Landowner Liability for Terrorist Acts?

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LANDOWNER LIABILITY FOR TERRORIST ACTS†

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INTRODUCTION

The specter of terrorism within the United States has become frighteningly real. The World Trade Center and Oklahoma City bombings have effectively erased the traditional American paradigm of terrorism as a foreign problem. These two incidents alone caused staggering national losses. The World Trade Center bombing in February of 1993 killed six people and injured more than a thousand others, created a crater 150-200 feet deep, and damaged the massive complex five levels down and two levels up from the explosion. Economically, total damage was estimated at over $510 million, with claims in civil lawsuits filed totaling over $1.9 billion. And while the World Trade Center bombing was repeatedly called "the single most destructive act of terrorism ever committed . . . in the United States," a preliminary estimate from the

Oklahoma City bombing put damage at over $652 million. When considered with other recent terrorist attacks and threatened attacks, these incidents suggest that domestic terrorism is an emerging national problem. Americans must therefore develop innovative solutions to address the issues of prevention and victim compensation.

Initial responses to domestic terrorism have resulted in what some have called the "hardening" of America. Government responses to domestic terrorism have included both modifications to existing agencies' priorities as well as legislation providing for limited victim compensation and expanded law enforcement powers. This Note considers the American common law response to

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5. See Paul English, Preliminary Estimate Puts Bomb Losses at $652 Million: Uncovered Costs To Stagger State Budget Resources, THE DAILY OKLAHOMAN, May 19, 1995, at 1. Oklahoma Governor Frank Keating noted that the loss amount "not only makes it the most catastrophic dollar loss in American history for a terrorist act, but in Oklahoma it's without doubt the greatest loss to the public and private sectors ever." Id.

6. Including, for example, the Centennial Park bombing at the Olympics in Atlanta, the Amtrak derailment in Arizona, Unabomber bombings and threats, and abortion clinic attacks. "Scarcely a week goes by without at least one terrorist related incident making the headlines." Ileana M. Porras, On Terrorism: Reflections on Violence and the Outlaw, 1994 UTAH L. REV. 119, 119. The director of the CIA recently told Congress that he expects an increase in domestic terrorism over the next decade. See Sunday Today (NBC television broadcast, Jan. 7, 1996).

7. See, e.g., Tom Masland et al., Fighting Back; Life in the Bull's-Eye, NEWSWEEK, May 1, 1995, at 56. For example, security measures at the World Trade Center in the aftermath of the bombing reflect both structural and procedural changes, including wrapping columns with steel, painting windows with shatter-resistant coating, installing a hydraulic crash barrier, using an online photo ID system, restricting access to the towers, hiring of hundreds of new security guards, moving outside parking away from the building, see id., and restricting parking in the underground garage where the bomb was detonated. See Richard Lacayo, How Safe is Safe? Americans Must Decide How Much Freedom They Are Willing to Trade for More Security, TIME, May 1, 1995, at 68, 71. After the Oklahoma City bombing, changes were implemented at Federal buildings around the country. All in all, officials put more than 8,000 federal buildings on "second-level alert"—requiring all employees and visitors to identify themselves "until further notice." Masland et al., supra, at 56. And although he had opposed the action for some time, President Clinton agreed to a ban of vehicular traffic in front of the White House. See Kathy Lewis & G. Robert Hillman, White House Barriers Erected: Clinton Cites Terrorist Fears, THE RECORD (Northern NJ.), May 21, 1995, at A1. In arguing for the measure, Treasury Secretary Robert Rubin said that "the bombings of the federal building in Oklahoma City and the World Trade Center in New York are reminders of a growing terrorist threat." Id. at A3.

8. For example, the Federal Emergency Management Agency (FEMA), which is best known for its response to disasters like floods or earthquakes, has also begun to focus on the problem of "technological events" like major acts of terrorism. See Scott S. Greenberger, FEMA Focuses on Prevention, TELEGRAM & GAZETTE (Worcester, Mass.), May 2, 1995, at A1, A2. After the World Trade Center bombing, FEMA came up with recommendations to make structures safer, proposing designs for stronger windows and doors. See id. at A3. In responding to the Oklahoma City bombing, in a more traditional role, FEMA is expected to offset about $33 million of the loss, as well as provide for rebuilding-loan programs. See English, supra note 5, at 1.

The Emergency Supplemental Appropriations for Additional Disaster Assistance, for
domestic terrorism—landowner liability for terrorist acts—as typi-
fied by the civil litigation following in the wake of the World
Trade Center bombing.

After the World Trade Center bombing over 174 suits were
filed against the Port Authority, the owner of the World Trade
Center complex.9 The suits involve "a relatively murky area of the
law,"10 namely a landowner's responsibility to protect tenants or
invitees against criminal acts of third parties. In brief, the courts
face the issue of whether the Port Authority, as landowner, was
negligent in either its assessment of the foreseeability of the harm
of a terrorist attack or the adequacy of the security measures it
took in response to that assessment.

An examination of this particular legal response to domestic
terrorist acts is critically important for several reasons. First, be-
yond the economic effects that can be imagined at the individual
party level, the placement of liability could also have significant
macroeconomic results.11 Further, imposing civil liability on land-

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9. Some of these suits have either been settled or dismissed, but of the original suits,
126 involved personal injuries (containing a total of 294 individual claims), 17 involved
property damage (containing a total of 159 claims, most of them for cars in the parking
garage), and 31 involved business interruption (containing 194 claims filed by companies
with offices in the World Trade Center or their insurers). See Wise, supra note 2, at 5.

10. See Pacelle, supra note 3, at B1.

11. For example, after the World Trade Center explosion some investors expressed
concerns about the Port Authority's ability to pay off some of its $4.1 billion in public
improvement bonds. See Jon Nordheimer, Crisis at the Twin Towers: The Port Authority;
Complex Insurance Issues in Aftermath of Explosion, N.Y. TIMES, Mar. 2, 1993, at B5;
see also infra notes 225-36 and accompanying text (discussing macroeconomic effects of
imposing liability on landowners or tenants and the effect of exculpatory clauses).
lords may have extensive implications for individual rights to privacy, as well as availability of fairly-valued rental space for more controversial tenants. These issues must be measured against the harsh inequity that could result if civil suits are not allowed, as some innocent victims will invariably not be made whole by insurance or victim-compensation-type statutes. Finally, no precedent appears to squarely address civil recoveries for acts of domestic terrorism as described here; hence plaintiffs’ reliance on the general body of law dealing with landlord liability for criminal acts of third parties. The question at hand then is whether this body of law is the best way to achieve equitable victim compensation and increased antiterrorism protection.

In the wake of terrorist attacks in the United States, injured parties inadequately compensated by insurance or statutory assistance programs are likely to turn to civil lawsuits against landowners for relief. These suits will involve claims under the general rubric of “landlord liability for criminal acts of third parties.” If based on current doctrines, claims involving terrorist acts will only exacerbate problems of unpredictability, inequity, and inefficiency endemic to claims presently involving more typical criminal acts. A nationwide legal response consisting of federal legislation, government-assisted insurance, and judicial decisions restricting recovery to more narrowly drawn theories of liability is necessary to provide more equitable and efficient answers to concerns about both victim compensation and prevention.

Part I of this Note presents potential legal responses available to victims of domestic terrorism by reviewing victim-compensation-type statutes that might apply and by examining how potential civil claims could be brought using landowner liability for criminal acts of third parties. The examination of contemporary landowner

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12. See infra notes 217-24 and accompanying text.
13. See infra notes 17-23 and accompanying text.
14. The term “terrorism” is generally used here to refer to bombing-type acts since they will most often have the greatest effect on landowners. See infra notes 134-41 and accompanying text (discussing in more detail the definition of terrorism).
15. Throughout this Note, societal goals of increased victim compensation and antiterrorism are presumed. This presumption is based on an economic theory of torts which holds that liability is imposed on defendants in order to (1) compensate those who are harmed and (2) provide incentives for tortfeasors to limit risk-producing behavior to efficient levels (in this case theoretically complete deterrence). See Uri Kaufman, When Crime Pays: Business Landlords’ Duty to Protect Customers From Criminal Acts Committed on the Premises, 31 S. TEX. L. REV. 89, 103 (1990).
16. The topic of landowner liability for criminal acts of third parties has been commented on extensively. See, e.g., William H. Hardie, Jr., Foreseeability: A Murky Crystal Ball for Predicting Liability, 23 CUMB. L. REV. 349, 364 n.61 (1992) (listing no less than fifteen law review pieces discussing landlord liability for criminal acts of third parties); Kaufman, supra note 15, at 92 n.13 (discussing representative pieces advocating extreme
liability will focus on problems arising from the use of foreseeability as a legal element, since this appears to be a primary cause of the current unpredictability in the law. The implications of applying existing liability theories in the environment of commercial leaseholds are also examined in detail since they will have particular importance in the context of terrorism. Part II examines how issues particularly related to terrorism will affect the application of existing doctrines, with the conclusion that the exclusive use of these types of claims is not the most appropriate legal means to achieve society's goals. Part III presents alternative legal responses that may provide more comprehensive victim compensation as well as the predictable legal outcomes which will cause landowners to take cost-effective preventive measures.

I. ANALYSIS OF POTENTIAL CLAIMS

A. Victim Compensation for Terrorist Attacks in the United States—Statutory Claims

While there are some statutory provisions addressing victim compensation for acts of terrorism, they have traditionally been inadequate for a number of reasons. For example, the only appropriation aimed at providing direct assistance to victims of the Oklahoma City bombing seems to be the $39 million Community Development Block Grant. Other statutory provisions, which theoretically apply to victims of terrorism or other international incidents, apply only in narrow sets of circumstances. For example, the Torture Victim Protection Act provides that a "private cause of action in federal court against individuals who commit such abuses while acting under ‘actual or apparent authority, or color of law, of

17. See Emergency Anti-Terrorism Act, supra note 8, at 253 (making other appropriations to various governmental agencies for rebuilding). In view of the magnitude of the claims noted earlier, this is not likely to provide sufficient compensation. Additional assistance should also be available to some government employees. See infra note 20 and accompanying text (citing the Victims of Terrorism Compensation Act, Pub. L. No. 99-399, § 801, 100 Stat. 879 (1986)). Also, the Antiterrorism Act of 1996 specifically provides for mandatory victim restitution as well as additional compensation for victims of terrorism via The Victims of Crime Act of 1984. See Antiterrorism Act of 1996, supra note 8, at 1227-41 (mandatory victim restitution), 1243-47 (assistance to victims of terrorism). However, obtaining restitution from terrorists will probably not provide adequate compensation in the majority of cases. See infra notes 25-26 and accompanying text (noting that terrorists will often have insufficient or hard-to-reach assets). Further, while the Antiterrorism Act of 1996 specifically authorizes Federal funding of state crime victim compensation programs which provide assistance to victims of terrorism, these types of programs provide very limited compensation (for example, limited medical expenses and lost wages). See infra note 23 and accompanying text.
any foreign nation,” may be brought by or on behalf of a United States citizen who was a victim of torture or summary execution. The Warsaw Convention addresses incidents on international airlines, and the Victims of Terrorism Compensation Act provides relief only to victims associated with the United States government. Moreover, even those victims who do fall under one of these “patchwork” statutory provisions are generally not fully compensated. Thus, “[i]t is inevitable . . . that there will be individuals, including United States citizens, who will be victimized by terrorism and forced to suffer injury without remedy.” If statutory recoveries are insufficient, victims are likely to turn to the courts, bringing civil suits against one of the parties involved to obtain compensation for their injuries.

B. Civil Litigation—Background

In the types of terrorist acts contemplated here, parties that could be potentially held responsible by victims include the terrorist organization, security firms, and landowners. Bringing suit

21. See id. at 393.
22. Id. at 401. Of course, this statement assumes that victims are unable to satisfy losses completely via insurance recoveries.
23. While it may be possible for victims to obtain partial recovery under more traditional state-sponsored crime victim compensation funds, if available, these generally provide a significantly lower recovery than a civil suit, so there is still an incentive to sue. See Rex A. Sharp, Paying for the Crimes of Others? Landowner Liability for Crimes on the Premises, 29 S. Tex. L. Rev. 11, 16 n.11 (1987).
24. If the victim is an invitee of a commercial tenant, it might be possible for the victim to include the commercial tenant as a responsible party, since if the lessee has exclusive control and possession it may be considered to have the same protective duties as a landlord. See, e.g., Daniels v. Shell Oil Co., 485 S.W.2d 948, 951 (Tex. Civ. App. 1972). For purposes of this Note, references to landlords or landowners are presumed to include tenants where tenants retain exclusive control and possession of the leased premises. Further, employees of tenants or landlords may likely be precluded from bringing suit against one or the other since their injuries may be exclusively addressed by workers’ compensation. See, e.g., Daniel Wise, Law Firms Based in World Trade Center Regroup: Lawyers See Potential for Dozens of Liability Claims, N.Y. L.J., Mar. 2 1993, at 1 (noting that Port Authority employees are precluded from recovery outside of worker’s compensation in the World Trade Center bombing); see also infra note 127 (discussing invitees and employees of tenants). Recently, victims (including the owner of the World Trade Center) have also attempted to hold chemical manufacturers responsible—alleging that they could have made the ammonium nitrate, an ingredient in the bombs used in Oklahoma City and at the World Trade Center, less explosive. See Hassan Fattah, Federal
against the responsible terrorist organization itself is not unheard of. For example, the son and daughter of Leon Klinghoffer sued the Palestinian Liberation Organization ("PLO") after their father was murdered during the Achille Lauro incident. However, as in ordinary criminal cases, plaintiffs are not likely to target those parties where recovery is difficult due to insufficient or hard-to-reach assets. Security firms or landlords would seem to provide an easier recovery. Indeed, if it can be proved that a security firm was negligent in its provision of services, it should be susceptible to liability itself. However, a landlord would likely not escape liability even in that case, because if a landlord has an affirmative duty to protect the plaintiff, then the landlord remains liable for negligence in selecting, directing, or supervising the security agency. The likely target for injured plaintiffs will be the solvent party with the most broadly defined responsibility for protection—the landowner.

C. Landowner Liability for Criminal Acts of Third Parties

This landowner-as-target hypothesis is borne out by the many suits filed as a result of criminal acts of third parties. A victim of a terrorist (or criminal) act could file a complaint against an allegedly negligent landlord for failing to secure the premises under a number of different theories, with differing likelihoods of success. While landlords now have some duty to protect their tenants from third-party crime in practically every jurisdiction, the extent of

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25. See Alexander Stille, The PLO: A Suit Provides an Inside Look, 10 NAT’L L.J. 1 (1987). The 1985 murder of Leon Klinghoffer (an elderly man in a wheelchair who was ostensibly singled out because of his Jewish name and United States passport by Palestinians who hijacked the cruise ship, Achille Lauro) came to symbolize terrorism in the late 1980's much as the World Trade Center, Oklahoma City, and Centennial Park bombings do in the mid-1990's. Recently, the PLO has tentatively agreed to underwrite a peace institute in order to settle the lawsuit. If the agreement is finalized, the Klinghoffers will drop all legal claims against the PLO. See Beth J. Harpaz, Klinghoffers, PLO Plan Peace Institute In Terror Victim’s Memory, AP, Jan. 18, 1996, available in LEXIS, Nexis Library, AP File.

26. For example, what is certain to be the first of many lawsuits involving the Centennial Park bombing was filed less than a week after the explosion. The suit, filed by a woman injured in the blast, asks for $500,000 in damages and alleges that security guards did not evacuate people quickly enough. See FBI Continues Investigation of Olympic Blast (CNN news broadcast, Aug. 3, 1996).

27. See Sharp, supra note 23, at 54-55. Further, the landlord could be held liable via vicarious liability. See id. at 55; see also Sharp v. W.H. Moore, Inc., 796 P.2d 506 (Idaho 1990) (noting that security service’s liability could be imputed to landlord as a result of agency relationship).

28. And, where applicable, the landowner’s insurer.

such duty varies greatly depending upon the jurisdiction, and sometimes even the court.  

1. Background

For a full understanding of the problems involved in predicting the success of these claims, some background is necessary. The unsettled state of the law in this area is due to several factors. Traditionally, landlords did not have any special duty regarding the security of their tenants, a corollary of the rule that private parties generally have no duty to rescue others. Only within the last twenty-five years have landlords been held liable to their tenants for criminal acts of third parties. Another cause of the unsettled nature of this doctrine may be some of the competing policy considerations evident throughout its uneven evolution, appearing first in the seminal case, Kline v. 1500 Massachusetts Avenue Apartment Corp.

The Kline court imposed a duty on residential landlords to take reasonable steps to protect tenants from foreseeable criminal acts. This case is generally said to mark the initial departure from the traditional view that landlords had no duty to protect tenants. The court achieved this by extending the traditional landlord duty to maintain common areas in a reasonably safe condition beyond prevention from physical defects to protection from criminal acts. This was done by: (1) applying the warranty of habitability
to defects in security, and (2) by recognizing a special relationship between landlord and tenant;\textsuperscript{35} both of which are critical theories of recovery in many jurisdictions today. While \textit{Kline} provided an important remedy to victims of crime, it was also the harbinger of some of the uncertainty that continues to mark this area of the law. In defining the standard of landlord liability, for example, the \textit{Kline} court equivocally remarked that the "landlord is no insurer of his tenants' safety, but he certainly is no bystander."\textsuperscript{36} This rather tentative assertion apparently reflects the tension the court recognized in trying to fashion an efficient yet equitable result.\textsuperscript{37} Further, \textit{Kline} gives little guidance about what security measures are required of landlords once duty is established.\textsuperscript{38} Subsequent cases have read \textit{Kline} both narrowly and broadly; depending on jurisdiction and setting.\textsuperscript{39} Answers to the two questions raised in \textit{Kline}, namely the appropriate standard for establishing duty given efficiency and equity concerns, and the definition of appropriate responses to any duty imposed, will no doubt continue to occupy courts when the crime in question is terrorism.

2. Current Theories of Recovery

Depending on the jurisdiction and court,\textsuperscript{40} any number of theories of landowner liability may be available for victims of terrorism. Current theories may be aggregated into five principal groups: (1) strict liability; (2) duty to maintain safe common areas; (3) voluntary assumption of duty to protect; (4) contract; and (5) negligence. An examination of the differing theories available is important in order to determine which of them will prove most


\textsuperscript{36} \textit{Kline}, 439 F.2d at 481.

\textsuperscript{37} For example, the court's first basis for liability, maintaining common areas in a reasonably safe condition, perhaps reflects an economic efficiency argument; namely, since the landlord has exclusive control, it is cost-effective for him, rather than tenants, to take preventive action. Tenants' responses would necessarily be duplicative or involve collective action with high transaction costs; tenants lack security expertise, and the landlord is in the best position to ensure against risk via insurance. See Peter S. Selvin, \textit{Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since Kline}, 9 REAL EST. L.J. 311, 315 (1981). On the other hand, in recognizing that there are limits to liability, or that the landlord is not an "insurer," the court may be acknowledging that public policy or fairness dictates that a landlord should not be liable when he is not at fault. See Sharp, supra note 23, at 16.


\textsuperscript{39} In this regard, \textit{Kline} may be limited to its facts, in that the tenant specifically advised the landlord about other prior criminal acts on the premises, see \textit{Kline}, 439 F.2d at 479 n.3, and the landlord had actually decreased security measures since the inception of the tenant's lease. See \textit{Schoshinski}, supra note 31, § 4.15, at 218-19.

\textsuperscript{40} See supra note 30 and accompanying text.
successful for victims of terrorism. Outcomes for victims of more typical crimes vary primarily because their theories of liability use different definitions of foreseeability and require different landlord behavior. Further, different theories emphasize certain underlying policy concerns, which could have implications for how complaints alleging landlord liability for terrorist acts will be received by courts. Finally, although landlord liability for criminal acts first arose in a residential context, this Note focuses on commercial landlord liability since terrorist acts are most likely to involve that type of leasehold. While the appropriateness of the application is examined at the conclusion of this section, commentators feel that most jurisdictions have generally "made no explicit distinction between commercial and residential landlords" in holding landlords liable for the criminal acts of third parties. Therefore, this discussion initially assumes a commercial setting.

a. Safe Common Areas

The duty to maintain common areas in a safe condition is perhaps the most traditional of all the theories of recovery. As the court in Kline noted, this duty applies the same rationale as the longstanding duty of landlords to protect tenants from unsafe physical defects. To sustain this claim, a tenant must show both that

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41. See infra notes 115-27 and accompanying text.
42. Haines, supra note 34, at 343 n.144. See also Marvin F. Milich, Protecting Commercial Landlords From Liability for Criminal Acts of Third Parties, 15 REAL EST. LJ. 236, 241 (1987) (citing cases involving commercial landlords where theories of recovery paralleled those in cases involving residential landlords). Further, it is generally acknowledged that residential landlord/tenant law was the "impetus for the modern trend imposing a duty upon commercial landowners." Donna Lee Welch, Case Comment: Ann M. v. Pacific Plaza Shopping Center: The California Supreme Court Retreats from its "Totality of the Circumstances" Approach to Premises Liability, 28 GA. L. REV. 1053, 1064 n.64 (1994).
43. With this said, the first theory listed above, strict liability, sparingly adopted in residential suits, does not seem to have ever been successfully applied in the commercial context. See, e.g., Sharp, supra note 23, at 73-76 (citing Davis v. Allied Supermarkets, Inc., 547 P.2d 963, 965 (Okla. 1976), which held that in spite of the risk spreading policy behind strict liability, "it does not seem that shifting the financial loss caused by crime from one innocent victim to another innocent victim is proper"); Jeffrey Fowler, Rowe v. State Bank of Lombard: The Key to Unlocking a Landlord's Duty to Provide Security, 23 J. MARSHALL L. REV. 131 (1989) (discussing Rowe v. Lombard State Bank, 531 N.E.2d 1358 (Ill. 1988) which rejected strict liability but held the commercial landlord liable on other grounds). Further, even those who would argue for increased application of strict liability for landlords in the residential setting seem to agree that its application to the commercial setting is not appropriate. See Frank F. Gibson & Elliot Klayman, Landlord Liability: A New Dimension, 25 AM. BUS. LJ. 1, 27-28 (1987) (holding that the policy considerations favoring strict liability in the defective products context apply in the residential but not commercial leasehold context). Therefore, this theory is not discussed here.
44. See Kline, 439 F.2d at 481.
the landlord had control of the area and knowledge of the defective condition, and that the defects foreseeably enhanced the risk of criminal activity.\textsuperscript{45} Accessibility defects (e.g. defective locks) seem to trigger liability most often under this theory.\textsuperscript{46} Perhaps because of its traditional nature, this approach has gained wide acceptance, even in jurisdictions reluctant to recognize landlord liability.\textsuperscript{47} This theory of liability may have important ramifications for holding landlords liable for acts of terrorism due to its focus on the landlord's exclusive control of common areas. For example, in Kline, the court noted that the landlord is in an even better position than the police to take preventive measures. "Municipal police cannot patrol the entryways and the hallways, the garages and the basements of private multiple unit . . . dwellings. They are neither equipped, manned, nor empowered to do so."\textsuperscript{48} This type of emphasis on control and efficiency provides a powerful argument for using this theory to require landlords to provide at least minimal structural security measures against terrorist acts.

b. Voluntary Assumption of Duty

Another traditional theory of landlord liability involves a landowner's voluntarily assumed duty to provide security. Under this theory, if a landowner voluntarily assumes the performance of duties for security, he should be required to perform those duties carefully.\textsuperscript{49} Even courts that have limited a landowner's duty to protect a tenant from the criminal acts of others absent any affirmative conduct on the part of the landowner would likely find a duty if the landlord provided some type of security in what proved to be a negligent manner.\textsuperscript{50} In practice, these claims can arise as a

\textsuperscript{45} See Glesner, supra note 29, at 690.
\textsuperscript{46} See id. at 691.
\textsuperscript{47} See id. at 690.
\textsuperscript{48} Kline, 439 F.2d at 484.
\textsuperscript{49} See Bob Gibbins & Yii-Chwen (Francis) Pan, Landlords and Third-Party Criminal Conduct, TRIAL, Mar. 1986, at 48. Many courts that have adopted this rule cite the Restatement of Torts in support, which states that:

\begin{quote}
[O]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.
\end{quote}

\textbf{Restatement (Second) of Torts} § 323 (1977). This is effectively an exception to the "no duty to rescue" rule, which holds that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." § 314.

\textsuperscript{50} See John M. Adler, Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Oth-
result of the landlord's express or implied promise to provide security, including representations in lease terms, oral statements, and advertisements. Many decisions based on this theory use an implicit balancing test to determine liability, considering the degree of reliance assumed by the injured tenant as well as the potential burden to the landlord. Courts using this balancing test may have particular difficulty in applying it to terrorism since both the degree of reliance by the tenant and burden to the landowner in preventing the crime are generally very high. Some commentators note that because this theory provides no positive incentive to provide security it results in landlords being less inclined to offer increased security protection. Choosing to provide no security is theoretically risky for landlords, however, because the definition of what constitutes a voluntary provision of security differs by jurisdiction. What constitutes a provision (or further, a negligent provision) of antiterrorism security is likely to be even less clear than in the context of more traditional criminal acts, so that predicting liability will continue to be at least as difficult.

c. Contract

Claims brought under contract theories may rely on either express or implied warranties to provide security. A recovery theory based on express warranties would suggest that a landlord has a duty to provide the type and amount of security advertised. The World Trade Center litigation provides an example of

ers, 1991 Wis. L. Rev. 867, 884.
51. See Glesner, supra note 29, at 696. A landlord's failure to provide adequate security could also result in a breach of contract claim. See id. at 698 n.88.
53. See id. at 510.
54. See Glesner, supra note 29, at 696. See also Jardel Co., Inc. v. Hughes, 523 A.2d 518 (Del. 1987) (finding that since mall owner had voluntarily undertaken to provide a security program, sufficiency of that program constituted jury question).
55. In the residential context, a "handful" of courts have held that the implied warranty of habitability should include a duty to provide security. See Markatos, supra note 52, at 521-22. In the commercial context, a duty to provide security "would have to be confined as an independent material provision of the lease." Haines, supra note 34, at 326 n.91. While some commentators have argued for the extension of residential habitability warranties to certain commercial settings, see Robert A. Levinson & Michael N. Silver, Do Commercial Property Tenants Possess Warranties of Habitability? 14 REAL Est. L.J. 59 (1985), in practice such application has been restricted. When used in the commercial context, this theory has generally involved conditions existing at the inception of the lease. See Gibbons & Pan, supra note 49, at 48.
56. See Sharp, supra note 23, at 30. This claim may also give rise to a tort claim of misrepresentation or fraud. See e.g., O'Hara v. Western Seven Trees Corp. Intercoast Management, 142 Cal. Rptr. 487, 491 (Cal. Ct. App. 1977) (holding that cause of action
how liability based on express contract provisions could be triggered in the context of terrorism. One large tenant, Dean Witter, claims that it raised concerns about safety when it negotiated its lease in 1984 and 1985, but that it was assured in writing that security provisions at the World Trade Center surpassed "all other comparable building complexes within the city" and that the parking garage was secure.\textsuperscript{57} Dean Witter claims that it never would have leased the space, for about one billion dollars over twenty years, if it knew that the Port Authority already had knowledge that the parking garage was vulnerable to terrorist attack.\textsuperscript{58} Dean Witter is asking to rescind its lease and demanding more than $220 million in property and punitive damages.\textsuperscript{59}

Contract claims are usually thought to be brought less frequently than tort claims, since damages for the former are generally very limited—compensating the injured party for property damage, but not providing for pain and suffering or punitive damages.\textsuperscript{60} Since contract claims are very fact-specific, they tend not to be as susceptible to arguments based on broader notions of social policy as some of the other theories presented here.\textsuperscript{61} This will likely be a disadvantage for tenant-victims of terrorism urging courts to extend liability beyond the "four corners" of the lease. Further, of course, the injured party must have a legally cognizable basis for recovery under the contract as a party in privity, or perhaps as a third-party beneficiary.

However, there are often clear advantages to contract claims for plaintiffs. In one case where the court held that a landlord did not have a duty to protect a tenant from the criminal act of a third party, a recovery based on an express contract provision for the value of property stolen was not precluded.\textsuperscript{62} By imposing a contractual obligation to furnish security measures, courts may provide

\textsuperscript{57} Pacelle, supra note 3, at B10.

\textsuperscript{58} See id.; see also infra notes 190-99 and accompanying text (discussing the issue of whether discovery of previous security studies should be allowed).

\textsuperscript{59} See Pacelle, supra note 3, at B10; Douglas Feiden, D. Witter Fights WTC Lease, Says It Was Duped by PA, DAILY NEWS (New York), July 25, 1996, at 36. Some have suggested that Dean Witter's suit is largely motivated by business reasons rather than security concerns. While the firm locked in to a long-term lease at $35 per square foot, rents in the building have generally decreased to the point that some tenants now pay less than $25 per square foot. See id.

\textsuperscript{60} See Glesner, supra note 29, at 698 n.88. Further, when contract claims are brought, they often appear as alternatives to claims based on tort theories and are therefore cursorily pleaded and prone to dismissal by courts. See Markatos, supra note 52, at 516.

\textsuperscript{61} See Markatos, supra note 52, at 516.

\textsuperscript{62} See Richmond Medical Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988).
tenants with some means of correcting dangerous security problems before a tragedy occurs. This aspect of contract claims may also have particular application for the prevention of terrorism to ensure that landowners provide bargained-for structural and procedural safeguards. Finally, especially in the commercial context, a landlord's liability may be modified by contractual provisions, such as exculpatory clauses, which generally result in a more efficient allocation of risk between the two parties.

d. Negligence

The clear majority of claims in this area are based on negligence theories. In order to sustain a negligence claim, a plaintiff must show that the defendant's behavior created an unreasonable risk of harm by departing from a reasonable standard of care, and that such behavior was the proximate cause of the plaintiff's damages. A review of the various negligence formulations courts use provides ample support for the contention that the law regarding landlord liability for the criminal acts of third parties is unsettled. In general, a landlord's duty to provide security in this context may be based on a special relationship, special circumstances, or statutory requirements. Recurring questions raised by this type of liability that have particular applications to terrorism include: when a criminal act should be deemed to be foreseeable; when a third party's criminal act should be considered a superseding cause; and when a landlord's response should be deemed reasonable. Failure

63. See Markatos, supra note 52, at 516.
64. See infra notes 228-36 and accompanying text.
65. See Glesner, supra note 29, at 688.
67. With this said, the last basis for negligence claims, statutory violations, appears primarily in the residential context. Statutory requirements for the provision of different security measures do appear to be a growing trend, however, and may be applied with more frequency in the commercial context in the future. A landlord's compliance with statutory requirements usually does not protect him from liability, however, since they generally represent only minimum measures. See Glesner, supra note 29, at 702. For these reasons, and since no statutes currently address required antiterrorism measures, this basis for liability is not addressed extensively here, although it is suggested infra at notes 244-46 and accompanying text.
68. Of these questions, the issue of when an act is foreseeable (thereby establishing duty) is the most troublesome and is discussed in detail in the text. The issue of proximate cause, or more specifically, determining when a criminal act intervenes between the negligence of the landlord and injury to the tenant, is also dependent on foreseeability since if the defendant should have foreseen the criminal's actions, such actions will not be considered superseding causes. See RESTATEMENT (SECOND) TORTS §§ 448-49 (1977). Technically, the plaintiff must also prove the threshold issue that the landlord's act or omission was the legal cause of his injury as well. However, courts have apparently not discussed this concept in detail. One author contends that while it is not clear that the
to adequately resolve these questions suggests that under the current state of the law, landlords are largely unable to accurately predict either liability or the appropriate level of responsive security precautions. These problems will only be exacerbated when negligence claims, based on landlords' failure to protect tenants from terrorism, are allowed.

i. Negligence Formulations

Courts first developed the negligence formulation that landlords had a duty to protect tenants from criminal acts of third parties based on their special relationship because of the changing circumstances of the modern residential tenant. The underlying basis for this per se duty seems to be the landlord's superior position to perceive and prevent risks of criminal conduct. For ex-

causal link between provisions of security and likelihood of crime is legally sufficient, "situational crime prevention" studies do find that there is some relationship between opportunity and crime. Madeline Johnson, Landlord's Responsibility for Crime: Determining Legal Causation, 17 REAL EST. L.J. 234, 241 (1989). Similar arguments may arise with regard to the relationship between "opportunity" and the incidence of terrorism, although terrorists' motivations differ from those of "ordinary" criminals. See infra notes 140, 145 and accompanying text.

While it has apparently not been a recurring issue in the regular crime cases, if landlords are held liable for the effects of terrorist acts, they may attempt to argue that the behavior of controversial tenants (e.g., performing abortions) itself constitutes a superseding cause that precludes their being held liable. See infra notes 211-24 (discussing the effects of landlord liability on controversial tenants).

The reasonableness of a landlord's response also involves issues of foreseeability since landlords effectively need to predict what types of security will prove adequate to prevent attempted crimes. However, courts have not been consistent in finding what measures constitute adequate security. They have addressed the sufficiency of any number of security measures, from security guards to alarms to lighting, in different ways. See Jardel Co. v. Hughes, 523 A.2d 518, 525 (Del. 1987) (holding that whether one security guard on premises for each nightly shift was sufficient was question for jury); Peacock's, Inc. v. Shreveport Alarm Co., 510 So. 2d 387, 400 (La. Ct. App. 1987) (finding landlord partially liable for negligently allowing access to alarm controls); Shepard v. Drucker & Falk, 306 S.E.2d 199, 202 (N.C. Ct. App. 1983) (allowing landlord to present testimony comparing lighting at apartment complex with other complexes, since it was proper attempt to show whether reasonable care had been exercised). But see Carrigan v. New World Enterprises, Ltd., 446 N.E.2d 265, 270 (Ill. App. Ct. 1983) (holding landlord's breach of contractual obligation to maintain burglar alarm was not sufficient to trigger liability for tenant's rape). In one case, the court denied recovery where "the plaintiff failed to adduce testimony from a qualified expert in the field of building security thereby leaving the jury to speculate regarding the deficiencies in security, if any, at the time of the incident." Jannelli v. Powers, 498 N.Y.S.2d 377, 382 (N.Y. App. Div. 1986). Certainly, questions of when more sophisticated antiterrorism security measures are reasonable will be even more difficult for courts to handle. For example, when are crash barriers and photo I.D. access reasonable? This issue seems destined to foster a battle of experts at trial. See supra note 7 and accompanying text; infra notes 142-63.

69. See, e.g., Glesner, supra note 29, at 707.
70. See id. at 704.
ample, in *Samson v. Saginaw Professional Building, Inc.*, the Michigan Supreme Court, in adopting the special relationship theory in a commercial context, held that "[t]he existence of this relationship between the defendant [landlord] and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable risk of physical harm." Conversely, under the special circumstances formulation of negligence, foreseeability of a criminal attack serves to establish both duty and proximate cause. For example, in *Rowe v. State Bank of Lombard*, the court, allowing a claim for the tenant's employees in spite of a finding that the landlord-tenant relationship was not a special relationship, held that "when knowledge of foreseeable harm is combined with the landlord's sole ability to guard against it, without undue burden, the landlord has the duty."

### ii. Foreseeability—Definitions

The definition of foreseeability is often the determining factor in negligence claims, with more expansive definitions more likely to result in findings of duty. Three more major and two more minor definitions of foreseeability are commonly used. The most restrictive view of foreseeability requires that the landowner actually had notice of the risks involved. Foreseeability is generally proven under this definition by representations made by tenants or others, either notifying the landlord of past crimes as in *Kline*, or that attacks are possible or likely as in *Samson*. In a recent case, to prove that the defendant landlord had knowledge of existing risks, the plaintiff introduced evidence in the form of a letter from a commercial tenant advising the landlord of crimes on the premises and requesting that a security review be performed.

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71. 224 N.W.2d 843 (Mich. 1975).
72. Id. at 849 (citation omitted).
73. See Glesner, *supra* note 29, at 703. Unlike under the special relationship formulation, there is no presumption that landlord's have a duty to protect tenants. *Id.*
74. 531 N.E.2d 1358 (Ill. 1988).
75. *Id.* at 1367-68. Some commentators have noted that this dual role of foreseeability is problematic. While foreseeability is usually understood to define and limit the scope of a pre-existing duty, it is not generally used to "justify the imposition of duty." Haines, *supra* note 34, at 339; see also Sharp, *supra* note 23, at 21.
78. See *Old v. Lefmark Management Co.*, 1995 WL 500619, at *2 (Tex. Ct. App. Aug. 24, 1995). The letter also requested that "if the results of this survey indicate additional security is needed for the common areas, please take the appropriate action necessary to protect our employees and customers." *Id.* The actual notice standard is also apparently reflected in *Rowe*, where plaintiffs had to prove that the landlord actually knew
This type of subjective condition has significant drawbacks in that it may discourage landlords from looking for unsafe conditions and from being amenable to tenants' reports of unsafe conditions. Such a foreseeability rule for terrorism would generally result in landowners avoiding liability for these reasons, although perhaps not in the World Trade Center case. Most jurisdictions imposing a duty based on foreseeability now use some type of "knew or should have known" standard instead.

The prior similar incidents rule is a less restrictive, middle-ground definition which requires that a plaintiff produce evidence of prior similar criminal acts on the landowner's premises to establish foreseeability. While widely used, especially in commercial settings, the prior similar incidents rule also has several drawbacks. First, the landowner is effectively allowed one free assault before he can be held to have a duty. Second, some commentators and courts have stated that the prior similar incidents rule leads to "arbitrary results and distinctions" since it is often unclear how close in time, near in location, or analogous in conduct the prior incidents must be. If this standard were adopted in landowner liability for acts of terrorism cases, issues about where to draw the line for terrorist incidents (e.g., between a prior explosion and a bomb threat) would undoubtedly be at the forefront.

In perhaps the most famous denouncement of the prior similar incidents rule, the California Supreme Court, in 1985, abandoned it in *Isaacs v. Huntington Memorial Hospital*, adopting instead the

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79. See Fowler, supra note 43, at 145. In some cases, it is clear that courts have also used the defendants' security precautions as evidence of their "constructive notice" of risks. See Hardie, supra note 16, at 400.

80. See infra notes 190-99 and accompanying text (discussing the existence of a security report warning of susceptibility to terrorist attacks).

81. See Fowler, supra note 43, at 145.

82. See Welch, supra note 42, at 1060.

83. See id.

84. See Markatos, supra note 52, at 513 (quoting the court in Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985) (criticized by Ann. M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993))). This prompted one Florida court in rejecting this definition to declare that it would not "sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the . . . notion that at least one criminal assault must have occurred on the premises before the landlord can be held liable." Patterson v. Deeb, 472 So. 2d 1210, 1219 (Fla. Dist. Ct. App. 1985) (rejecting the prior similar incidents rule).

85. See Markatos, supra note 52, at 513. In jurisdictions following this rule, there is a general sense that in order to qualify as "prior similar incidents," crimes must be on the premises, be sufficient in number and recent enough to put the landlord on notice, and be sufficiently similar in nature to the incident in question. See Glesner, supra note 29, at 706.

86. 695 P.2d 653 (Cal. 1985). See Welch, supra note 42, at 1061.
totality of the circumstances definition discussed below. However, in 1993, the California Supreme Court essentially re-adopted the prior similar incidents rule in *Ann M. v. Pacific Plaza Shopping Center*, holding that a landowner is rarely, if ever, liable to a plaintiff absent evidence of prior similar crimes on the premises. The return to the use of the prior similar incidents rule in California perhaps signals that the view of the landlord as “social insurer” has fallen out of favor. If so, the curtailment of pro-victim approaches may have implications for how the application of landowner liability to acts of terrorism will be received by courts. In contrast, the rising rate of violent crime has often been held to be the primary influence in expanding the duty to protect. Thus, it seems likely that judges will also feel pressure to interpret standards expansively in response to the increasing visibility of terrorism. How courts respond to these conflicting demands for either more restrictive or expansive liability in addressing landlord liability for acts of terrorism may depend on the alternatives to this type of liability presented.

The totality of the circumstances approach mentioned above represents the high water mark of pro-victim landowner liability theories, requiring that courts analyze foreseeability in light of all the facts and on a case-by-case basis. While some jurisdictions

87. 863 P.2d 207 (Cal. 1993).
88. *See id.* The court went on to note, however, that the foreseeability of the harm should still be balanced against the burden of the duty imposed—reserving the questions of whether a commercial leasehold that is “inherently dangerous” or in the immediate proximity to a substantially similar business that has experienced prior crimes could trigger a duty without itself being the site of any prior similar incidents. *See id.* at 215-16; Welch, *supra* note 42, at 1065-66.
90. *See Glesner, supra* note 29, at 679-82 (noting a correlation between increasing crime rates and landlord liability in general); Milich, *supra* note 42, at 236 (noting that “not to be overlooked as influencing modern-day judges is the rising crime rate.”); Welch, *supra* note 42, at 1057 (noting that “crime problems of epidemic proportions caused courts to recognize . . . exceptions to their judicially created no-duty rules.”).
91. *See infra* Part III discussing alternatives.
92. *See Markatos, supra* note 52, at 514. Obviously, prior similar crimes on the premises remain highly probative under this theory, which effectively holds only that an absence of prior similar crimes does not foreclose liability. *See, e.g.*, Whittaker v. Saraceno, 635 N.E.2d 1185, 1188 (Mass. 1994) (“The previous occurrence of similar criminal acts on or near a defendant’s premises is a circumstance to consider, but the foreseeability question is not conclusively answered in favor of a defendant landlord if there has been no prior similar criminal act.”).
have applied it less frequently to commercial leaseholds, the totality of the circumstances definition has been called the "touchstone" of foreseeability. Factors that come in under the totality of the circumstances rule range from evidence of neighborhood crime (e.g., a computer printout of police records of reported crimes in the area), to environmental criminology studies (including "physical structure of the building, lighting, traffic patterns, and social and ecological circumstances linked to the potential for a criminal event"). By analogy, if studies about how terrorists choose targets are generally available, they could provide a basis for recovery under this formulation. The extent of a landowner's role in determining foreseeability is unclear under this definition.

Two more minor definitions of foreseeability that have appeared occasionally in various jurisdictions are the "first line of defense" and "tempting target" theories. Under the former, even if foreseeability is rather low (e.g., no prior incidents), when a landlord's nonfeasance amounts to what would generally be considered gross negligence (e.g., no door locks), courts will usually find a duty. While only a few courts have adopted the "tempting target" theory, a number of have acknowledged it as a factor in the determination on some other basis. This theory proposes that some leaseholds are by their nature particularly attractive for crime: bars, concert halls, and casinos. Both of these theories may have implications for the application of the landowner liability to terrorism in that the duty to simply warn of a terrorist threat would seem to be a good candidate for the "first line of defense rule," and leaseholds with controversial clients (e.g., abortion clinics) might be seen as "tempting targets" for terrorists.

93. See, e.g., Kaufman, supra note 15, at 97 ("To date, only California has adhered to this rule in the business-invitee context.").
94. See Markatos, supra note 52, at 514.
97. If a landlord is aware of such reports, at some level of specificity to her premises she may be considered to have notice under even the most restrictive definition of foreseeability. See supra notes 76-81 and accompanying text (discussing the role of notice in varying definitions of foreseeability).
98. See Kaufman, supra note 15, at 97.
99. See id. at 98.
100. See Sharp, supra note 23, at 32-34.
101. See infra notes 164-69 and accompanying text (discussing the use of warnings against terrorist attacks).
102. See infra notes 211-24 and accompanying text (discussing the negative implications to these types of tenants of imposing this duty on landlords).
iii. Foreseeability—Problems

Whatever its definition, determining foreseeability will likely be critical in predicting landowner liability in cases involving terrorist acts. When foreseeability is used both to establish duty and causation, it becomes a “murky crystal ball.” If foreseeability is used as a method of establishing liability in claims involving terrorism, courts must find a way to cure the problems of inefficiency and inequity it now generates. One such problem is that foreseeability is susceptible to judges’ and juries’ subjective beliefs. In the tort context, it seems that foreseeability should be related to fault. When applied to criminal acts, however, its boundaries often seem defined by courts’ concerns about public policy. For “new” causes of action, like landowner liability for terrorism, courts may be especially tempted to use policy considerations to define foreseeability.

Similarly, judges and juries tend to focus on the severity of resulting harm when determining, with the benefit of hindsight, whether a criminal act was foreseeable. For example, a landowner’s duty may be framed as to avoid creating unreasonable risks for his tenants. In assessing “reasonableness,” the landowner should consider the severity of the harm, alternatives available to him, and the probability of harm. While the severity of harm from terrorist acts is admittedly great, probability is very low for most leaseholds. Further, while the cost of safer alternatives may be generally low for ordinary criminal acts (e.g., safer locks, more lighting), the costs of preventing terrorism are generally significant.

This analysis would therefore suggest that fact finders

104. In fact, foreseeability has been held to just be a tool of the courts; changing as needed to mask public policy decisions about how broad a landowner’s duty should be. See Hardie, supra note 16, at 393; Welch, supra note 42, at 1057 n.25.
105. For example, one commentator feels that:

[C]ourts are uncomfortable with jury determinations of foreseeability as an element of duty in causes of action that have not yet matured and that have not yet been established as common theories with which the court is familiar. Until this maturation occurs, courts simply will continue to decide cases on the basis of policy considerations.

Hardie, supra note 16, at 392. Of course, this does not bode well for the development of a clear definition of foreseeability in landowner liability for acts of terrorism.
106. See Johnson, supra note 68, at 247. This is basically a permutation of the famous “Hand formula.” See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). One commentator has noted, however, that in an evaluation of this “formula” for criminal acts, the third factor, probability, has been underplayed since it is the most difficult to evaluate. See Johnson, supra note 68, at 248. Johnson further notes that empirical studies suggest a causal link between physical conditions controlled by the landlord and crime, but that there is no way to determine the exact probability of a given crime given a certain condition. See id.; supra note 68.
107. Further, in evaluating available alternatives, the landowner is generally found culpa-
must be especially reminded of the latter two components of the foreseeability/duty decision when determining liability for terrorist acts, since they will generally serve to temper the role that the severity of the harm should play.

Another of the problems with foreseeability in this context is whether it should be a question for the judge or jury. Because foreseeability is used in different ways by many courts, it is not clear whether courts have uniformly decided who should resolve the foreseeability issue.108 What is clear is that if the question does go to the jury, the landlord will likely be the loser. Jury verdicts are likely to turn not so much on facts but on the jury's sense of right and wrong.109 This puts landlords at an unfair disadvantage, creates confusion about what is required of them, and pressures them to settle.110 Problems with juries deciding foreseeability will be greater in terrorism cases, as compared to ordinary criminal cases, since methods of determining foreseeability, as well as what constitutes a reasonable security response, are more likely to be beyond the common knowledge of the average juror.

Given this status quo, the chances for developing a clear definition of foreseeability for use in cases involving landowner liability for acts of terrorism are slim. When standards are unclear, some commentators believe that landlords will "overprotect." The resulting "uncertainty zone" is wasteful to society because the amount spent on protection (and passed on to consumers) will not reduce enough violent acts to justify its costs, resulting in an inefficient use of resources.112 Further, cases where summary judgment would have been proper instead go to the jury to determine foreseeability; resulting in judicial inefficiency.113 Finally, a vague

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109. See Kaufman, supra note 15, at 100.
110. As one commentator has noted:

[Courts and commentators have long recognized that any case which goes to a jury under general instructions on the foreseeability of a heinous crime almost invariably results in a verdict for the plaintiff. With hindsight, juries inevitably find that more security should have been employed since the security provided was in fact inadequate. It is precisely for this reason that most cases surviving a motion for summary judgment result in large settlements for the plaintiffs.]

111. In other words, spend more on protection than the theoretically efficient legal standard would require in order to take into account the court's "margin of error" in determining fault. See Kaufman, supra note 15, at 105.
112. See id.
113. See Sharp, supra note 23, at 19.
standard of duty works to the immediate economic disadvantage of the defendant, or landlord.\textsuperscript{114} Therefore, should the negligence concept of landowner liability be applied to acts of terrorism, courts or legislatures must develop a more definitive standard of duty in order to ensure that these inefficiencies and inequities are not perpetuated.

3. Implications of a Commercial Setting

While the vast majority of the early cases imposing landlord liability for criminal acts involved residential buildings, acts of terrorism will probably target commercial leaseholds. Even though many commentators think that most jurisdictions have not distinguished between the two settings,\textsuperscript{115} not all commentators or courts are of that opinion and many believe the application of the law should not be the same.\textsuperscript{116} An analysis of the desirability of symmetry between the rules for residential and commercial leaseholds is important since any valid differences should affect the standards of duty adopted for terrorism.

First, since landlord liability for security was developed largely in response to courts' objectives of improving the quality of affordable housing,\textsuperscript{117} the initial purpose behind the imposition of liability is different. Second, commercial tenants are generally in a much better bargaining position than residential tenants; they are more likely to be able to negotiate for the levels of security protection they feel are adequate.\textsuperscript{118} This seems due to the fact that commercial tenants generally possess more resources and the fact that

\textsuperscript{114} There is no reason for plaintiffs not to forego suit because their legal fees are a percentage of recovery; there is little incentive for defendants to proceed to trial because they do have real legal costs and the probability of success and range of potential verdicts will be hard to quantify. See Hardie, supra note 16, at 405. This arguably puts defendants in the position of settling on amounts in excess of optimum.

\textsuperscript{115} See supra note 42.

\textsuperscript{116} See Royal Neckwear Co. v. Century City, Inc., 252 Cal. Rptr. 810 (Cal. Ct. App. 1988) (holding that a commercial landlord does not owe a duty to safeguard tenant's property from foreseeable criminal activity by third parties); Craig v. AAR Realty, 576 A.2d 688 (Del. Super. Ct. 1989) (denying liability of owner of large mall who did not retain control); Czech v. Aspen Indus. Ctr., 368 A.2d 938 (N.J. Super. 1976) (rejecting liability for landlord, the court distinguished commercial from residential tenancies in terms of fairness and public interest); Exxon v. Tidwell, 867 S.W.2d 19, 21 (Tex. 1993) (stating that the general rule in a commercial setting "is that a landlord is not liable to a lessee for injuries caused by an unsafe condition, which can include the unreasonable risk of harm from criminal intrusions, unless the landlord was aware of the latent dangerous condition at the time the premises were let."); Glesner, supra note 29, at 684 n.16 (noting that "many courts apply a lower standard of security for commercial buildings").

\textsuperscript{117} See Glesner, supra note 29, at 684 n.16.

\textsuperscript{118} See, e.g., Gibson & Klayman, supra note 43, at 27-28 (noting that "in most instances [commercial tenants] bargaining power is comparable—or perhaps superior—to that of the landlord. They can protect themselves by demanding express warranties that improve safety").
the commercial market generally offers more alternatives than the residential market. Third, a landlord’s physical control over the premises in the commercial setting is much lower. The need for public access, as well as a larger area to be protected, normally means that commercial buildings require more extensive security. A further control-type distinction is the definition of the premises boundary line. For example, when are parking lots or the street in front of a leasehold within the area that a landlord should protect? Fourth, security in a commercial setting generally has a different purpose than in a residential one. Banks and stores do not hire guards for the primary purpose of protecting customers; they are there to protect assets. An important economic distinction between the two settings is that most commercial tenants carry insurance and can theoretically pass on the costs of their own security measures through increased prices. Finally, commercial tenants are often in a better position than the landlord to assess the safety of the premises; defects in security may remain undiscovered by a landlord unaware of a commercial tenant’s particular safety needs. Commercial tenants are more likely to make a thorough inspection of the premises to determine if it is suitable for its purposes, relying less on the representations of the landlord. These considerations suggest that the duty to provide security in a commercial context should be lower than in a residential one.

119. See Selvin, supra note 37, at 328 n.61 (quoting Dietz v. Miles Holding Corp., 277 A.2d 108, 110 n.2 (D.C. App. 1971) which stated that “the residential housing market offers markedly less alternatives to tenants than does the commercial office building market”).

120. See id. at 323. For example, most commercial buildings by definition must be open to the public during the business day. In one case involving a government building, the court held that it was that nature of a such a building that it “remain accessible and open to the steady flow of dissimilar citizens” and that this was a reality that the court should realize in imposing liability. Id. at 327 (quoting Turner v. United States, 473 F. Supp. 317 (D.D.C. 1979)).

121. See id. at 325.

122. An apartment building, for example, is fairly self-contained. A commercial premises, like the World Trade Center, can extend over a city block (parking garages, walkways, plazas, etc.). Theoretically, the landlord’s protective liability should diminish as does his control—varying with proximity, although it is not clear where it should end. See Selvin, supra note 37, at 330; Sharp, supra note 23, at 14 n.3.

123. See Selvin, supra note 37, at 328.

124. See id. at 324.

125. See Gibson & Klayman, supra note 43, at 27. This consideration may not translate well to the terrorism context because of the often sophisticated and extensive security and structural measures required. For example, in the World Trade Center case, Dean Witter, certainly a sophisticated tenant, claims to have relied on the Port Authority’s representations. See supra notes 57-59 and accompanying text.

126. This rationale does not necessarily imply the same result if only one tenant occupies the leasehold, since then the tenant would be best able to provide protection. See Comment, Torts—Landlord-Tenant Relations—Landlord has Duty to Take Reasonable Precautions to Protect his Tenants Against Criminal Acts of Third Parties—Kline v. 1500
While this analysis does not necessarily demonstrate that there should be no landlord liability if applied to acts of terrorism, it does suggest that standards of duty should not be as strict as those used in the residential context.\(^\text{127}\)

**D. Summary**

The many different theories of recovery, formulations of negligence, and definitions of foreseeability available to plaintiffs make it difficult for landlords to both assess their liability for protecting tenants and develop an appropriate response to that liability. Since successful theories of recovery vary by jurisdiction and even by court,\(^\text{128}\) if landlord liability for criminal acts were applied to acts of terrorism, outcomes for victims would differ based on the location of the terrorist’s target.\(^\text{129}\) This confusion has led some commentators to note that regardless of Kline’s admonition that they are not insurers, landlords must in fact overprotect.\(^\text{130}\) This overprotection results in economic inefficiency and may prompt some landlords to seek other investment opportunities altogether.\(^\text{131}\) Furthermore, the number of different theories available and reluctance of courts to specifically define foreseeability decreases the chances of judicially resolving a case at an early stage.\(^\text{132}\) While current

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127. A final difference between commercial and residential tenancies is that a business expects customers and has employees. It has been assumed here that invitees, employees of tenants, and tenants are treated in the same manner (i.e., entitled to the same protection). Indeed this seems to be the case in most jurisdictions. *See* Doyle v. Exxon, 592 F.2d 44 (2d Cir. 1979) (finding duty to protect employee of tenant); Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 212-13 (Cal. 1993) (stating that because the commercial tenant generally is not a natural person and because it acts through its employees, “it cannot be seriously asserted that a tort duty that a landlord owes to protect the personal safety of its tenants should not extend to its tenant’s employees”); Haines, *supra* note 34, *Landlord-Tenant Relations*, *supra* note 126, at 950; Selvin, *supra* note 37, at 325. *But see* Compropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (denying plaintiff-shopper’s complaint stressing both the absence of landlord-tenant relationship and that the case involved commercial vs. residential property).

128. *See supra* note 30 and accompanying text.

129. While this is the case with many types of claims, it is particularly disturbing in the context of terrorism where preventive measures seem most effective when conducted based on a consistent national, if not international, scale. *See infra* notes 158-63 and accompanying text.

130. *See* Glesner, *supra* note 29, at 761; *supra* notes 111-12.


132. *See id.* at 707; *supra* note 113 and accompanying text.
victim compensation statutes appear inadequate, the alternative of landlord liability for criminal acts is subject to these significant drawbacks. Especially when viewed in the context of commercial leaseholds, current formulations of landlord liability will not provide the most efficient methods of victim compensation or increased prevention when the crime in question is terrorism.

II. LANDOWNER LIABILITY WHEN THE CRIME IS TERRORISM

Holding landlords liable for acts of terrorism raises issues beyond those involved in landlord liability for more mundane criminal acts. Topics more specific to terrorism that may affect the determination of whether landlord liability is an appropriate legal response can be divided into six categories: (1) defining terrorism; (2) preventing terrorism; (3) warnings; (4) insurance; (5) mass torts; and (6) evidentiary issues. Further, by imposing liability on landlords, society is really asking that they assume responsibility for preventing or protecting against terrorism. However, it is not clear that tort remedies provide a cost-effective incentive to do so. Finally, imposing liability on landlords may have extensive undesirable consequences, as landlords may not respond as desired. Examining these issues will support the hypothesis of the previous section: landowner liability by itself is not the most appropriate legal response to domestic terrorism.

A. Defining Terrorism

In terms of framing appropriate legal responses, a threshold issue for legislatures and courts will be who gets to decide when an act constitutes terrorism. Certainly, in order to determine whether landlord liability can be an effective preventive measure, the behavior to be prevented must be defined. For purposes of this Note, the term terrorism has generically been used to refer to bombings—the type of act most likely to impact landowners. It

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133. One additional issue beyond the scope of this paper is the treatment of government entities in their roles as landlords. As evidenced by the Oklahoma City bombing, government buildings may often be the target of terrorist attacks. While there may be certain filing or notification requirements specific to government landlords, it appears that there are tenable arguments that there should be no difference between suing government and private landlords, since the former are acting in a proprietary capacity. See Wise, supra note 24, at 1. See generally, ATTORNEY GENERAL'S ADVOCACY INSTITUTE, U.S. DEPT. OF JUSTICE, FEDERAL TORT CLAIMS ACT LITIGATION SEMINAR (1990); IRVIN M. GOTTLEIB & PAUL H. GANTT, UNCLE SAM AS A LANDLORD UNDER THE FEDERAL TORT CLAIMS ACT (1967).

134. For example, in other areas of the law, the success of a claim often depends, at least in part, on who gets to define it; that is, whether an act results in the violation of a federal statute (as defined in federal court) or in a breach of contract (as defined in state court).

135. Cases brought as a result of terrorist bombings on airlines, such as the Pan Am
seems, however, that no “one definition of terrorism has gained universal acceptance,” even the United Nations is unable to agree on a definition. Whatever its definition, Americans have traditionally considered terrorism to be a matter for international law. Americans think that if terrorism occurs in the United States, it must have “come in” across borders. Clearly though, as shown by the Oklahoma City bombing, terrorist acts may be entirely domestic. Further, the face of terrorism has changed over the past two decades. Skyjackings and spectacular raids like the one at the Munich Olympics have been replaced by car bombs. Based on this analysis, the definition of terrorism will no doubt change as both politics and technology change. One constant is that terrorists have very different motivations from ordinary criminals; a terrorist

incident over Lockerbie, involve very different legal theories than those at issue here since the standard for liability is outlined statutorily under the Warsaw Convention. See, e.g., In re Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804 (2d Cir. 1994). Other United States cases have involved acts that could be defined as terrorism, but do not raise the same issues as the types of acts involving domestic landowners as contemplated here. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (relatives of Israelis killed in a PLO attack brought suit under the Alien Tort Claims Act); New Market Investment Corp. v. Fireman’s Fund Ins. Co., 774 F. Supp. 909 (E.D. Pa. 1991) (Chilean grapes laced with cyanide seized at customs). More random acts of retribution not involving political overtones (e.g., acts committed by disgruntled employees and sociopathic individuals) are also not addressed here. See, e.g., Douglas Waller & Tom Morganthau, Caught by Surprise, NEWSWEEK, Mar. 8, 1993 at 28 (quoting Jerry Bremer, the State Department’s top counterterrorism official in the 1980s who commented after the World Trade Center bombing, “[W]e shouldn’t automatically [assume] this is the beginning of a new world war... It’s entirely plausible that this is some disgruntled employee who’s been fired.”); cf. Vrindavan v. Malcolm, No. 64839, 1994 WL 86225 (Ohio Ct. App. March 17, 1994) (involving a lone gunman entering Cleveland public library at noon and randomly shooting three people). Finally, a number of domestic cases use the term “terrorism” or “terroristic” but really involve more ordinary, random criminal activity, such as “terroristic threatening,” which is a misdemeanor in some states. See, e.g., Parker v. Norris, 859 F. Supp. 1203 (E.D. Ark. 1994).

136. Porras, supra note 6, at 125. See also Captain Bruce T. Smith, Assertion of Adjudicatory Jurisdiction by United States Courts Over International Terrorism Cases, ARMY LAW., Oct. 1991, at 15 (noting that each state has advanced a different definition of the term; in effect, “one man’s terrorist is another man’s freedom fighter”). The term terrorism has therefore been held to be “Humpty Dumpty,” or anything we want it to be. See Porras, supra note 6, at 124; see also, R. Thackrah, Terrorism: A Definitional Problem, in CONTEMPORARY RESEARCH ON TERRORISM 24 (Paul Wilkinson & Alasdair M. Stewart eds., 1987). A federal statute currently defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents,” usually intended to influence an audience. 22 U.S.C. § 2656f(f)(2) (1994) (prescribing annual country reports on terrorism by the Secretary of State). The United States Department of Defense calls it “the unlawful use or threatened use of force or violence against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.” Smith, supra, at 15.

137. See Porras, supra note 6, at 144.

138. See Waller & Morganthau, supra note 135, at 28 (contending that the reason for the change are intelligence agencies’ increased abilities to monitor terrorist activities).

139. See infra notes 152-54 and accompanying text.
act is neither profit-motivated nor a random assault, it is usually part of a larger plan, and is usually calculated for media effect. If landlord liability for criminal acts is applied to terrorism, we are effectively saying that these types of definitional differences do not matter, although they must affect the kinds of preventive measures that are effective.

B. Preventing Terrorism

Just as in the context of criminal acts, making landlords liable for terrorist acts really means that we want landlords to assist in prevention or protection. While in the criminal context structural changes by landlords (e.g., alarms and lighting) are of prime importance, most experts agree that structural changes by themselves will not thwart a terrorist attack. As Richard Moore, an associate director with FEMA, explained, "You can make a building less susceptible to severe damage, but it's got to be done in concert with other things—security for instance . . . ." Experts agree that the most effective counterterrorist measure is intelligence, especially infiltration of terrorist organizations. There are therefore three principal ways to prevent terrorist acts: structural changes to buildings, private security changes, and government actions. To determine whether landlords should be held liable, the effectiveness of the first two must be evaluated. Based on the following analysis, the argument for resting the primary burden of prevention with governments rather than private landowners is even stronger here than in the context of regular crime.

Attempting to prevent terrorism assumes that terrorist groups act rationally; that is, they attempt to minimize costs and achieve their own ideas of successful outcomes. Indeed, there is evidence that terrorist groups respond to measures that raise the risks of a particular type of attack. In this regard, while creating an absolutely damage-proof building is both architecturally impossible and prohibitively expensive, there are a number of ways to make build-

141. And further, they should affect who we want to have define (courts vs. legislatures) the behavior that constitutes terrorism. A case-by-case development of a definition in the courts would seem destined to perpetuate the unpredictability and inequity currently associated with foreseeability.
142. See supra note 15 and accompanying text.
144. “If you want to counter terrorism, 80 percent is a matter of getting good intelligence. . . . You can fiddle around with the other 20 percent all you want, but in terms of prevention, intelligence is the key.” Masland et al., supra note 7, at 56-57 (quoting L. Paul Bremer, who headed President Reagan’s counterterrorism office).
145. See Shaikh, supra note 140, at 2134.
ings more resistant to "human evil." Various structural modifications include imposing setbacks, preventing flying glass, and infrastructure supports. Structural changes are not cheap, however, and in fact may increase dangers for other perils (e.g., fire). Changes of a preventive rather than protective nature, like restricting access and using camera surveillance are more practical.

For what has been called "the most terrible weapon in a terrorist's arsenal"—the car bomb—adequate preventive measures may not exist. Robert Kupperman, a terrorism expert at the Center for Strategic and International Studies in Washington, noted that car bombs are a "throw away" weapon requiring little planning or support and fewer participants than the more traditional terrorist acts. A munitions expert who formerly worked with the CIA noted that very few places in the United States are protected from car bomb attacks. "People in the intelligence community have been warning for years that this kind of thing could come to the United States . . . . And in the United States, we have bigger cars than they do in Europe." Indeed, it seems the simplest of terrorist

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147. "The critical thing is to keep the weapons as far from the building as possible, by imposing some setbacks." Id. (quoting Eve Hinman, security analyst with Failure Analysis Associates). Examples of setbacks include pop-up bollards, such as pipes filled with concrete that can be recessed to street level and raised when needed to restrict vehicular traffic. See id.
148. "In a bomb attack, generally speaking, the primary sources of both property damage and bodily injury is flying glass." Id. (quoting Ron Massa, president of Loron Corp., a high-tech security consultant, who also noted that a 1993 Irish Republican Army bombing in London showered the surrounding area with 700 tons of shattered glass). After the Oklahoma City bombing, more than 400 buildings in the area had glass broken and about 75% of the people injured were hurt by flying glass. See Hofmann, supra note 146, at 3; see also Leslie Scism & Joe Davidson, Insurance Losses in Oklahoma Bombing Seen Topping Several Hundred Million, WALL ST. J. May 4, 1995, at A4. Preventive measures include installing laminated glass, like that used in cars. Hofmann, supra note 146, at 3.
149. Bombs, for example, produce enormous vertical thrust capable of "peeling roofs right off like a sardine can," requiring that they essentially be tied down. Hofmann, supra note 146, at 3. As opposed to retro-fitting buildings for restricting access, structural hardening is much more difficult, is costly, and is of questionable effectiveness. The Oklahoma City bombing made us all familiar with the structural concerns present in trying to protect against a bomb blast. See id.
150. See id. For example, security bars on windows can hamper a tenant's escape from a burning building.
151. "I think the answer has to be in the prevention area as opposed to protection." Id. (quoting Fred Deacon, highly respected risk engineering manager for Kemper Insurance).
153. See Waller & Morganthau, supra note 135, at 28.
154. Dickey, supra note 152, at 29; see also Sunday Today, (NBC television broadcast, Jan. 7, 1996) (interviewing Brian Jenkins, a terrorism expert who noted a trend discernible in the 1990's toward the increasing incidence of large-scale indiscriminate violence exem-
plots and weapons can foil the most sophisticated security. Security at the Olympic games in Atlanta involved more than 30,000 police and security experts, more than 2,000 explosives experts, 40 bomb-sno\-ffing dogs, 1,000 video cameras, 200,000 I.D. badges, 100 computerized command centers, and microchips that stored digital images of the bearer’s palmprint; all at a cost of over $117 million. The security teams in Atlanta had practiced against a release of nerve gas, a massive bomb attack inside the games, and a plane hijacking, but were unable to protect visitors from a crude pipe-bomb left unattended in a bag.

A further problem with preventive measures is that they serve to merely relocate criminal behavior. For example, while fortification of diplomatic facilities has resulted in a decrease of known terrorist missions aimed at them, incidences of assassinations and hostage-takings outside protected facilities against civilians has increased. This substitution phenomenon suggests that all landowners would have to continually refine structural and procedural security to thwart terrorists ready to relocate or develop new tactics in order for preventive measures to be effective. This highlights the need for more retaliatory or interventionist measures by government.

Experts believe that the preferred way to prevent terrorism is to “identify and break up terrorist cells, possibly expel or prevent the entry of individual terrorists and thwart their plans.” The FBI, which has the primary responsibility for counterterrorism measures in the United States, perceives that counterterrorism is still a “growing field” and has transferred a number of agents from counterintelligence to that area. One question raised after the Oklahoma City bombing was whether any free society could ever prevent terrorist acts. As Fred Moore of FEMA noted, “I don’t

156. See id.
157. Shaikh, supra note 140, at 2141-42. In 1990, for example, “hard” targets (military, government, and diplomatic) accounted for 25% of attacks, businesses and other targets accounted for 75%. See id. at 2142 n.42 (citing United States Department of State, Patterns of Global Terrorism: 1990 37 (1991)).
158. Howard M. Shapiro, The FBI in the 21st Century, Address at the Cornell Law School (Oct. 18, 1994), in 28 Cornell Int’l. L.J. 219, 223 (1995); see also James Q. Wilson, The Case for Greater Vigilance, Time, May 1, 1995, at 73 (“Terrorist groups . . . are best attacked by infiltration. This means either planting an undercover agent in their midst or recruiting one of their members as an informant. This is the job of the FBI.”).
159. See Shapiro, supra note 158, at 223.
160. See id.
161. See Wilson, supra note 158, at 73.
think any government, even the most authoritarian, has found a way to eliminate terrorism.” Indeed, even though the Oklahoma City tragedy appears wholly domestic, it seems likely that many acts of terrorism within the United States will be perpetrated by those who come from outside the country or flee the country afterwards. Without a unified international effort, or at least consensus on means of deterrence and agreement to accept the costs that a global antiterrorism strategy would entail, efforts by agencies of any one nation seem destined to be reactive. These comments suggest that at the least a national policy, rather than the state-by-state approach inherent in landlord tort liability, is warranted.

Many of the same concerns about the effectiveness of private citizens as compared to government in preventing regular crime apply in the terrorism context. The differences noted above—that structural changes are even less effective but more costly, and that there is a greater necessity for national if not international government intervention—reinforce the conclusion that landlord liability as a method of increasing terrorism prevention should be restricted.

C. Warnings

In addition to intervention, the term “prevention” as used here is assumed to include protection, or measures designed to lessen the damage caused by terrorist attacks. One way of protecting tenants and invitees is to require landlords to warn them about terrorist threats received. The question of whether mere warnings about the risk of crime (or terrorism) on the premises could ever be sufficient to avoid liability has not been addressed by litigation. Theoretically at least, warnings themselves could be an adequate security measure in response to lower levels of foreseeable terrorism. However, if warnings would be sufficient, there may still be a question about whether it would be equitable or efficient to require landlords to issue them. Disclosure of terrorist threats is not an easy issue as there are several competing concerns in a determination of when to notify tenants or customers. Disclosure could theoretically reduce lawsuits if the threat is carried out, but could hurt business if it is not. Disclosure can encourage public dialogue that can help law enforcement—or encourage copycats. For example, after the World Trade Center bombing there were seventy bomb threats a day in New York City. The classic “boy who cries wolf” syndrome creates a risk that real threats will be ignored.

163. See, e.g., Shaikh, supra note 140, at 2134.
165. See id.
Finally, however, there are advantages to public notification in that citizens can help with prevention. For example, British officials in particular were dependent upon citizens to help spot IRA bombs.\(^{166}\)

If a landlord guesses incorrectly and does not issue a warning, certainly issues of notice and reasonable response are implicated.\(^{167}\) For example, over Easter weekend in 1995, Disneyland received a threat that a chemical attack would take place.\(^{168}\) Disneyland officials decided not to warn visitors, but did summon health officials and a chemical warfare team before the FBI determined it was a hoax.\(^{169}\) If something had gone wrong that weekend, Disneyland would have been faced with the prospect of defending its decision not to warn customers in front of an unsympathetic jury. The best solution to this problem may be to statutorily establish that landowners have a duty to inform the appropriate government authority if they are aware of any risks. The authority can then make a determination about any necessary warnings. In that way private landowners have a clear role in prevention, while determinations about public policy are left to the experts.

**D. Issues from the World Trade Center Bombing Litigation**

The civil litigation following the World Trade Center bombing provides examples of some of the more detailed legal issues likely to arise when landlord liability is applied to acts of terrorism. An examination of some of these concerns (namely, insurance, mass tort, and evidentiary issues) reinforce the conclusion that this type of litigation, which requires massive amounts of resources to pursue, will not likely provide an efficient legal response to domestic terrorism.

1. Insurance

Since the targets of terrorist attacks are likely to be commercial leaseholds, and since commercial leaseholds generally carry insurance, litigation following a terrorist act will likely consist of a

\(^{166}\) See *id.*

\(^{167}\) See *supra* notes 76-81 and accompanying text. For example, while the United States Department of Transportation is now required to assess the safety of foreign airports and issue warnings when they do not meet safety standards, airlines themselves decide what, if anything, to tell passengers about known threats. Many airline officials feel compelled to disclose threats because of litigation following the Pan Am Lockerbie incident, where juries awarded almost $40 million to plaintiffs for Pan Am’s failure to take proper precautions. A terrorist bomb downed Pan Am Flight 103 over Lockerbie, Scotland in 1988. Travelers on the flight were not informed that terrorists had threatened several flights, like Flight 103, that had originated in Frankfurt, Germany.

\(^{168}\) See Rainey, *supra* note 164, at 1.

\(^{169}\) See *id.*
battle between insurance companies. Insurers of tenants will attempt to subrogate claims that they have been forced to pay, probably by alleging that either the policyholder or someone else (i.e., the landlord) was negligent.170 For example, in the World Trade Center litigation, one insurance company, Phoenix Assurance, is seeking to recoup a $5-10 million payout on a property and business interruption policy for Teleport Communications Group, Inc., a World Trade Center tenant. A lawyer for Phoenix Assurance notes, “Insurance companies have an obligation to policyholders and shareholders to minimize their losses."171 In fact, insurance companies with significant claims are well represented among the remaining plaintiffs in the World Trade Center litigation.172 Of course, having insurance companies involved as final litigants first requires that they have decided to honor policyholders’ claims.173

When claims are significant,174 insurers may try to avoid them under any number of exceptions to coverage. For example, insurers might try to argue that a terrorist bombing is not a covered “occurrence” because it was technically not an accident but a deliberate act. Theoretically, this type of maneuvering should not be successful, “as the use of the term ‘accident’ was [not] intended to deprive policyholders of coverage for deliberate acts of violence against them by unknown third parties.”175 A more likely tactic when damages from a terrorist attack are at issue may be for insurers to claim refuge under a “war risk exclusion.” The war risk exclusion generally bars coverage for damages resulting from “war, invasion, civil war, revolution, insurrection or warlike operations, whether there be a declaration of war or not.”176 In practice, this exclusion has generally been limited to actions taken by hostile

170. See Pacelle, supra note 3, at B1. One New York insurance lawyer notes that “[i]nsurance companies do not pay any large losses without a fight. I call it insurance nullification by litigation.” Id.

171. Id. (quoting Phoenix Assurance lawyer Blair Fensterstock).

172. See, e.g., Wise, supra note 2, at 1 (noting that one firm represents 20 insurance companies seeking to recover over $75 million in claims).

173. For damage attributable to a terrorist attack, any number of policies might apply. Direct physical damage to insured property as a result of fire, smoke, or vibrations is generally covered by a property policy. Indirect losses resulting from a tenant’s loss of use of their property may be covered by either a property or business interruption policy. General liability policies should cover tenants for damages they may incur because of damage to a third party (e.g., if a customer’s business is interrupted because of the terrorist act). See Rhonda D. Orin, Insurance May Provide Glimmer of Light for Darkened World Trade Center Businesses, N.Y. L.J., Mar. 10, 1993, at 1.

174. Using the World Trade Center bombing as an example, indirect losses alone can often be significant. New York City officials have estimated that companies and government agencies could lose $692 million if the World Trade Center was closed for a week. See id.

175. Id. at 7.

176. Id. at 6.
government entities or attempts to overthrow government entities.\footnote{177} For example, at least one insurance company has tried, albeit without success, to argue that the war risk exclusion should preclude coverage for damages resulting from a hijacking.\footnote{178} Further, should insurance companies attempt to assert an exclusion, they generally have the burden of proof to show why coverage should not apply.\footnote{179} Specifically with regard to the World Trade Center, shortly after the bombing, two of the biggest carriers in the property and business-disruption fields took different positions on whether the war risk exclusion would apply in that instance.\footnote{180} In many European countries, insurance policies now include specific terrorism exclusions, however, the World Trade Center's policies did not.\footnote{181}

Given that insurance companies for tenants injured by a terrorist act will most likely have to honor claims for property loss, business interruption, and general liability,\footnote{182} it is likely that they will attempt to subrogate claims via litigation. As insurance companies undoubtedly have the resources to be powerful plaintiffs, commercial landlords whose properties have been the site of terrorist attacks will likely be harder pressed to defend themselves against allegations of negligence than their residential counterparts whose tenants' losses may often be uninsured.

2. Mass Torts

Due to the nature of the terrorist attacks contemplated, a great number of plaintiffs will be involved in subsequent litigation against landlords for a given incident. In the wake of the World

\footnotesize{177. See id.}  
\footnotesize{178. See Orin, supra note 173, at 1. The court, in Pan American World Airways v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir. 1974), relied on the fact that Pan Am was covered by an "all risk" policy, where all risks not excluded are automatically included.}  
\footnotesize{180. Hartford said that there should be no problem with coverage because under its policies the exclusion only applies if war has been declared. Aetna argued that it was too soon to say how the exclusion would be applied. See Wise, supra note 24, at 1. The spokesperson for Hartford said that standard clauses (in this case coverage exclusions for damage attributable to "insurrection and acts of war") are recommended to the industry by the Insurance Services Office, a trade organization, and that each company has its own interpretation of such language. Id.}  
\footnotesize{181. See William B. Bice, Comment, British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re, 15 U. PA. J. INT'L. BUS. L. 441, 448 n.39 (1994) (stating that the World Trade Center provides an ideal example of a no-exclusion policy). Should incidences of domestic terrorism continue, it may not be long until domestic insurers covering U.S. commercial risks attempt to use terrorism exclusions as well.}  
\footnotesize{182. See supra note 173 and accompanying text.}
Trade Center bombing, an eight-firm steering committee was appointed to direct the litigation of the 170 civil actions filed.\textsuperscript{183} For purposes of judicial economy (if not ecology),\textsuperscript{184} it makes sense to litigate all the World Trade Center claims simultaneously. It is also important to ask, however, whether there will be any undesirable side-effects to doing so.

For example, in more typical class action cases,\textsuperscript{185} concerns arise as to whether the focus will shift from client to lawyer, from damages to attorney’s fees, and from litigation to settlement. Apart from saving costs, which primarily benefit the defendant, it is probably to the plaintiffs’ advantage to have the cases consolidated, since their claims will tend to reinforce each other.\textsuperscript{186} Apparently, in this case the Port Authority thought that the cost of litigating all the claims separately would far outweigh any such intangible benefit gained by the plaintiffs. As long as these types of concerns of both defendants and plaintiffs can be managed efficiently, which remains to be seen in the World Trade Center litigation, perhaps the fact that terrorist acts will create mass tort litigation is not a significant problem, at least as to its effect on the substantive law.

\textsuperscript{183} See Today’s News Update, N.Y. L.J., Aug. 2, 1994, at 1. The World Trade Center cases were consolidated on June 4, 1994 upon a motion of the Port Authority which argued that (1) the claims all involved Port Authority’s liability; (2) the salient facts involved (place, date, time) were the same in every case; (3) the fact that there were some issues of law and fact that were not common should not defeat the motion to consolidate since there was at least one important issue of law/substantial fact in common; and (4) consolidation would avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent injustice resulting from divergent decisions based on the same facts. See Green & Tripathi, supra note 1, at 48-49.

\textsuperscript{184} As Justice Sklar noted in the course of the first conference of the World Trade Center litigation, “We have to have coordination to avoid wasting your time and my time, . . . [f]ailure to organize . . . would be anti-ecological. . . .” Wise, supra note 2, at 1.

\textsuperscript{185} Courts have avoided the use of class actions for “mass accidents,” perhaps largely because of differences between plaintiffs’ injuries or damages. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (allowing certification of a class action for asbestos claims).

\textsuperscript{186} In the World Trade Center litigation, of the roughly 114 lawyers representing the 661 claimants, only four objected to the creation of the committee, and they will manage their cases separately. See Today’s News Update, supra note 183, at 1. The lawyer leading the committee, Blair Fensterstock, represents Phoenix Assurance Co., one of the insurance companies attempting to subrogate claims related to the blast. See Wise, supra note 2, at 1, 5; see also supra note 9 (discussing the types of claims filed). In making recommendations for the committee, Fensterstock acknowledged that it is not always easy to please the variety of plaintiffs. For example, some lawyers with personal injury claims are concerned that their clients’ interests might get lost if the committee is dominated by lawyers representing commercial clients. See Wise, supra note 2, at 5.
3. Evidentiary Issues

In attempting to hold landlords liable for terrorist acts, some interesting evidentiary issues may develop. For example, in the wake of the bombing, the World Trade Center has undertaken significant additional structural modifications and security procedures. It does not appear to have been addressed yet, but one question may be whether the plaintiffs can introduce evidence of these subsequent remedial measures to attempt to prove that the Port Authority either knew that existing security was inadequate or that alternate cost-effective safety measures were available. The New York equivalent of Federal Rule of Evidence 407, which excludes “evidence of the subsequent [remedial] measures... offered to prove negligence or culpable conduct” would be at issue. As the Federal rule itself notes, however, it “does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”

Thus, plaintiffs’ attorneys will likely find a way to get evidence of the modifications admitted.

Another evidentiary issue that will undoubtedly arise in terrorism cases against landlords, and indeed has arisen in the World Trade Center litigation, involves whether discovery of previously conducted security studies should be allowed. Plaintiffs in the World Trade Center bombing case requested that the Port Authority turn over some sixty-two documents that relate to security audits of the complex conducted in the mid-1980s. The Port Authority has resisted production of the materials on grounds that the documents “are subject to the public interest privilege and/or that they contain information which is neither material nor necessary in the prosecution of the action.” Discovery of the security reports is

187. See supra note 7.
188. FED. R. EVID. 407. New York state courts do not follow the Federal Rules of Evidence, but they do follow a common law rule which holds that evidence of subsequent remedial measures is not admissible at trial to prove the negligence or culpable conduct of a defendant. See Particia A. Brass, Federal Rule of Evidence 407: Should It Apply to Products Liability, 11 TOURO L. REV. 253, 280 (1994).
189. FED. R. EVID. 407.
191. Id. "The public interest privilege applies to 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or their sources should not be divulged.'" Id. (quoting Cirale v. 80 Pine St. Corp., 316 N.E.2d 301, 303 (N.Y. 1974)). While perhaps limited to quasi-governmental agencies like the Port Authority, many of the policy arguments presented by the public interest privilege issue are likely to be raised in admissibility questions generally. For example, in arguing against discovery of the docu-
a key issue for the plaintiffs since they allegedly contain comments like "the vulnerability of the World Trade Center to the terrorist is substantial . . . . It is an extremely inviting target," and that the parking garage "presents an enormous opportunity at present for a terrorist to park an explosive filled vehicle that could affect vulnerable areas." The same reports also allegedly contain specific recommendations to tighten security, including closer monitoring of the garage, and banning all public parking. The lawsuit filed by Phoenix Assurance alleges that "as far as we can tell, [the reports were] almost entirely ignored." In attempting to establish that the Port Authority was negligent in failing to protect tenants from the bombing, the plaintiffs are attempting to show that the Port Authority was aware of security problems and did not respond reasonably to them. Plaintiffs' attorneys are therefore also undertaking discovery by seeking testimony of consultants and Port Authority employees who might have been aware of the risk.

As noted above, the plaintiffs claimed that the documents should be produced since they are relevant to Port Authority's recklessness (or knowledge) and foreseeability. In response, the
Port Authority argued that since the explosion occurred on a sublevel, any information about a safety system, device, or practice occurring at or above the concourse level is irrelevant. The judge dismissed the Port Authority's argument, holding that "[t]he mere fact that the explosion occurred in a level beneath the concourse does not necessarily render irrelevant the documents... relating to the concourse or floors above the concourse." Further, he noted that "the PA may assert as a defense that, while numerous recommendations were made, it was unable to take all of the recommended steps because of, inter alia, cost and that therefore it had to prioritize the implementation of them." The judge warned that by asserting such a defense—that it acted reasonably and with due care in following the reports and implementing recommendations found therein—the Port Authority could then be compelled to produce the documents.

While the public interest privilege may be specific to a quasi-governmental agency like the Port Authority, many of the relevance and policy issues noted could easily arise in a completely private setting. For example, though not raised by the Port Authority, other relevancy arguments could include whether the type of harm is not specifically addressed by the security report, the security report is out-of-date, or even that the contents of the report would likely cause the jury to be prejudiced against the defendant. Finally, defendants are likely to make the policy argument that the admissibility of security reports may actually constitute a disincentive to conduct them in the first place. Therefore, evidentiary issues specific to terrorism will require significant resources and add another layer of complexity to an already complex area of litigation.

E. The Effects of Finding Landlords Liable

All of the problems endemic to terrorism discussed above suggest that imposing liability on landowners is not an efficient mechanism for increased prevention. Further, imposing liability on landowners may have some unintended, potentially negative effects because landowners may not respond as desired. Such unintended consequences may be divided into five categories: (1) landowners...
may not respond to liability with increased security; (2) landowners may even treat liability as a disincentive to engage in further security measures; (3) landowners may use liability as justification for impinging on tenants’ rights; (4) landowners may shift resources to other investments (unintended macroeconomic consequences); and (5) landowners may attempt to shift the risk of liability to other parties.

1. Liability as Incentive

In determining whether landowner liability will result in increased protection against terrorist attacks, beyond the analysis of which preventive measures may be effective against terrorism, an examination of whether landowner liability has resulted in increased security measures against regular criminal acts may be helpful. Commentators have argued both for and against liability under tort law as an effective deterrent (or incentive). For example, one author argues that finding landlords liable for protecting tenants and invitees has induced landlords to make “considerable efforts” to render their buildings negligence-proof, if not crime-proof, by hiring extra lobby personnel and security guards, and improving lighting. Further, apparently due to liability exposure, almost every major fast food company has recently hired a security director and over the past ten years these companies’ security budgets have approximately doubled.

The same author notes that tort law as a deterrent is only moderately successful, and questions whether deterrence benefits outweigh the costs imposed. For example, it is unclear whether imposing liability on landlords actually prevents crime overall or merely serves to relocate it. Many commentators also point out the social costs, including potential violations of tenants’ rights, and increased chances for corruption, discriminatory enforcement, and vigilantism, which could result from the deputization of the citizenry and the fact that law enforcement essentially becomes private. For example, from 1969 to 1990 the value of private

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200. See supra notes 142-63 and accompanying text.
202. See id.
203. See id. at 444.
204. See Glesner, supra note 29, at 773.
205. See id.; see also Kaufman, supra note 15, at 109 n.24 (“The police function is highly specialized, involving skills and training which the government alone can provide. There is no room for the private devices of frontier days.”); infra notes 211-224 and accompanying text (discussing potential violations of tenants’ rights that could result). But see Fred C. Zacharias, The Politics of Torts, 95 YALE L.J. 698, 709 n.70 (1986) (arguing that “there is little danger that imposing liability will cause [security officers] to become
security industries rose from $2.5 million to $18 billion annually and the number of employees increased from fewer than 300,000 to nearly two million. Currently private security personnel outnumber police by more than two to one, but are largely unregistered and usually not as well trained.

Despite these concerns, and while it seems unfair to find that a person is entitled to more protection from a landowner than from police, business and industry do have the financial and technical resources available for aiding the prevention of crime (or terrorism). It therefore seems reasonable to conclude that while imposing liability on landlords does provide a moderate incentive to increase crime prevention, such incentive must be evaluated on a cost-benefit basis. For terrorism, this analysis suggests that the preventive measures that landlords can take by applying private resources seem to be less cost-effective than the measures that government can take by applying public resources.

2. Liability as Disincentive

The propensity for liability to act as a disincentive is perhaps most apparent under the voluntary assumption of duty theory of liability. In the commercial context, this type of liability would likely be triggered frequently since a large percentage of commercial landowners provide some level of security. For example, assume that there are two landlords who both can foresee that at some point there will probably be a terrorist act upon one of their tenants (e.g., each leases to an abortion clinic). One landlord chooses to ignore various threats, while one hires a security guard in response. When tenants or their invitees ultimately suffer injuries, under the voluntary assumption of duty theory, the landlord who hired the security guard is more likely to be found to have a duty and will probably face a jury to defend the reasonableness of his conduct. Under this analysis, it is hard to see why any landlord would initially take what is undoubtedly the safer course,

vigilantes or "officious intermeddlers" into private affairs'".

206. See Glesner, supra note 29, at 785.
207. See id. In the context of terrorism, private security firms have initiated specialization in "crises response" services to respond to "acts of violence . . . directed at a company, governmental agency or individuals. . . ." WACKENHUT CORPORATION CRISIS RESPONSE SERVICES BROCHURE (on file with author).
208. See Kaufman, supra note 15, at 112 n.106 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 35, 289 (1967)); Zacharias, supra note 205, at 709 ("The government's general responsibility for law enforcement does not eliminate the business's separate duty to supplement public compensation and public protection.").
209. See supra notes 49-54 and accompanying text.
210. This passage is based loosely on the "two restaurants" example in Adler, supra note 50, at 884.
since he would be, at best, in the same position as his counterpart who did nothing—facing a potentially hostile jury to defend his conduct. On the other hand, if the landlord does not provide security, he still has not eliminated risk. Without empirical data, it is difficult to gauge disincentive effects. However, it seems reasonable to conclude that if not a disincentive, the incentive effects of tort liability in this context are often muted.

3. Effects of Landlord Liability on Tenants' Rights

As one commentator has noted, it is perhaps “axiomatic” that “as a landlord’s duty to protect . . . tenants increases, so too the landlord’s right to screen, control and evict tenants increases.”211 Some of the implications of this doctrine are raised in Samson v. Saginaw Professional Building, Inc.,212 where the Michigan Supreme Court upheld a finding of liability against a landlord for a criminal act committed by a patient of a tenant mental health clinic against an employee of another tenant. While the court did not specify how landlords should deal with such high risk tenants,213 the court did seem to imply that a landlord has some responsibility to assess the risks caused by tenants.214 This prompted one commentator to caution, “There is a difference, however, between requiring a landlord to act once a dangerous condition becomes apparent, and encouraging him to discriminate against certain tenants based on their prior records, their occupations, or the types of invitees they may be expected to attract. Samson appears to do the latter.”215 In another instance, a court upheld a landlord’s right to refuse the tenancy of an ex-convict, noting that “[i]n choosing his tenants, a landlord has a legitimate interest in protecting his property, and an interest in protecting the health, safety, and welfare of his other tenants. He may consider any criteria, but especially criteria relevant to these ends.”216

Encouraging this type of behavior among landlords, especially in the application of liability to terrorism, would seem to invite discrimination against unpopular organizations. Indeed, this controversy recently arose in New York, where a judge ruled that a landlord could break an abortion clinic’s lease “if his purpose is to

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211. Glesner, supra note 29, at 762.
212. 224 N.W.2d 843 (Mich. 1975); see also supra notes 70-72 and accompanying text (discussing the “special relationship” theory of liability).
213. See Haines, supra note 34, at 344 (noting that “the majority opinion gives little guidance on this problem”).
214. See Samson, 224 N.W.2d at 849 (stating that “if the risk of death or serious bodily injury to a number of persons, the law requires that some care be exercised even though the probability is slight that the incident will occur”).
215. Haines, supra note 34, at 345.
protect other tenants against security risks arising from the clinic’s presence in his . . . building.” The landlord based the eviction on the clinic’s failure to follow his regulations, which were designed to prevent the clinic from performing abortions. The judge found the landlord’s regulations to be reasonable, holding that “[a] landlord must exercise reasonable care to protect its tenants against any foreseeable dangers.” The judge’s ruling, which never mentions the word abortion, cites seventeen incidents that were “directly related” to the abortion clinic, including gunshots, assaults on employees, rocks thrown at clinic windows, smashed cars, a false bomb scare, a tenant’s doors glued shut, and the anonymous posting of a threatening note that read in part “[y]ou risk injury or death if you are caught near these premises.” The ruling allowed the landlord to start eviction proceedings against the clinic, even though it had eight years left on its lease and was not in default of rent.

Negative reaction against the decision was swift and raised many of the civil rights concerns that result from imposing a duty to protect on landlords in this context. For example, Rep. Charles Schumer (D-Brooklyn) noted: “It’s an open invitation to the extremist fringe in the pro-life movement to harass and intimidate landlords until they evict clinics.” Priscilla Smith, attorney for Center for Reproductive Law & Policy, stressed that “[s]aying the clinic created an unsafe environment is the same as saying, ‘We can’t have Jewish people in our neighborhood because we can’t have people coming here and burning crosses.’ It’s an easy way of trying to hide your discriminatory actions.” And Donna Lieberman, attorney with the New York Civil Liberties Union noted:


218. John T. McQuiston, *Justice in Nassau Says Landlord May Evict Abortion Clinic*, N.Y. TIMES, Oct. 31, 1995, at B1, B4. The landlord first told the clinic in January that they could no longer perform abortions, but then, after consulting with his attorney, revised the regulations to prohibit “tenants from ‘engaging in any activity which, in and of itself, jeopardizes the safety or property of other tenants.’” Id.

219. McQuiston, supra note 218, at B1; see also Peterson, *Abortion Clinic Can Get Boot, Say Judge*, DAILY NEWS, Oct. 31, 1995, at 21 (noting that protesters also often aggressively confronted patients and staff, and sometimes other tenants of the building by mistake); *New York: Judge Allows Abortion Clinic Eviction, in ABORTION REPORT, Oct. 31, 1995, at 1* [hereinafter ABORTION REPORT].

220. See Peterson, supra note 219, at 21.

221. *Id.*

222. ABORTION REPORT, supra note 219, at 1.
The court has approved a landlord’s effort to evict a tenant because the landlord failed to secure the safety of the building for the tenant, which is a basic landlord obligation. . . . There was never any showing that the performance of abortions presented any danger to the security of the building.223

Finally, stressing contractual rather than public policy considerations, David Rosenberg, a Manhattan lawyer, noted:

I would hope that commercial tenants’ groups would rally behind this tenant. If it stands up, then a lease has almost no meaning for a tenant. . . . It’s a contract. The tenant hasn’t violated it. And the tenant has a right to expect to continue to operate according to the original contract.224

4. Macroeconomic Consequences—Risk Shifting

Besides inviting tenants’ rights violations, imposing a duty to provide security on landlords may prove to be economically inequitable to some controversial tenants. Theoretically, landlords leasing to more expensive stores can pass on the added cost of security to customers, but businesses catering to a lower-income clientele may not necessarily be able to do so without losing customers who are more sensitive to prices than security.225 This could ultimately cause smaller or marginally profitable landlords, especially with high-risk or controversial tenants, to leave the commercial real estate market for more lucrative investments.226

Short of leaving the market, some landlords may respond to liability for criminal/terrorist acts on their premises by simply refusing to provide security and disclaiming all responsibility for security—perhaps by informing prospective tenants that security is their own responsibility. This does not, however, eliminate the risk of liability if crime/terrorism, is found to be foreseeable; a more prudent alternative available to landowners would be to attempt to modify tort liability by shifting risk back to tenants.227 Including

223. McQuiston, supra note 218, at B1, B4.
224. Id.
225. See Sharp, supra note 23, at 51 (arguing that in the private context the “free market is better at allocating security resources”).
226. See Glesner, supra note 29, at 773; Haines, supra note 34, at 351 (both discussing this principle as applied to criminal acts). Also, short of leaving the real estate market, many landlords are likely to “overprotect” since it is difficult to set clear guidelines for liability given current negligence standards. This is an inefficient use of resources as the amount spent on protection (and passed on to consumers) will not reduce enough accidents to justify its costs. See supra notes 111-12 and accompanying text.
227. Of course, landlords who have attempted to delegate security duties to an outside
EXCLUSORY CLAUSES IN LEASES

Exculpatory clauses in leases is one method of allocating risk in a contractual arrangement. While few courts have specifically addressed the use of exculpatory clauses respecting criminal acts, in general, a commercial tenant may agree to exonerate a landlord from liability for future acts of negligence, for both property damage and personal injury. Exculpatory clauses in residential leases have often been found to be against public policy, and therefore invalid, although, their use in the commercial context has not been as restricted. There are some limitations on the use of exculpatory clauses in commercial leases. Five states impose statutory restrictions (e.g., New York law invalidates any agreement that exempts a lessor from liability for personal injury or property damage resulting from the lessor's negligence in operation or maintenance of the property). Additionally, there appears to be a consensus that exculpatory clauses cannot insulate landlords from intentional, wanton, or willful behavior. Some courts have found that exculpatory clauses only protect landlords from passive negligence, not active negligence. A few courts have held that an exculpatory clause cannot release a landlord who has violated a statutory provision. Further, an exculpatory clause is usually binding only on parties to the lease. Third-parties like the tenants' employees or invitees are not precluded from bringing suit against the landlord in this instance, although the existence of these types of provisions may provide for the landlord's later indemnity claim against the tenant. Finally, a court may always choose to invalidate an exculpatory clause as unconscionable if there is evidence of grossly unequal bargaining power. In summary, exculpatory

firm are attempting to shift risk as well, but will likely be less successful. See supra notes 26-27 and accompanying text.

228. See Haines, supra note 34, at 346.
230. "[C]ourts have distinguished between residential and commercial leases, ruling that exculpatory clauses in most residential leases will be voided as against public policy." Daniel G. Hise, Landlord and Tenant—Exculpatory Clause in Lease Void as Against Public Policy—Cappaert v. Junker, 413 So. 2d 378 (Miss. 1982), 3 Miss. C. L. Rev. 253, 258 (1983). But see College Mobile Home Park and Sales, Inc. v. Hoffman, 241 N.W.2d 174, 177 (Wis. 1976) (arguing that the categorical distinction between residential and commercial leases is "artificial and arbitrary" in this context).
231. See Jones, supra 229, at 729 (discussing statutes in New York, Illinois, Massachusetts, Maryland, and Georgia).
232. See Jones, supra note 229, at 730.
233. See, e.g., Vermes v. American Dist. Telegraph Co., 251 N.W.2d 101 (Minn. 1977) (holding that failure to advise tenant of qualities of jewelry store that might be undesirable was "active" negligence that could not be relieved by broad exculpatory clause in lease).
234. See Hise, supra note 230, at 256; Jones, supra note 229, at 728-32.
235. See Jones, supra note 229, at 731.
236. See id.; see also Haines, supra note 34, at 347-48 n.159; Hise, supra note 230, at
clauses in commercial leases have generally been held enforceable in enough cases to warrant landlords' use of them if confronted with liability for terrorist acts. In this regard, exculpatory clauses will likely provide a more efficient mechanism of allocating risks than the use of negligence standards, at least as to damage suffered by tenants.

5. Intended Effects

In the midst of this analysis of the negative effects, the potential for positive, intended effects should not be forgotten. If one of society's primary concerns is to ensure that victims are compensated fully, society may consider certain market or macroeconomic effects to be secondary. In other words, the weight given to the value of private victim compensation may be so high that market inefficiencies are minor in comparison. If so, the cost of terrorist prevention may often be "cheapest" to the landowner. As with victim compensation, perhaps the danger is so grave that society considers the prevention of terrorism by all reasonable methods, not just strictly cost-effective ones, desirable. Further, there is evidently some relationship between opportunity and certain types of crimes, as well as the magnitude of harm and security measures, so that often the landlord is not entirely blameless. Finally, the "political" benefit of imposing liability may be that pressure for legislative reform is eventually brought to bear by more influential landlords disgusted or threatened by current litigation practices.

258.

237. For example, the following analysis as to criminal acts was presented in Craig v. A.A.R. Realty Corp., 576 A.2d 688 (Del. Super. Ct. 1989):

Of all the involved parties, the cost of crime reduction is cheapest to the landowner. For the criminal, imposing civil liability on him in addition to existing criminal sanctions does not deter him from committing the crime. Imposing duty on the patron, so that he must protect and compensate himself, may result in crime reduction, but only at the expensive cost of the patron staying home. ... While the patron holds just one expensive [to society] option, staying home, the landowner holds many options ... [such as] installation of better lighting, fences, or guard service. ...

Id. at 693. Concerning terrorism, the issuance of warnings may be an example of where costs are clearly lowest to the landowner.

238. See Johnson, supra note 68, at 250. And in some cases, of course, it may be clear that the landlord acted irresponsibly. For example, it may be possible to set the negligence standard high enough (e.g., actual notice for duty) that a true fault-based liability standard is approximated.

239. Under a "political effects model," a new rule imposes liability on a well-represented group, which is expected to activate legislative attention to the problem, so that in the long run, the legislature will provide a solution and make the determination of who should bear accident costs and how. See Zacharias, supra note 205, at 725. While Zacharias argues that his model would work in the context of landlord liability for criminal acts, he might reject the imposition of liability on landlords for acts of terrorism for the same reasons he rejects liability for hijacking airlines. See id. at 750.
F. Summary

Landlord liability for criminal acts has not resulted in clear guidelines about when duty will be imposed or what security responses will be considered sufficient. These problems, which mitigate attempts at increased prevention and protection, would only be exacerbated by the application of this doctrine to acts of domestic terrorism. Our goals as a society are crime/terrorism prevention and victim compensation, but landlord liability seems equitable only as a prevention technique, not as a compensation mechanism. Expansive theories of liability, which have as their primary goals giving compensation to victims, while certainly desirable, are best run by the government with funds raised from society as a whole. Any rules placing burdens on landowners should therefore have prevention, rather than compensation, as their primary goal. This conclusion suggests that narrower theories of liability, designed only to induce landowners to take cost-effective measures to prevent terrorism, should be implemented.

Theoretically, cost-effective levels of protection could be derived empirically—for example, some types of structural changes must be more effective than others in certain settings. Under the current state of the law, however, an efficient standard is not likely to emerge. In fashioning a legal response to terrorism, perhaps other systems that have been forced to address the problem more extensively will provide direction toward a comprehensive solution.

III. ALTERNATIVE LEGAL RESPONSES TO DOMESTIC TERRORISM

The primary conclusion offered by this Note is that using current legal theories of landlord liability for criminal acts as a method of recovery by victims of domestic terrorism is not the best legal response, given goals of increased prevention and victim compensation. Courts deciding this issue will likely be confronted by societal pressures both to expand and contract the scope of landowners' duties. Their decisions may be affected by the availability of other alternatives able to adequately address concerns about victim compensation and prevention. The alternatives presented here are only intended to be a basis for consideration and not definitive proposals. Discussion is limited to how these types of representative alternatives can, either

240. See generally Kaufman, supra note 15, at 103-08.
241. "To effectively guide primary behavior ... legal rules must inform people of liabilities that will be imposed for particular behavior. To do that they must be clear, they must refer to verifiable facts and they must not call for unachievable behavior." Adler, supra note 50, at 920.
242. See supra notes 89-91 and accompanying text.
separately or in combination, achieve the goals and address the problems presented.

A. **Comprehensive Federal Legislation**

Even though victim compensation seems to be a task best handled by government entities rather than private individuals, in this context current legislation would not appear to adequately redress the injuries of non-government affiliated victims of terrorist acts. Therefore, perhaps the most equitable and efficient solution to the victim compensation issue is to amend current legislation to provide for a comprehensive platform of victim compensation for acts of domestic terrorism. Further, the use of legislation to establish minimum levels of reasonable care has apparently proven to be effective in the residential context. Federal legislation specifying minimal structural and procedural antiterrorism measures for commercial buildings over certain sizes could be implemented, much as in the residential context, as the basis for public sanctions or as a guideline in the application of tort liability. A statutory violation would arguably be conclusive of liability—replacing foreseeability—resulting in greater predictability and lowered use of judicial resources. Alternatively, federal legislation could provide direct compensation to landowners. For example, landowners in Northern Ireland are compensated directly by the British government for losses from terrorist attacks. Police certification that the injury was related to a terrorist attack is required for reimbursement, but no premiums are paid. Funding comes from tax revenues throughout Great Britain. Claims in Northern Ireland are relatively small when compared with the two incidents referred to throughout this Note. Further, under this system there does not appear to be any incentive for landowners to take preventive measures. For these reasons (potential size of losses and lack of incentives), the Northern Ireland legislative response does not seem appropriate for adoption in the United States.

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243. *See supra* notes 17-23 and accompanying text.
244. *See supra* note 67 and accompanying text.
245. *See, e.g.*, Haines, *supra* note 34, at 353-54 (arguing that courts may not provide the most appropriate forum for determining the type of protection to which tenants should be legally entitled, and that legislatures should act to place duty on landlords to use reasonable care, which should be specifically defined at a minimum level).
246. And providing a consistent national benchmark for establishing duty.
247. *See Bice, supra* note 181, at 463-64.
B. Government Assisted Insurance

It is pragmatic to assume that if domestic terrorism continues, United States insurance companies will follow the lead of their European counterparts and begin to write terrorism exclusions into commercial property policies. When continental and British insurers took this course in 1993, fears of an economic crisis prompted the British government to promise that it would ensure that coverage for terrorist acts would be available to landowners in Great Britain.\textsuperscript{249} The British government essentially agreed to become the "reinsurer of last resort" for losses caused by terrorist acts.\textsuperscript{250} To do so it formed "Pool Re," a mutual reinsurance company, to provide the coverage excluded by private insurers.\textsuperscript{251} The British system provides five layers of terrorism coverage to a landowner, with the government having final responsibility if all layers are exhausted.\textsuperscript{252} Premiums charged for the additional Pool Re coverage are determined based on a number of different factors, some of which are apparently particular to the "terrorism insurance" market.\textsuperscript{253}

Another part of the premium structure is that an "IRA levy" is attached by the British government to all household and vehicle policies written, to shift the cost of insurance from London to other parts of the country.\textsuperscript{254} While it does spread risks, there are problems with the British reinsurance scheme. There seems to be no incentive for insureds to take preventative measures. Certainly, premium reductions are common in other contexts, and as was

\textsuperscript{249} See id. at 447-48 (listing potential economic consequences of the lack of coverage for terrorism losses including: widespread business bankruptcies; bank lending bases secured by property becoming suspect; property developers becoming unable to secure financing; and pension funds becoming unable to rely on income from property investments). The British government was also pressured to step in by the Association of British Insurers, who argued that "terrorism is a political problem and that the government should therefore bear the losses." Id. at 448 n.36.

\textsuperscript{250} Reinsurance is "the insurance by an insurer of the liability of another insurer arising under contracts of insurance which the latter has entered into"—practically meaning that "reinsurers insure direct insurers for a pre-determined part of their liability." Id. at 442-43.

\textsuperscript{251} See id. at 441.

\textsuperscript{252} The layers are (1) a primary layer of regular property coverage with a policyholder's direct insurer; (2) if that is exhausted, an additional layer of up to £100,000, also with direct insurers; (3) and (4) two layers provided directly through Pool Re, if premiums paid to Pool Re are exhausted (third), member insurers in the pool contribute an additional 10% (fourth); and (5) if all these are exhausted, the British government is ultimately is liable for all excess losses. See generally Bice, supra note 181, at 449-54. Pool Re has approximately 115 insurance companies and 120 Lloyd's syndicates as members who "cede" premiums to the pool to reinsure risks of terrorism. See id. at 450.

\textsuperscript{253} For example, "target risk" is determined by rate setting personnel based on whether and to what extent a particular property is at risk of terrorist attack. See id. at 452.

\textsuperscript{254} See id.
discussed earlier, there are measures landlords can take to mitigate the effects of, if not prevent, terrorism.255

In a somewhat similar vein, the Overseas Private Investment Corporation ("OPIC") was formed by the United States government at least partly to "underwrite political risk insurance in friendly, less developed countries."256 If political risk was defined to include terrorism, the principles of OPIC could theoretically be applied in developing a model for government provided domestic terrorism insurance, whereby the United States government could act as either a direct or indirect insurer for terrorism risks. The lessons learned from the shortcomings of the British system, like ensuring that premiums reflect preventive measures and using levies to spread the cost of premiums throughout the country, could be integrated. When insurance is used in this manner, economic efficiency is aided because insurance companies, in setting premiums reflective of precautions taken, will help minimize the cost of accident prevention. Landlords will have a clearer standard to follow; mitigating tendencies to either overprotect or do nothing. In this manner, the costs of victim compensation can be at least partially borne by the party best able to spread the risk—the government—in an economically efficient manner that also provides incentives for landlords to take measures to help prevent, or lessen the effect of, terrorist attacks.

C. Contract Theories

Once society is assured that victims of domestic terrorism will be fully compensated, via comprehensive legislation and government assisted insurance as suggested above, there are strong philosophical arguments for letting the market function via contract liability alone.257 Market or contract based theories partially depend on the premise that it is the government's, and not the private sector's, duty to protect citizens. Further, even if there is a private sector duty, it is not fair to single out landlords.258

255. See id. at 459, 461-62.
256. Id. at 466. In general, OPIC offers programs to insure United States investments in developing countries against currency inconvertibility and expropriation, as well as political violence. Most forms of long-term investment (equity, debt, loan guarantees, and leases) may be insured.
257. The choice between tort and contract law is perhaps philosophical. A contract view would suggest that tort law should act only when there is no possibility to contract (and even then the outcome should mirror what the parties would have done), while a tort view would suggest that tort law should control when society has decided that it (and not the parties themselves) should set the applicable standards. See Thomas C. Galligan Jr., Contortions Along the Boundary Between Contracts and Torts, 69 Tul. L. Rev. 457, 461-62 (1994). Whatever the philosophical view, the landlord-tenant relationship is predicated, before all else, on a contract.
258. "The fact that government and law enforcement authorities cannot prevent criminal
theories provide that whatever security measures are necessary will be implemented by landowners on their own because customers will demand them. "By letting the market police itself . . . the more efficient level of protection will emerge as business owners seek to attract customers by using the most cost effective measures."259

Advantages to traditional contract liability include the ability to potentially cure a dangerous situation before a terrorist act occurs via traditional contract remedies like rent abatement, repair and offset, rescission, or even termination of the lease if contracted security measures are not provided.260 In the commercial context, the uses of exculpatory clauses and indemnification provisions result in a more efficient allocation of risks than the legal rules now in effect, at least when tenants are the victims.261 They result in greater precision in the negotiated solution, as each party's responsibilities are defined, and the bearer of the risk is clearly identified. This in turn allows procurement of appropriate insurance, as well as preventive security measures by the party bearing the risk (avoiding overlap of duties).262 Provisions regarding risks related to terrorist acts and the provision of security against them should therefore be explicitly provided for in every commercial tenant's lease and pursuing a contract remedy should always be considered an appropriate legal response where applicable.

D. Tort Reform

When contract claims are not available, and if recommendations regarding victim compensation are not implemented, the problems with the negligence theories of landlord liability for criminal acts can be lessened so that they can be considered appropriate legal responses in that limited context. In those instances, since victim compensation is not assured, equity demands that landlord liability not be rejected. To mitigate the primary problems involved in the negligence formulations discussed above, foreseeability should be treated as a question of law and reserved for the court. The courts


260. See Haines, supra note 34, at 323; see also supra note 63 and accompanying text.

261. Exculpatory clauses will generally not preclude suits in tort by plaintiffs who are not parties to the lease. See supra note 235 and accompanying text. If actions for victims of domestic terrorism were restricted to those based on contract, the victim compensation legislation suggested here would be expected to provide exclusive recovery for those victims precluded from tort suits.

262. See Jones, supra note 229, at 733.
should then promulgate clear standards of liability and appropriate responsive security measures with an eye toward uniformity among jurisdictions. And finally, the courts should be responsive to concerns about landlords as social insurers, landlords operating in the commercial context, and the limited ability of landlords to prevent terrorism, by restricting the definition of duty.

CONCLUSION

In the wake of the World Trade Center and Oklahoma City bombings, America is learning how to deal with domestic terrorism by “hardening” our buildings and stepping-up security. We have not yet, however, developed methods for providing equitable and efficient legal remedies for victims of domestic terrorism. Since statutory victim compensation provisions in place will likely not provide full relief, victims are apt to pursue civil litigation against the one party likely to have sufficient, available assets—the landlord. Victims will likely proceed, and in fact have proceeded in the World Trade Center bombing case, under the theory that landlords have a duty to protect tenants from criminal acts of third parties. However, the body of law in this area is unsettled. Landlords are generally unable to predict liability or develop appropriate responses once liability is imposed. Liability varies from jurisdiction to jurisdiction and indeed even from court to court. Many of the problems with landlord liability in this area have resulted from courts’ treatment of the concept of foreseeability as establishing duty. In applying this theory of liability to terrorist acts, the issue of foreseeability is stretched to its outer limit; all of its shortcomings are accentuated. Further, courts will be asked to develop standards for terrorism liability in an environment of conflicting pressures; to both restrict duty, in the face of growing concern that landlords should not be social insurers, and to expand duty, in the face of the increasing visibility of terrorist acts.

While it is not clear how courts will define liability in view of these pressures, it seems certain that imposing tort liability on landlords for terrorist acts is not the most appropriate legal response. Victim compensation is best handled by the ultimate risk-spreader, the government. To the extent society’s concerns involve victim compensation and risk spreading, comprehensive federal legislation and government assisted insurance should be the primary remedies. To the extent society’s concerns involve prevention, or antiterrorist measures, perhaps government is again the most efficient actor. Still, landlords can often effectively contribute through structural and procedural changes in security designed to aid both in the prevention and mitigation of damage. Sufficient incentives for this role can likely be achieved by making premiums under a
government assisted insurance program contingent on attaining certain specifically defined safety levels, establishing statutory minimums for security measures based on building types, and allowing the market to function via contractual risk shifting provisions, such as exculpatory clauses. Limited tort liability (i.e., with clear, uniform standards of duty and sufficient responses) should only be used as a safety net when necessary to prevent inequity. How our society responds to domestic terrorism will necessarily be indicative of our opinions about the current state of the American legal system. To achieve society's goals of both victim compensation and prevention, we must forge equitable yet efficient legal responses from the stockpile of alternatives at our disposal.

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