terrorist attacks. However, terrorist attacks are so infrequent and unpredictable that satisfying the foreseeability requirement will be a major challenge for any tenant. In sum, for a wide array of circumstances, the implied warranty plus foreseeability approach would provide an ideal means of establishing landlord liability for third-party criminal acts against tenants.

***