Vanderbilt Law Review

Volume 33
Issue 6 *Issue 6 - November 1980*

Article 5

11-1980

Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity

Caroline Hudson

RECENT DEVELOPMENT

Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity

I. INTRODUCTION

Profound and radical changes have occurred in landlord-tenant law over the past two decades. One of the most significant trends in this area has been the judicial and legislative recognition of the implied warranty of habitability in residential leases.[1] Realizing that the primary interest of today's urban tenants is not in the land but in "a well known package of goods and services,"[2]

---

1. A majority of states recognize the implied warranty, either by statute or by judicial decision. *See* ALASKA STAT. §§ 34.03.010-.380 (1979); ARIZ. STAT. ANN. §§ 33-1324 to -1364 (1974); CAL. CIV. CODE §§ 1941, 1941.1, 1941.2, 1942 (West Supp. 1980); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (en banc); CONN. GEN. STAT. ANN. §§ 47a-7 to -12 (West Supp. 1980); DEL. CODE ANN. tit. 25, § 5303 (1975); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); FLA. STAT. ANN. §§ 83.51, .55, .56 (West 1979); (Georgia) GA. CODE ANN. §§ 61-111, -112 (1979); HAWAII REV. STAT. § 521-42 (1976); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); KY. REV. STAT. ANN. §§ 383.595, .625, .635, .640, .645, .655 (Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 6021 (1980); MASS. GEN. LAWS ANN. ch. 239, § 8A (West Supp. 1980); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); MICH. COMP. LAWS ANN. § 554.139 (Supp. 1980); MINN. STAT. ANN. § 504.18 (West Supp. 1980); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); NEB. REV. STAT. §§ 76-1419, -1425 (1976); NEV. REV. STAT. §§ 118A.290, .360 (1979); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); N.M. STAT. ANN. § 47-8-20 (1978); N.Y. REAL PROP. LAW § 235-b (Consol. Supp. 1979); N.C. GEN. STAT. § 42-42 (Supp. 1979); N.D. CENT. CODE § 47-16-13.1 (1978); OHIO REV. CODE ANN. § 5321.04 (Page Supp. 1979); OR. REV. STAT. §§ 91.770, .800 (1979); R.I. GEN. LAWS § 34-18-16 (1969); TENN. CODE ANN. §§ 53-5501 to -5505 (1977) (applies to major cities only); Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978); VT. STAT. ANN. tit. 12, § 4859 (1973); VA. CODE §§ 55-248.13, .23, .25 (Supp. 1980); WASH. REV. CODE ANN. §§ 59.18.060, .090, .100 (West Supp. 1980), Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); WIS. STAT. ANN. § 704.07 (West 1979); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

2. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); *see* text accompanying note 42 *infra.*

courts have increasingly imposed a duty on landlords to maintain the leased premises in a habitable condition, making the landlord responsible for the repair of latent and even patent defects.[3] Although the warranty standard is typically fixed by reference to the relevant housing code,[4] some jurisdictions have articulated more flexible standards, such as whether the premises are "habitable and fit for living"[5] and whether the defect adversely affects "safety and sanitation."[6] Thus, some courts have defined the warranty broadly enough to include cases in which there is no technical violation of any housing code provision.[7]

In a parallel development, the increasing incidence of urban crime[8] and the rapid proliferation of multifamily dwellings[9] have prompted courts to abandon the general rule that a landlord owes no duty to protect his tenants from criminal acts committed by third parties on the leased premises.[10] These recent cases have relied overwhelmingly upon traditional tort concepts of duty, foreseeability, and proximate cause in recognizing the landlord's responsibility for protecting his tenants from reasonably foreseeable

---

3. *See* Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1 (1976).

4. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. 1976).

5. Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971).

6. Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

7. Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (en banc); Boston Hous. Autb. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973). *See generally* Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979). In Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), the court described the implied warranty as follows:

> It is a mere matter of semantics whether we designate this covenant one "to repair" or "of habitability and livability fitness." Actually it is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.

Id. at 144, 265 A.2d at 529.

8. *See* Bazyler, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727, 727 n.1 (1979).

9. Henszey and Weisman, *What is the Landlord's Responsibility for Criminal Acts Committed on the Premises?*, 6 REAL EST. L.J. 104 (1977).

10. Cases enunciating this general rule include Trice v. Chicago Hous. Auth., 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973); Goldberg v. Hous. Autli., 38 N.J. 578, 186 A.2d 291 (1962); DeKoven v. 780 West End Realty Co., 48 Misc. 2d 951, 266 N.Y.S.2d 463 (Civ. Ct. 1965).

criminal activity.[11]

Although a few opinions mention the expansion of the implied warranty of habitability to include protection against criminal assault,[12] the New Jersey Supreme Court's recent decision in *Trentacost v. Brussel* contains the first express holding that a landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises.[13] Thus, *Trentacost* represents the interface between two rapidly developing lines of authority—the implied warranty of habitability and the landlord's duty in tort to protect his tenants—and bodes ill for the landlord, who faces difficulty in complying with an ill-defined standard.[14]

This Recent Development traces the evolution of the implied warranty of habitability and of the duty of the landlord under tort law to protect his tenants from criminal activity on the leased premises. The Recent Development then analyzes the courts' efforts to deal with the potential overlap between these two areas. The discussion focuses on the New Jersey court's recent and unprecedented broadening of the implied warranty and the potential problems faced by landlords and tenants as a result of that decision.

II. HISTORICAL DEVELOPMENT: THE DECLINE OF *Caveat* LESSEE

A. The Implied Warranty of Habitability

At common law, the paradigm lease was agrarian in nature and involved the transfer of land to a tenant who paid the rent from the proceeds of tilling the soil. Any physical improvements situated on the land were of secondary importance,[15] and it was therefore appropriate to characterize the lease as a conveyance of an interest in real property.[16] As a purchaser of real property, the

---

11. *See* Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d 76 (1975); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972); Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970).

12. *See* Part III, section A *infra*.

13. Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980).

14. *See* Part IV *infra*.

15. *See generally* Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369, 371 (1961); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123 (1971).

16. 2 W. BLACKSTONE, COMMENTARIES 317 (Dawson ed. 1966). This characterization was advantageous to the tenant because it made available to him the real remedy of ejectment rather than the contractual action of debt. T. PLUCKNETT, A CONCISE HISTORY OF THE

lessee was subject to the doctrine of *caveat emptor* and therefore took the premises "as is,"[17] the theory being that the lessee had the opportunity to inspect the premises for defects before entering into possession.[18] Although the lessor did covenant that he had the power to transfer possession and that the tenant would be free to live in "quiet enjoyment" of the leasehold, there was no implied warranty of habitability or fitness of the premises for the purpose for which they were leased.[19] Although the implied covenants of title and quiet enjoyment were interdependent with the lessee's covenant to pay rent, any other express covenants, such as one to repair the premises, were independent of the lessee's rent obligation.[20]

This doctrine of *caveat* lessee was not ill-suited to the sixteenth and seventeenth century agrarian setting, but with the advent of the urban leaseholder, the doctrine began to appear singularly outmoded. Unlike the "jack-of-all-trades" farmer who could make his own repairs, the increasingly mobile city dweller had neither the funds nor the expertise to do so.[21] Therefore courts began to develop exceptions to the harsh *caveat* lessee doctrine. For example, the American courts followed their English counterparts[22] in recognizing an implied warranty of habitability in the lease of a furnished house or apartment for a short term; this exception was based upon the tenant's inability to make an adequate inspection or to prepare the premises in the short time prior to occupancy.[23]

COMMON LAW, 599 (5th ed. 1956).

17. The lessee assumed all risks as to the condition of the premises. 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 233 (Rohan ed. 1977).

18. *See* Cowen v. Sunderland, 145 Mass. 363, 364, 14 N.E. 117, 118 (1887); 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

19. 1 AMERICAN LAW OF PROPERTY, *supra* note 18, §§ 3.45, .47.

20. The tenant could recover damages and had a defense to an action for rent if either a paramount title holder or the lessor disturbed his possession of the premises. If, however, the landlord merely breached his covenant to repair, the lessee had a cause of action for damages but did not have a defense to his landlord's rent action. Abbott, *supra* note 3, at 6.

21. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077-78 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

22. Smith v. Marrable, 152 Eng. Rep. 693 (Ex. 1843) (lease of furnished house for approximately five weeks).

23. Ingals v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). The Massachusetts court stated:

> One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use.

Id. at 350, 31 N.E. at 286. American courts have limited the exception to defects present at

Courts held in such cases that the lessor impliedly warranted that the premises and furnishings were fit for immediate use.[24]

The second major judicial exception to the *caveat* lessee maxim concerned the landlord's fraudulent concealment of a latent dangerous condition or defect in the premises, known by the landlord but not discoverable by the tenant upon reasonably diligent inspection.[25] The tenant's remedy upon discovery of the defect was either to vacate the premises and rescind the lease[26] or to sue in tort for injury to his person or property resulting from the defect.[27]

One of the most important departures from the doctrines of *caveat* lessee and independent covenants was the new defense of constructive eviction.[28] Basing this doctrine upon an expansion of the covenant of quiet enjoyment, courts held that substantial interference by the lessor with the tenant's use and enjoyment of the premises constituted a constructive eviction and a breach of the covenant.[29] Acts constituting a constructive eviction included breach of express promises to furnish services such as heat and water and failure to remedy defective conditions beyond the tenant's capacity to repair.[30] A tenant constructively evicted by his landlord could defend an action for rent and bring an action for damages, but the utility of the doctrine was diminished by the requirement that the tenant abandon the premises.[31]

The final crucial exception to the *caveat* lessee doctrine was

---

the inception of the lease. Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947). *See generally* Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for a Short Term: Erosion of Caveat Emptor*, 3 U. RICH. L. REV. 322 (1969).

24. *See* Young v. Povich, 121 Me. 141, 116 A. 26 (1922).

25. *E.g.*, Gamble-Robinson Co. v. Buzzard, 65 F.2d 950, 954 (8th Cir. 1933); Perkins v. Marsh, 179 Wash. 362, 37 P.2d 689 (1934).

26. *See, e.g.*, Scudder v. Marsh, 224 Ill. App. 355 (1922).

27. *See, e.g.*, Cowen v. Sunderland, 145 Mass. 363, 14 N.E. 117 (1887).

28. *See* Dyett v. Pendleton, 8 Cow. 727 (N.Y. Ct. Err. 1826), *rev'g* 4 Cow. 581 (N.Y. Sup. Ct. 1825).

29. A tenant had to establish four prerequisities before he could invoke the doctrine as a defense to his lessor's action for rent: first, the landlord's act of misfeasance or nonfeasance; second, substantial interference with his use and enjoyment of the premises; third, the landlord's intent to interfere with his quiet possession; and last, his abandonment of the premises within a reasonable time after the commission of the act. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 35-36. *See generally* Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69 (1951).

30. Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) (recurrent flooding); Barnard Realty Co. v. Bonwit, 155 A.D. 182, 139 N.Y.S. 1050 (1913) (rats in walls of new apartment); Levine v. Baldwin, 87 A.D. 150, 84 N.Y.S. 92 (1903) (drainpipe leaking in cellar damaged property of tenant).

31. *See* Love, *supra* note 29, at 36-37.

the landlord's duty to repair facilities used in common such as lobbies, stairways, elevators, halls, basements, and heating, plumbing, lighting, and gas systems.[32] Under this theory, the landlord's possession and control of these common areas justified the imposition of a duty of reasonable care in maintaining them in a reasonably safe and fit condition.

Despite the judicially fashioned exceptions to the harsh doctrine of *caveat* lessee, the rule itself was not abrogated until the 1960s. The Minnesota Supreme Court, it is true, held in *Delamater v. Foreman*[33] that there is an implied warranty of habitability in any lease of an apartment; this decision, if followed elsewhere, could have initiated a revolutionary trend. Minnesota's example, however, was not followed until the climate of landlord-tenant law was receptive to the development of the implied warranty in the 1960s.

Although courts and commentators frequently cite *Pines v. Perssion*[34] as the initial landmark decision in the warranty area, the Wisconsin Supreme Court arguably overruled *Pines sub silentio* in a later decision.[35] Thus, the most persuasive foreshadowing of the recognition of the implied warranty of habitability came in 1969 with *Reste Realty Corp. v. Cooper.*[36] In *Reste* the Supreme Court of New Jersey found an implied warranty of habitability in a five-year commercial lease after a tenant complained of recurrent flooding that rendered the premises unusable. Although the court devoted a large portion of its opinion to the tenant's constructive eviction claim, it affirmed the existence of an "implied warranty against latent defects."[37] One year later the New Jersey court clarified its position on the warranty issue in *Marini v. Ireland,*[38] hold-

32. *Id.* at 65-66.

33. 184 Minn. 428, 239 N.W. 148 (1931).

34. 14 Wis. 2d 590, 111 N.W.2d 409 (1961). *Pines* rejected *caveat emptor* in favor of an implied warranty of habitability and the mutual dependence of the tenant's covenant to pay rent and the landlord's implied covenant to provide a habitable dwelling. The facts of the case, however, lead to a restrictive interpretation of *Pines,* since plaintiffs had entered into a one-year lease of a *furnished* home. *See* note 35 *infra.*

35. In Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970), the court impliedly restricted the *Pines* holding by refusing to recognize the defense of housing code violations in an action for rent.

36. 53 N.J. 444, 251 A.2d 268 (1969).

37. *Id.* at 461, 251 A.2d at 277.

38. 56 N.J. 130, 265 A.2d 526 (1970). *Marini* involved a landlord's failure to repair a cracked and leaking toilet, which the tenant subsequently repaired, deducting the cost from the next month's rent. The court affirmed the tenant's right to resort to self-help measures when the landlord has notice of the defect and fails to correct it after a reasonable period of time.

ing that a warranty of habitability and livability is implied in all residential leases.

These innovations of the New Jersey courts precipitated a number of decisions in the early 1970s that characterized the lease as a contract containing an implied warranty of habitability that was interdependent with the covenant to pay rent and enforceable by contract remedies.[39] *Javins v. First National Realty Corp.*,[40] a landmark decision in the area and the case most often cited by other courts, is an appropriate vehicle for a discussion of the rationale underlying most of the warranty cases.

In *Javins* a landlord had filed separate actions seeking to evict three tenants because of their failure to pay rent. The tenants alleged in defense that approximately 1500 violations of the Housing Regulations for the District of Columbia had arisen during the lease terms. The Circuit Court of Appeals reversed the lower court's judgment for the landlord, holding that a warranty of habitability, measured by the standards in the Housing Regulations, is implied in the leases of urban dwellings covered by those Regulations, and that breach of this warranty gives rise to the usual remedies for breach of contract.[41]

The court noted initially that although the characterization of a lease as a real property conveyance had been reasonable in an agrarian society, it did not comport with the position of the modern urban tenant:

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[42]

Drawing analogies to the law of sales and residential real estate—areas in which the courts have implied warranties of fitness and merchantability in order to protect consumers—the court abandoned the no-repair rule, which, in its view, could not coexist with the obligations imposed on a landlord by the typical housing

---

39. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (en banc); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

40. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

41. *Id.* at 1072-73.

42. *Id.* at 1074.

code.[43]

The court then examined the modern tenant and concluded that he differed dramatically from the "jack-of-all-trades" farmer of earlier times who had the skill and financial resources to make the repairs on his dwelling. The modern urban tenant, the court observed, usually has only one specialized skill, is highly mobile, lives in a complex building, and lacks the funds and incentive to make repairs.[44] The *Javins* court also noted that a severe housing shortage had created a disparity in bargaining power between landlord and tenant, and that standardized form leases had become contracts of adhesion offered to tenants on a "take it or leave it" basis.[45]

Finally, the *Javins* court examined the recent legislative dissatisfaction with the doctrine of *caveat* lessee, a displeasure manifested by the widespread enactment of housing codes. The court cited two District of Columbia Court of Appeals cases that had similarly used the Housing Regulations to create new legal rights and duties enforceable in tort by private parties.[46] Relying on these two cases, and on an Illinois case[47] that incorporated the existing building code into a construction contract, the *Javins* court found that the Housing Regulations implied a warranty of habitability,

---

43. *Id.* at 1076-77. Similarly, other courts have utilized the commercial sales analogy in employing the warranty of habitability. *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

44. 428 F.2d at 1078-79. Other decisions have pointed to this rationale as a basis for implying a warranty of habitability. *See, e.g.*, Green v. Superior Court, 10 Cal. 3d 616, 624-25, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709 (1974) (en banc); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

45. 428 F.2d at 1079.

46. 428 F.2d at 1080. In Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960), the Court of Appeals overturned the common-law no-repair rule and granted the tenant the right to sue for personal injuries suffered as a result of the landlord's negligent code violations. *Accord,* Kanelos v. Kettler, 406 F.2d 951 (D.C. Cir. 1968). In Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968), the court extended the principle of illegal contract to violations of the housing code, holding that the validity of every lease to which the housing code applied depended upon substantial compliance with the code at the inception of the lease term.

The principle of illegal contract referred to in *Brown* "is that an illegal contract, made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer." Hartman v. Lubar, 133 F.2d 44, 45 (D.C. Cir. 1942), *cert. denied,* 319 U.S. 767 (1943). A number of District of Columbia cases have recognized the "illegal contract" theory. *See, e.g.*, William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. 1970). The theory, however, has gained little recognition in other jurisdictions. *But see* King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (Mun. Ct. 1972).

47. Schiro v. W.E. Gould & Co., 18 Ill. 2d 538, 165 N.E.2d 286 (1960).

measured by the standards they set forth, into all leases that they covered.[48]

Although most courts have confirmed the policy justifications articulated in *Javins* for the recognition of an implied warranty in residential leases, the decisions evidence great divergence concerning the scope of the warranty and the standard used in its application. Like the *Javins* court, several jurisdictions use the applicable housing code as one standard, holding that proof of a code violation with a substantial adverse effect on the tenant's safety or health is sufficient to establish a breach of the warranty.[49] Indeed, at least one decision has interpreted *Javins* as holding that the implied warranty should be measured *solely* by the standards established in the housing code; the court refused to expand the warranty to include defects that failed to violate the code.[50]

In contrast to strict reliance on the housing code as a standard, several courts have taken a broader approach based upon public policy considerations. These courts examined each case in light of its particular circumstances in order to determine whether the defects—whether or not violations of the housing code—are so substantial that they render the premises unsafe or unsanitary and therefore unfit for habitation. The strongest statements made against use of the housing code as the sole standard appear in *Boston Housing Authority v. Hemingway:*[51]

> Proof of any violation of [the sanitary and health] regulations would usually constitute compelling evidence that the apartment was not in a habitable condition . . . . However, the protection afforded by the implied warranty of habitability does not necessarily comply with the Code's requirements. There may be instances where conditions not covered by the Code regulations render the apartment uninhabitable.[52]

---

48. 428 F.2d at 1082.

49. Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (en banc); Jack Spring, Inc. v. Little, 50 Ill. 2d 531, 280 N.E.2d 208 (1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973). Typical violations include insect or rodent infestation, inadequate room size, light, or ventilation, defective bathroom fixtures, insufficient hot water, inadequate heating, and inadequate emergency exits. *See* Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1456 (1974). These cases, however, also recognize that minor housing code violations alone do not threaten a tenant's health or safety and therefore do not constitute a breach of the implied warranty. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 n.63 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) ("one or two minor violations standing alone which do not affect habitability are *de minimis*"); *but see* Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974).

50. Winchester Management Corp. v. Staten, 361 A.2d 187, 190 (D.C. 1976).

51. 363 Mass. 184, 293 N.E.2d 831 (1973).

52. *Id.* at 844 n.16.

The broader standard, which typically requires that a breach of implied warranty be of a nature and kind that will render the premises unsafe or unsanitary and thus unfit for living, is necessarily more nebulous than the code standard and therefore lends itself to varying interpretations. In an effort to delineate more precisely the scope of this broader standard, several courts have identified a list of factors relevant to the question whether the implied warranty has been breached: first, whether the defect constitutes a violation of the housing code; second, the nature and seriousness of the defect; third, the potential or actual impact of the defect upon safety, sanitation, or habitability; fourth, the length of time the defect has persisted; fifth, the age of the structure; sixth, the amount of the rent; and last, whether the tenant is in some way responsible for the defect or has waived his objection to it.[53] The more recent decisions tend to favor this broad approach, using the housing code either as a minimum standard or as one of many factors in the determination of breach.[54]

In considering the scope of the implied warranty, most courts consider the term "defect" to include the landlord's failure to provide "essential" services, such as hot water[55] and elevator service.[56] According to the New Jersey Supreme Court in *Berzito v. Gambino,* the defect must "truly render the premises uninhabitable in the eyes of a reasonable person" in order to constitute a breach.[57] Moreover, the implied warranty generally extends to both latent and patent defects existing at the beginning of the tenancy,[58] and most courts have found that the warranty imposes a broad, continuing duty on the landlord to make all repairs necessary to maintain the premises in a habitable condition, whether the defects existed at the inception of the lease or arose during the tenancy.[59] Generally speaking, however, the landlord must have notice of the defective condition and a reasonable time in which to correct the deficiency before the court will find him guilty of breach of the

53. Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

54. Love, *supra* note 29, at 107.

55. Winchester Dev. Corp. v. Staten, 361 A.2d 187 (D.C. 1976).

56. Academy Spires v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970).

57. 63 N.J. at 469, 308 A.2d at 22.

58. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration,* 56 B.U. L. REV. 1, 14 (1976).

59. Cunningham, *supra* note 7, at 92. *See* Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972); Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970).

implied warranty.[60] This requirement reflects the courts' reluctance to impose strict liability on the landlord.

As the preceding discussion illustrates, courts have used the term "habitability" almost exclusively to describe the *physical* qualities of the demised premises, such as the adequacy of the heating and hot water services. In recent years, however, several jurisdictions have exhibited a willingness to use the term in connection with a landlord's responsibility to provide tenant security. After reviewing the history of the landlord's duty to protect his tenants from criminal activity on the premises, this Recent Development will examine those cases that have dealt with the convergence of that duty with the expanding scope of the concept of habitability.

B. The Landlord's Duty to Protect Tenants from Criminal Activity on the Premises

1. Development of the Duty

Ordinarily, a private person has no duty to protect another from criminal acts of third parties, absent some special relationship between the first person and the victim.[61] Sections 314A and 320 of the *Restatement (Second) of Torts* enumerate such special relationships; they include innkeeper-guest, common carrier-passenger, business invitor-invitee, and custodian-ward.[62] The rationale for this "special relationship" exception is that the victim has placed himself under the control and protection of the other party and has therefore sacrificed his ability to protect himself.[63] Consequently, the controlling party is under a duty to protect the dependent person from criminal attack.

Traditionally, courts did not consider the landlord-tenant relationship a special one that imposed upon the landlord a duty to protect the tenant.[64] Landlord liability generally could arise solely

---

60. Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 193 N.E.2d 831, 844 (1972); Marini v. Ireland, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970). Courts will waive the notice requirement if the landlord knew or should have known of defects present at the commencement of lease. *See* Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

61. Harper & Kine, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934); W. PROSSER, LAW OF TORTS § 56 (4th ed. 1971).

62. RESTATEMENT (SECOND) OF TORTS §§ 314A, 320 (1966).

63. *See* Merchants' Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 196, 186 S.W. 87, 89 (1916); 55 MINN. L. REV. 1097, 1098.

64. *See, e.g.*, Teall v. Harlow, 275 Mass. 448, 452, 176 N.E. 533, 535 (1931); McCappin v. Park Capitol Corp., 42 N.J. Super. 169, 172, 126 A.2d 51, 52 (1956).

from the breach of a contractual or statutory obligation or upon a showing that negligence constituted the proximate cause of the loss.[65] For example, the court in *Tirado v. Labarsky*[66] found that a landlord was not under a duty to anticipate the criminal act of a third person, even though the landlord's failure to repair the front door lock on the tenant's apartment was arguably the proximate cause of the assault upon the tenant. The main reason for the failure of plaintiff's argument in *Tirado* and other similar cases is that the courts regarded the intervening criminal activity as a superseding cause that relieved the landlord from liability.[67]

Injured plaintiffs have used several arguments, some more successful than others, in an attempt to circumvent this restrictive definition of landlord liability. In *Williams v. William J. Davis, Inc.*[68] and in *New York City Housing Authority v. Medlin*[69] tenants argued that the terms "safe" and "safety" in certain statutes and housing regulations included freedom from the criminal acts of third parties. Both courts rejected this argument, however, reasoning that such statutes or regulations referred exclusively to physical deficiencies of the premises, such as fire hazards, sanitary inadequacies, and structural defects.

The most important development in the movement to abrogate the doctrine of landlord immunity in this area has been the recognition of the landlord's duty to exercise reasonable care to protect his tenants against foreseeable criminal acts of third parties. The breach of this duty would subject the landlord to liability in tort.[70] Proponents of this rule argue that the landlord's duty to repair and maintain the safe condition of common areas under his control should extend to the implementation of security measures,

---

65. *See* Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Smith v. ABC Realty Co., 66 Misc. 2d 276, 322 N.Y.S.2d 207 (Civ. Ct. 1971).

66. 49 Misc. 2d 543, 268 N.Y.S.2d 54 (Civ. Ct.), *aff'd*, 52 Misc. 2d 527, 276 N.Y.S.2d 128 (App. Term 1966).

67. *See* Freezer & Favor, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1946).

68. 275 A.2d 231 (D.C. 1971).

69. 57 Misc. 2d 145, 291 N.Y.S. 672 (Civ. Ct. 1968).

70. This development is closely related to the relatively successful argument that landlords have a duty to protect against *negligent* acts of third persons—an argument similarly based on the well-established duty of the landlord to keep common areas that are controlled by him in a reasonably safe condition. *See* Mayer v. Housing Auth., 84 N.J. Super. 411, 202 A.2d 439 (App. Div. 1964) (landlord's failure to provide adequate protection subjected him to liability for playground injury caused by third party); DaRocha v. New York City Hous. Auth., 282 App. Div. 728, 122 N.Y.S.2d 397 (1953) (child injured in playground by third party).

not simply to the repair of physical defects, since the means of crime prevention available to a tenant are limited.[71]

As early as 1969 courts began to accept tenants' arguments that a landlord was obligated to exercise reasonable care under the circumstances with respect to the prevention, deterrence, and control of foreseeable criminal conduct within the common areas of an apartment building. For example, in *Ramsay v. Morrissette,*[72] a tenant sued her landlord for injuries sustained in an assault by an intruder who forced his way into her apartment. The District of Columbia Court of Appeals held that the tenant's allegations that the landlord was negligent in, *inter alia,* failing to install a lock on the front door and failing to prevent strangers from sleeping in the hallways were sufficient to preclude summary judgment in favor of the landlord.[73]

Similarly, in *Johnston v. Harris*[74] the Supreme Court of Michigan held that a tenant who was assaulted in an apartment vestibule could maintain an action against his landlord on the theory that the landlord's negligent failure to provide adequate lighting and locks created a condition conducive to criminal assaults.[75] A New York court also interpreted the definition of proximate cause liberally in *Sherman v. Concourse Realty Corp.,*[76] in which a tenant sued his landlord for injuries inflicted by a criminal who allegedly entered the apartment lobby through a door with a broken lock. Emphasizing the facts that the landlord had actual knowledge of criminal activity in the area and had increased the rent in order to provide a bell and buzzer system to protect against intruders, the court held that the intervening criminal assault did not preclude consideration of whether the injury was proximately caused by the landlord's negligence in failing to repair the lock.

Courts in New Jersey and Maryland have also adopted the "enhanced risk plus foreseeability" theory of *Johnston* and *Sherman,* stating that a breach of duty by a landlord would be the proximate cause of the injury if the breach enhanced the likelihood of occurrence of particular criminal activity.[77] The Maryland court

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

72. 252 A.2d 509 (D.C. 1969).

73. *Id.* at 512-13.

74. 387 Mich. 569, 198 N.W.2d 409 (1972).

75. The court found that "in a high crime district it is reasonably foreseeable that inadequate lighting and unlocked doors would create conditions to which criminals would be attracted to carry out their nefarious deeds." *Id.* at 573, 198 N.W.2d at 410.

76. 47 A.D.2d 134, 365 N.Y.S.2d 239 (1975).

77. Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976); Braitman v. Overlook Terrace,

broadly stated in *Scott v. Watson* that

> [i]f the landlord knows, or should know, of criminal activity against persons or property in the common areas, he then has a duty to take *reasonable* measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity.[78]

In contrast to the cases discussed above, several courts have been less inclined to recognize a landlord's duty to provide safe and secure premises; they have based their holdings primarily on the concept of superseding cause. Thus, in *DeKoven v. 780 West End Realty Co.*[79] the court found that failure to provide round-the-clock doorman service was not the proximate cause of injury to tenants from crime perpetrated by third parties on the premises. Similarly, in *Hall v. Fraknoi*[80] the court suggested that the pervasiveness of crime in the modern city made it virtually impossible to establish a causal connection between the presence or absence of a door lock or buzzer system and the crimes committed on the premises. According to the court in *Goldberg v. Housing Authority*,[81] anyone "can foresee the commission of crime virtually anywhere and at any time."[82] Therefore, in the court's view, whether or not an unknown criminal would have been deterred by additional police protection for a public housing project was mere conjecture.

At least two decisions have denied recovery to tenants on the grounds that a landlord's responsibility for the condition of the common areas within his control encompasses only the obligation to maintain and repair, not the duty to police. In *Trice v. Chicago Housing Authority*[83] the court found that a landlord, though aware of the risk of injury, did not have a duty to protect his tenant from the intentional and criminally reckless act of another tenant in throwing a television set over a railing. According to the court, to impose such a vague standard upon landlords would be to transform them into insurers against criminally reckless acts of third persons whenever some form of notice was proved.[84] The Supreme Court of Virginia in *Gulf Reston, Inc. v. Rogers*[85] also noted that

---

68 N.J. 368, 346 A.2d 76 (1975).

78. 278 Md. at 169, 359 A.2d at 554.

79. 48 Misc. 2d 951, 266 N.Y.S.2d 463 (Civ. Ct. 1965).

80. 69 Misc. 2d 470, 336 N.Y.S.2d 637 (Civ. Ct. 1972); *accord,* Smith v. ABC Realty Co., 71 Misc. 2d 284, 336 N.Y.S.2d 104 (App. Term 1972).

81. 38 N.J. 578, 186 A.2d 291 (1962).

82. *Id.* at 583, 186 A.2d at 293.

83. 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973).

84. *Id.* at 100, 302 N.E.2d at 210.

85. 215 Va. 155, 207 S.E.2d 841 (1974).

the landlord's duty did not include providing police protection; his only obligation was to maintain the areas over which he has control in good repair and free of latent defects.[86]

As evidenced by the above discussion, courts are divided on the issue of the landlord's liability to tenants injured by criminal acts committed by third parties on the premises. The trend, however, appears to be in favor of the imposition of a duty to protect, based primarily upon the traditional notion that the landlord is responsible for the maintenance and safe condition of common areas under his control. Two decisions by courts in the District of Columbia and New Jersey—the two jurisdictions most often in the forefront of landlord-tenant reform—symbolize this trend and also set the stage for the recent dramatic change wrought by the Supreme Court of New Jersey.[87]

2. *Kline* and *Braitman:* Precedent for Change

Courts and commentators frequently cite *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[88] as the leading case regarding the landlord's responsibility for tenant security. In *Kline,* the tenant was injured when she was criminally assaulted and robbed in the common hallway of her apartment building. Despite a rise in the crime rate in the neighborhood and a significant increase in crime in the building itself, the landlord had decreased the guard and doorway services that were available at the beginning of the lease term. The court held that a landlord was obligated "to take steps to protect tenants from the foreseeable criminal acts committed by third parties,"[89] reasoning that a landlord was in a better position than a tenant to guard against the foreseeable risk of entrance by criminal intruders.

Although the *Kline* court's analysis synthesized several different bodies of law, the basis for the decision is somewhat ambiguous. The primary rationale for the *Kline* holding appears to be an extension of developing tort principles to the concept of liability for failure to protect one's tenants. The court noted the landlord's duty to maintain common areas in a reasonably safe physical con-

86. The primary basis for the court's holding, however, was the fact that prior activities by trespassers on the premises were noncriminal in nature; thus, the act of criminal violence involved in the case could not have been reasonably foreseen. *Id.* at 159, 207 S.E.2d at 845.

87. Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980).

88. 439 F.2d 477 (D.C. Cir. 1970).

89. *Id.* at 477.

dition and reasoned that, since the landlord retained control over these areas and was the only party with the power to provide protection, this duty should extend to protection of tenants from criminal attack.[90] The court also used the landlord's duty to repair—and his liability in tort for breach of that duty—to support its holding by analogy. Comparing the landlord-tenant relationship to that of an innkeeper and his guest, the court opined that because the tenant had in a sense submitted to the control of the landlord he had limited his ability to provide for his own protection. Thus, the court concluded that the landlord, who possessed control and the power to act, was responsible for taking reasonable precautions to protect his tenants from attacks that were "foreseeable" in the sense that they were "probable" and "predictable."[91]

The *Kline* court also attempted, not altogether successfully, to elaborate an alternative rationale for its holding. The court cited *Javins* for the proposition that the lease of an urban dwelling had increasingly been viewed as a contract for "a well known package of goods and services," including "secure windows and doors."[92] In light of the recognition in *Javins* of an implied "obligation on the landlord to provide those protective measures which are within his reasonable capacity,"[93] the following paragraph is particularly perplexing:

> The . . . tenant was entitled to performance by the landlord . . . whether the landlord's obligation be viewed as grounded in contract or in tort . . . . [T]his standard of protection was implied as an obligation of the lease contract from the beginning. Likewise, on a tort basis, this standard . . . may be taken as that commonly provided in apartments of this character and type in this community . . . .[94]

It seems that the court outlined a tort duty of reasonable care as a minimum below which the landlord's conduct could not fall and then added a contractual element by suggesting that the tenant might be entitled to extra protection if he had impliedly contracted for it at the inception of the lease.[95]

In contradistinction to the apparent dual analysis in *Kline*, the Supreme Court of New Jersey in *Braitman v. Overlook Ter-*

---

90. *Id.* at 481.

91. *Id.* at 483.

92. 428 F.2d at 1074.

93. 439 F.2d at 485.

94. *Id.* at 486.

95. Comment, *The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275, 285 n.80 (1971).

race Corp.[96] based its holding solely on traditional negligence principles. The Braitmans sued their landlord for property loss sustained when their apartment was burglarized following failure of the landlord to repair a defective deadbolt lock. Although the tenants had complained repeatedly about the defective lock and had received assurances from the landlord that the repair would be made, the landlord had made no attempt to fix the lock.[97]

After acknowledging the traditional view that the landlord-tenant relationship does not, without more, impose a duty upon the landlord to protect his tenants from crime, the court noted that cases in other jurisdictions had expanded the scope of the landlord's duty with respect to security.[98] The court cited *Kline* as the leading case in the area, but neither accepted nor rejected explicitly the rationale of that opinion. Rather, the court turned to the traditional negligence principles adopted in the New Jersey cases. Restricting *Goldberg*[99] to the proposition that police protection is the duty of government and not of the owner of a housing project, and noting *Goldberg*'s caveat that a landlord might be liable if he carelessly enables a thief to enter a tenant's apartment,[100] the court proceeded to examine the foreseeability and proximate cause issues. Several New Jersey cases lent support to the proposition that negligence liability was not necessarily precluded by reasonably foreseeable criminal activity,[101] and that the key to duty, negligence, and proximate cause was the foreseeability of an unreasonably enhanced hazard.[102] The court concluded that, in light of prior break-ins in the neighborhood of the Braitmans' building, a reasonable person would have foreseen the enhanced risk created by a faulty security device and, after notice of the defect, would have supplied adequate locks.[103]

---

96. 68 N.J. 368, 346 A.2d 76 (1975).

97. *Id.* at 371-72, 346 A.2d at 77-78. As the trial court noted, the landlord had, however, taken other security measures to protect the tenants, such as posting a security guard and installing an inter-communications system. 132 N.J. Super. 51, 54, 332 A.2d 212, 213 (App. Div. 1974).

98. 68 N.J. at 374, 376-78. For example, the court discussed the decisions in Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972) and Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

99. Goldberg v. Housing Auth., 38 N.J. 578, 186 A.2d 241 (1962). *See* text accompanying note 82 *supra*.

100. 38 N.J. at 588.

101. Genovay v. Fox, 50 N.J. Super. 538, 143 A.2d 229 (App. Div. 1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959).

102. Zinck v. Whelan, 120 N.J. Super. 432, 294 A.2d 727 (App. Div. 1972).

103. 68 N.J. at 382-83, 346 A.2d at 84. The court added an alternative rationale for its

Three justices issued a "word of caution" in a separate section of the majority opinion,[104] although they concurred in the conclusion that the lower court's judgment had to be affirmed by "resorting to familiar negligence concepts."[105] The three justices observed that, in light of the rising crime rate and the population shift toward multi-family dwellings, future decisions might impose a *contractual* duty upon landlords to take reasonable precautions for the protection of tenants. Whether based on the landlord's superior ability to take precautions, or on an expanded notion of the implied warranty of habitability, the predicted development would obviate the necessity of relying exclusively upon negligence principles to establish landlord liability.[106]

Thus, although *Braitman* stopped short of expanding the concept of "habitability" to include safety from criminal attack, it clearly foreshadowed that expansion, which finally materialized almost five years later.

III. The Convergence of Developments: *Trentacost v. Brussel* and the "Warranty of Security"

A. Precedent

Although courts have wrought revolutionary changes in landlord-tenant law in the last decade by implying a warranty of habitability and by expanding the tort liability of the landlord for negligence in maintaining common areas, few courts have considered the relationship between these two distinct developments with respect to residential security. "Habitability" has usually referred to the physical quality of the premises, and any duty to protect tenants from criminal attack has been based on traditional concepts of duty, foreseeability, and proximate cause.

Those courts that have recognized the possible overlap of

---

holding, stating that the landlord's failure to provide an operable deadbolt in violation of a state regulation was a circumstance to be considered by the trier of fact in determining liability, although it was not conclusive on the issue. *Id.* at 383-86, 346 A.2d at 84-86.

104. *Id.* at 386, 346 A.2d at 86.

105. *Id.*

106. *Id.* at 387-88, 346 A.2d at 86-87. The justices noted that resort to the implied warranty theory would require a re-consideration of Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463 (App. Div.), *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973), in which the court limited the implied warranty of habitability to the context of rent abatement and eviction, refusing to apply it to personal injury action. In a separate concurring opinion, Justices Clifford and Schreiber affirmed the decision on the basis of traditional negligence principles, but disavowed any attempt to rely upon a doctrine that expands the landlord's duty with respect to tenant security. 68 N.J. at 388, 346 A.2d at 87.

these trends have reached differing conclusions. Several courts have disregarded or minimized the overlap. In *Hall v. Fraknoi*[107] the court observed that an implied warranty of habitability and an implied warranty against the criminal acts of third persons were not precisely the same, and it expressed doubt that the expectations of the parties to a lease included a landlord's duty to protect his tenants.[108] The court noted further that the landlord's control of common areas was customarily associated with the obligation to maintain and repair, rather than with a duty to police.[109] An Illinois appellate court adopted the same position in *Trice v. Chicago Housing Authority*,[110] stating that an implied warranty of habitability and an implied warranty against criminal acts were not the same and noting that the duty to police was not a traditional facet of the landlord's duty to maintain common areas.[111] The court also limited the *Kline* decision to its facts, noting that the high level of security present at the inception of the lease and the significant decrease in security during the tenancy were important factors in the decision.[112] Interestingly, Justice Hayes filed a special concurring opinion in *Trice;* he expressed a willingness to expand the implied warranty to encompass the provision of security, but only when a tenant used a breach of the warranty as a shield to justify the withholding of rent in an action for forcible entry and detainer. Justice Hayes, however, would not support the use of the expanded warranty as a weapon in an action for money damages for wrongful death. He reasoned that the vast economic and social consequences of such an action called for reform by the legislature and not the judiciary.[113]

In *Dwyer v. Skyline Apartments*[114] the Supreme Court of New Jersey refused to expand the implied warranty of habitability beyond the context of rent abatement and eviction. In an action to

---

107. 69 Misc. 2d 470, 330 N.Y.S.2d 637 (Civ. Ct. 1972).

108. The court opined that "the implication of a warranty of security may be the product of a desire to deal with the crisis presently posed by criminal activity rather than one that is derived from the expectations that are implicit when the landlord-tenant relationship is created." According to the court, the imposition of such a police function upon landlords as an implication of the landlord-tenant relationship is a matter for the legislature, not the courts. 330 N.Y.S.2d at 640.

109. *Id.*

110. 14 Ill. App. 3d 97, 302 N.E.2d 207 (1973).

111. *Id.* at 100, 302 N.E.2d at 209.

112. *Id.*

113. *Id.* at 102-03, 302 N.E.2d at 211 (Hayes, J., specially concurring).

114. 123 N.J. Super. 48, 301 A.2d 463 (App. Div.) *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973).

recover for personal injuries resulting from a defective hot water faucet, the tenant argued that the landlord's breach of the implied warranty enunciated in *Marini*[115] would give rise to tort liability. The court rejected this argument, holding that the implied warranty in *Marini* "was not intended to overturn existing principles of law applicable to tort actions for personal injuries by tenants versus landlords."[116] Although *Dwyer* did not concern a landlord's liability for criminal acts committed by third parties, three justices in *Braitman* recognized that any decision to expand the implied warranty to include protection against such acts would necessarily involve a reconsideration of the *Dwyer* holding.[117] The *Braitman* court, however, refused to decide the issue.

Other decisions have been more receptive to the establishment of some correlative relationship between the implied warranty of habitability and the landlord's tort liability for injuries on the premises. For example, in *Sargent v. Ross*[118] the New Hampshire Supreme Court stated that recognition of the tort liability "springs naturally and inexorably from" the recognition of the implied warranty.[119] According to the court, the logical extension of the landlord's duty to make the premises suitable for their intended use was a duty to remedy negligently created safety hazards.[120]

Kline v. 1500 Massachusetts Avenue Apartment Corp.[121] is the strongest precedent for extension of the implied warranty of habitability to include the duty to provide security to tenants. Several commentators, however, have noted that the *Kline* opinion is ambiguous, in that it is unclear whether the court grounded its holding on contract or tort theory.[122] Moreover, the court's use of the implied warranty theory has been criticized as "unnecessary and inadequately reasoned."[123] The factual context of the *Kline* case is also conducive to a restrictive interpretation of its holding. When the tenant signed her lease, a round-the-clock doorman was on duty at the main entrance, and another employee manned the lobby desk. Two garage attendants were stationed at the dual entranceway to the building and to the parking garage, and a side

115. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).
116. 123 N.J. Super. at 55, 301 A.2d at 466.
117. *See* note 106 *supra*.
118. 113 N.H. 388, 308 A.2d 528 (1973).
119. *Id.* at 396, 308 A.2d at 533.
120. *Id.* at 397-98, 308 A.2d at 534.
121. 439 F.2d 477 (D.C. Cir. 1970).
122. *See* Comment, *supra* note 95, at 276; text accompanying notes 90-95 *supra*.
123. 45 N.Y.U. L. Rev. 943, 952 (1970).

entrance was locked at 9:00 p.m. By the time of the assault, however, the main entrance had no doorman, the desk was usually unattended, and two side entrances were usually unguarded and unlocked. This decrease in security was accompanied by an increase in the number of assaults and robberies committed in the common areas of the building.[124] If the *Kline* duty to protect was actually a duty only to maintain *existing* security measures, then *Kline* did not really impose any new obligations on a landlord; instead, it merely held him liable under traditional notions of misfeasance.[125]

The *Kline* opinion is similarly unclear on the standard of care required of a landlord. The court articulated a typical tort standard of "reasonable care in all the circumstances,"[126] yet cited with approval the *Javins* case, in which "habitability" was determined solely by reference to the housing regulations. *Kline* could conceivably be interpreted as holding that a landlord need only provide protective services comparable to those available at the inception of the lease, because such services and no others were implied in the lease contract.[127] If the court did intend to extend the implied warranty to include a duty to protect tenants against reasonably foreseeable criminal activity, it certainly failed to articulate an unambiguous rule.

B. *Trentacost v. Brussel*

In *Trentacost v. Brussel*[128] the Supreme Court of New Jersey forthrightly synthesized two of the most important developments in landlord-tenant law—the implied warranty of habitability and the emerging duty of the landlord to protect his tenants from foreseeable criminal atack. *Trentacost* involved a 61-year-old woman who sustained injuries when she was assaulted and robbed in the

124. 439 F.2d at 479.

125. *See* Note, *Judicial Expansion of Tenant's Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489, 503 (1971). Several courts have distinguished *Kline* or have limited it severely. *See, e.g.*, Trice v. Chicago Hous. Auth., 14 Ill. App. 3d 97, 100, 302 N.E.2d 207, 209 (1973) (*Kline* applies only when tenant relies on initial security measures which are subsequently reduced); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 159, 207 S.E.2d 841, 845 (1974) (*Kline* applies only to large urban apartments and when landlord has notice of criminal activity and reduces security).

126. 439 F.2d at 485.

127. The court stated that "[w]e do hold that the same *relative* degree of security should have been maintained." 439 F.2d at 486 (emphasis added). A possible consequence of this holding may be that landlords have an incentive to provide *no* security measures at the beginning of the lease term.

128. 82 N.J. 214, 412 A.2d 436 (1980).

common stairway of her apartment building. A padlock secured the rear entrance to the building, but there was no lock on the front door, which plaintiff and apparently her assailant had used to enter the premises.[129] There was evidence of criminal activity in the neighborhood; moreover, Mrs. Trentacost had reported to the landlord an attempt to break into the basement of the building only two months prior to her "mugging." She also claimed that the landlord had promised to install a lock on the front door, although he denied having any such discussion.[130]

In affirming the Appellate Division's judgment for the tenant,[131] the supreme court focused initially on the *Braitman* decision, which the lower court had considered controlling. The court noted that *Braitman* had cited with approval the *Kline* case, which, in the view of the *Trentacost* court, drew on "an implied contractual undertaking to maintain those protective measures in effect at the beginning of the lease term" as an alternative ground for its imposition of liability.[132] The court, however, reiterated that the *Braitman* holding rested on traditional negligence principles of duty, foreseeability, and the creation of an unreasonably enhanced risk of criminal activity. In the court's view, application of these principles supported affirmance of plaintiff's judgment, because the evidence supported the conclusion that the "mugging" was a foreseeable result of the landlord's negligent failure to supply a lock on the front entrance.[133]

Nothing thus far in the court's opinion represents any radical departure from existing law. Next, however, the court took the opportunity "to clarify the scope of a residential landlord's duty to his tenant" and to deal with the alternative theories discussed in *Braitman*.[134] It began with a discussion of the modern urban tenant's definition of a habitable dwelling, which included, at a minimum, "proper security and maintenance."[135] After detailing some of the more persuasive reasons for its imposition of an implied

---

129. *Id.* at ___, 412 A.2d at 438.

130. *Id.* at ___, 412 A.2d at 439.

131. 164 N.J. Super. 9, 395 A.2d 540 (App. Div. 1978).

132. 82 N.J. at ___, 412 A.2d at 440. The court mentioned the fact that a majority in *Braitman* did not embrace the reasoning of *Kline*. *Id.*

133. 82 N.J. at ___, 412 A.2d at 441.

134. *See* text accompanying notes 104-06 *supra*. The court cited New Jersey precedent to support its conscious choice to decide issues that need not have been decided, although the court believed that a decision was "warranted." 82 N.J. at ___, 412 A.2d at 441, *citing* Busik v. Levine, 63 N.J. 351, 363-64, 307 A.2d 571, 578, *app. denied*, 414 U.S. 1106 (1973).

135. 82 N.J. at ___, 412 A.2d at 442.

warranty of habitability, such as the housing shortage and the inability of tenants to maintain common areas of their apartments, the court reaffirmed its holding in *Marini,* which extended the implied warranty to all "facilities vital to the use of the premises for residential purposes."[136] The court then proclaimed that, in view of the omnipresence of crime in our society, "facilities vital to the use of the premises" included provisions for a tenant's security. The court next went beyond *Braitman* by holding unequivocally that "the landlord's implied warranty of habitability obliges him to furnish reasonable safeguards to protect tenants from foreseeable criminal activity on the premises" and that the landlord breached that warranty by failing to secure the front door of the building.[137] Perhaps even more of a departure from precedent was the court's holding that the implied undertaking to provide security exists independently of the landlord's knowledge of any risks, so that it is not necessary to prove notice of an unsafe condition in order to find the landlord in breach of his duty; the mere fact that the landlord failed to take reasonable measures for maintaining a habitable dwelling was sufficient.[138] In effect, the court in *Trentacost* imposed a duty to provide adequate security based solely upon the landlord-tenant relationship itself.

IV. Analysis

The prediction of three justices in *Braitman v. Overlook Terrace Corp.*[139] became a reality in *Trentacost v. Brussel.* Justice Pushman wrote both the prescient trio's opinion in *Braitman* and the *Trentacost* opinion; in the latter case, he apparently convinced at least three other justices that the plight of the urban tenant warranted an extension of the implied warranty to include the landlord's duty to protect tenants against reasonably foreseeable criminal activity. Three justices, however, refused to support this extension and affirmed the judgment solely on the basis of tradi-

136. *Id.* at ___, 412 A.2d at 442-43 (quoting Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970)).

137. 82 N.J. at ___, 412 A.2d at 443. The court defined "premises" to include the common areas of multiple dwellings. *Id.*

138. *Id.* The court concluded its analysis with a discussion of the landlord's violation of New Jersey's multiple dwelling regulation, finding that the violation constituted evidence of the defendant's negligence. 82 N.J. at ___, 412 A.2d at 443-45. Although all seven justices affirmed the judgment for the tenant, three justices disagreed with the "majority" implied warranty theory, preferring to limit the basis for the holding to traditional negligence principles. 82 N.J. at ___, 412 A.2d at 445-47 (separate opinions of Schreiber, J. and Clifford, J.).

139. *See* text accompanying notes 104-06 *supra.*

tional negligence principles.[140] The fact that the *Trentacost* court was divided, however, does not reduce the impact of the case upon landlord-tenant law. In *Trentacost,* the New Jersey Supreme Court expanded *Kline* to its full revolutionary potential. At first blush, this extension of the implied warranty appears to bode ill for the landlord and to constitute a substantial step in the advancement of the urban tenant's rights. Further inspection, however, reveals that even the tenant may be adversely affected by this attempt to merge two of the most significant trends in landlord-tenant law.

Trentacost imposed upon the landlord a duty to protect his tenants; yet the court failed to delineate with any clarity the scope of that duty or the standards hy which a landlord's conduct was to be evaluated. At various points in its opinion, the court spoke of "a reasonable measure of security," "appropriate security devices," "reasonable safeguards," "some measure of security," and "adequate security,"[141] yet the court neither defined any of these terms nor even attempted to give an example of what types of security might comply with this vague standard. Thus, the landlord must decide, for instance, whether the warranty of habitability requires him to hire a twenty-four hour gnard service or to install deadbolt locks on all the doors to the building. The implied warranty recognized in *Javins* was measured by the applicable housing code, which provided some certainty. In *Kline* the court established a standard of "reasonable care in all the circumstances,"[142] but it provided guideposts for determining whether a landlord has met the standard. These guideposts were "the protection commonly provided in apartments of this character and type in this community"[143] (apparently a tort standard) and "the same relative degree of security"[144] provided by the landlord at the commencement of the lease term (apparently a contract standard).

The court's failure in *Trentacost* to provide a clear standard places the landlord in an untenable position. Perhaps a better approach would have been to delineate certain factors to be used in the determination of liability, similar to those enumerated in warranty cases dealing with physical defects in the premises.[145] Courts

140. *See* note 138 *supra.*
141. 82 N.J. at ___, 412 A.2d at 443.
142. 439 F.2d at 485.
143. *Id.* at 486.
144. *Id.*
145. *See* text accompanying note 53 *supra.*

have traditionally considered the amount of rent, the nature of the deficiency, whether it affects a vital facility, the potential or actual effect upon safety, the age of the structure, and the design and location of the structure.[146] Additional factors in tenant security cases should include the incidence of crime and the availability of police in the neighborhood, and, more importantly, the security measures in force when the tenant signed the lease, because the tenant would reasonably expect and rely upon such measures. The latter, however, is only one factor in the determination; if a court assigns it too much weight, landlords might fail to provide *any* protection against criminal interlopers, thus forestalling any claim of expectation or reliance upon security measures implied in the lease.

Unlike *Kline*,[147] *Trentacost* made virtually no attempt to use a tort standard of reasonable protection to delineate the scope of the implied contractual obligation. True, the court used the words "reasonable" and "foreseeable," but these terms are meaningless in the absence of a notice requirement. The court seemed to hold that the mere relationship of landlord and tenant imposed a duty on the landlord to safeguard the tenant from crime. In the traditional special relationship cases, courts have relied heavily on the element of foreseeability in determining whether one person has violated his duty to protect another. Yet foreseeability is intimately related to the concept of notice. A landlord should be under no duty to provide safety measures if he has no notice—actual or constructive—of the probability that crimes will result from some defective or unsafe condition.[148] Of course, the landlord is a "reasonably prudent person" who will be liable if he *should* have known that the condition of the premises aggravated the risk of criminal activity. The *Trentacost* court, however, boldly stated that "the landlord's implied undertaking exists independently of his knowledge of any risks." Therefore, it eliminates the need to prove notice of an unsafe condition,[149] and the fact that a landlord failed to take "measures which were in fact reasonable for maintaining a habitable residence" would be sufficient.[150] Habitability includes the furnishing of "appropriate" or "adequate" or "reasonable" security de-

146. *See* Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

147. *See* text accompanying notes 92-95 *supra*.

148. Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L. J. 1153, 1178 (1971).

149. 82 N.J. at ___, 412 A.2d at 443.

150. *Id.*

vices. The court, then, has led the landlord in a circular path in an attempt to define the scope of this newly minted obligation. Rather than solving the problems raised by *Kline, Trentacost* raises a myriad of new ones.

If, for example, the court intended by its use of the terms "reasonable" and "foreseeable" to imply a tort standard of care similar to that in *Kline,*[151] one wonders whether a slumlord is obliged to provide only those protective measures applied by other landlords in equally uninhabitable tenements. Conversely, if a landlord provides no protection at the moment a tenant signs his lease, and puts the tenant on notice that *no* protection is exactly what he has bargained for, but other buildings of similar character provide adequate security, does the tenant have a remedy when he is assaulted on the premises?

The *Trentacost* court failed to realize that the effect of its decision was to impose strict liability on the landlord. One of the main purposes of the notice requirement in warranty actions is to prevent the imposition of liability without fault, yet the court eliminated that requirement as an element of a plaintiff's proof. Thus, *Trentacost* actually imposes twin duties upon the landlord—the duty to investigate or inquire and the duty to protect. A landlord must now investigate and maintain a watchful eye to see whether any locks have been broken or whether any other conditions of the premises may be conducive to criminal activity. He must have the prescience to know whether a criminal act is probable and to know what measures a court would consider reasonable for deterring such an act.

Although the "package of goods and services" referred to in *Javins* may be reasonably thought to include protection and security, implication of a "warranty of security" is not a panacea for the plight of the urban tenant, and *Trentacost* fails to deal with the possible ramifications of its holding. First, characterization of the landlord's duty as one grounded in contract rather than in tort may result in the imposition of traditional contract limitations on the money damages recoverable by an injured tenant. The court does not discuss whether a landlord's breach of the implied warranty would give the tenant a cause of action in tort in addition to his action *ex contractu.*[152] Although *Javins* extended all contract remedies for breach to the parties to a lease, including an action

151. *See* text accompanying note 94 *supra.*

152. *See generally* Comment, *supra* note 95, at 286-88.

for specific performance of the landlord's implied warranty,[153] it remains unclear whether *Trentacost* contemplates the full availability of such remedies even if the tenant has sustained no physical injury. The new-found ability to sue for breach of the broadened warranty may engender litigation by tenants who seek, in effect, a declaratory judgment that their landlords have not provided them with "reasonable" security.

Second, as one commentator has astutely observed, use of a contract theory of liability may adversely affect the protection afforded a landlord by his liability insurance.[154] Although most general liability policies cover liability for a landlord's negligence, they exclude from coverage any contract entered into by a landlord that broadens his legal liability.

Third, the expansion of the implied warranty of habitability to include the duty to provide adequate security could have tremendous economic impact—both on the tenant and on the urban housing market. Although it seems logical that the landlord, who maintains control over the common areas of the building, is in a better position to take the necessary protective steps, in reality the increased costs of providing such security will probably be passed on to the tenants. The crime-ridden sections of today's urban areas are inhabited by those who are least able to afford an increase in rent.[155] In addition, landlords who are subject to rent ceilings and who already operate at low profit margins may not be able to absorb the costs of increased security. Consequently, they may abandon their buildings and accelerate the decay of urban housing stock. Such a result could only aggravate the problem of the security of the low income tenant and exacerbate the present housing crisis.

As Judge Goodell observed in *Hall v. Fraknoi*,[156] the implication of a "warranty of security" may be the result of a desire to respond to the current high incidence of crime rather than a result

---

153. 428 F.2d at 1082 n.61.

154. Comment, *supra* note 95, at 290.

155. The *Goldberg* court posited the following scenario:

> If the owner must provide that service, every insurance carrier will insist that he do it. The bill will be paid, not by the owner, but by the tenants. And if, as we apprehend, the incidence of crime is greatest in the area in which the poor must live, they, and they alone, will be singled out to pay for their own policy protection. The burden should he on the whole community—and not upon the segment of the citizenry which is least able to bear it.

38 N.J. at 591, 186 A.2d at 298.

156. 69 Misc. 2d 470, 472-73, 330 N.Y.S.2d 637, 640 (Civ. Ct. 1972).

derived from the expectations of the parties when the landlord-tenant relationship is created. The court in *Trentacost* has essentially enacted welfare legislation by judicial fiat, without considering the possible ramifications of its enactment. Justice Clifford, who dissented in part from the *Trentacost* majority, argued cogently for the continued use of traditional negligence principles as opposed to the imposition of "absolute liability solely upon the relationship between the landlord and tenant and upon loose notions of foreseeability."[157] Citing *Goldberg,* Judge Clifford advocated a "fair balancing" of the relative interests of the parties, the nature of the risk, and the public interest in the proposed answer to the inquiry.[158] Such arguments become increasingly persuasive when one considers the lack of guidance given to a landlord by the majority opinion in *Trentacost.*

Perhaps the best solution to the seemingly insoluble problem is the enactment by the legislature of a statute specifically requiring a bare minimum of security measures in all leased residential housing of a certain type and character. Such a statute would serve the same function as that served by the Housing Code in the *Javins* opinion.[159] Courts could then take the approach adopted by the court in *Boston Housing Authority v. Hemingway,*[160] using the statute as a threshold requirement which all housing must meet but not as an exclusive list of those defects or conditions that would render a landlord liable for breach of warranty.[161] Such minimum requirements as safe locks on all main entrances and a bell or buzzer system would provide the landlord with some knowledge of the limits of his duty while restricting the large gray area created by the *Trentacost* opinion. More importantly, indigent tenants would be provided with at least a minimum of protection against criminal activity, instead of that lack of protection existing in other similar slum areas.

V. Conclusion

In some respects the New Jersey Supreme Court's broad expansion of the implied warranty of habitability to include the duty to provide reasonable security is the logical and inevitable consequence of the convergence of two rapidly developing trends in

157. 82 N.J. at ___, 412 A.2d at 446-47 (Clifford, J., dissenting in part).
158. *Id.*
159. *See* text accompanying note 48 *supra.*
160. *See* text accompanying notes 51-52 *supra.*
161. 363 Mass. 184, 200 n.16, 293 N.E.2d 831, 844 n.16 (1973).

landlord-tenant law. Yet, four members of the court appear to have taken this revolutionary step without considering the possible detrimental consequences to both the landlord and the tenant, whom they were trying to protect. The court has placed the landlord "perilously close to the position of insurer of his tenants' safety".[162] Whether other courts will follow the lead of the New Jersey court is unknown, but those that do should delineate more clearly the scope of this new duty to protect the tenant from criminal activity that is inherently unpredictable.

CAROLINE HUDSON

162. Scott v. Watson, 278 Md. 160, 167, 359 A.2d 548, 553 (1976).