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The Duty to Protect Customers from Criminal Acts Occurring Off the Premises: The Watering Down of the "Prior Similar Incidents" Rule

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NOTE

THE DUTY TO PROTECT CUSTOMERS FROM CRIMINAL ACTS OCCURRING OFF THE PREMISES: THE WATERING-DOWN OF THE “PRIOR SIMILAR INCIDENTS” RULE

The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection.¹

INTRODUCTION

One fall evening, two frequent customers of a local 7-Eleven decided to patronize this convenience store.² The driver had “never used the store’s marked parking spaces, but [had] always parked his car as a matter of personal convenience in the adjacent vacant lot.”³ The owner of the 7-Eleven did not own, lease, possess, or use this vacant lot, but was aware that patrons occasionally parked there and walked to his store.⁴ Although local juveniles frequently congregated about the area, sometimes resulting in a fight, and the store’s manager occasionally would summon the police to remove loiterers from the

3. Id. at 661, 250 Cal. Rptr. at 59.
4. Id. at 661, 250 Cal. Rptr. at 58.
area surrounding the store, in the seven years prior to this fall night, there had been no crimes, no claims, and no injuries reported.\(^5\) After the two men exited the 7-Eleven, they returned to their vehicle. Upon reaching the adjacent lot off the 7-Eleven premises, they were assaulted by three unknown men. The driver brought suit against the owner of the 7-Eleven, claiming not only that the owner had control of the vacant lot, but also that the assault was foreseeable by the owner.\(^6\) A reading of the facts of this case causes a reader to wonder how a court could possibly rule in favor of the plaintiff. However, a California court did just that.\(^7\)

The duty of a business proprietor\(^8\) to protect his customers from injury has been analyzed extensively by courts in numerous jurisdictions.\(^9\) The inviter provides such protection by using due care to guard against accidents and criminal attacks that might be suffered by his customers.\(^10\) Typically, the topic is addressed when the invitee sustains injuries while on the proprietor's premises.\(^11\) In such cases, most courts have adopted a foreseeability approach when determining whether or not the proprietor owed a duty of care to the invitee.\(^12\)

\(^5\) Id. at 661-62, 250 Cal. Rptr. at 59.
\(^6\) Id. at 662, 250 Cal. Rptr. at 59.
\(^7\) Id. at 663, 250 Cal. Rptr. at 60 (holding that both questions raised triable issues of fact).
\(^8\) Throughout this Note, "proprietor," "inviter" and "landowner" will be used interchangeably, as will "patron," "invitee" and "customer."
\(^9\) See, e.g., infra notes 11 and 18 and accompanying text.
\(^10\) See id. This Note will focus primarily on the "criminal attacks by third parties" aspect of the inviter's duty. Cases involving injuries sustained by other means will be analyzed, however, in order to develop more completely the issues involved.
\(^12\) See supra note 11. In determining whether the event was foreseeable the occurrence of prior similar acts is usually taken into consideration. See infra notes 75-84 and accompanying text.
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Following this approach, courts have been willing to find that the business inviter had a duty to protect his customers from foreseeable injuries occurring on his premises. However, since criminal acts of third parties were typically deemed to be independent, intervening acts, courts often found that such acts could not be reasonably foreseen by the inviter. Despite this early judicial reluctance to impose liability upon an inviter for injuries to his customers caused by criminal acts occurring on the inviter's premises, many courts have extended liability to cover such situations.

Despite these holdings, however, many courts are opposed to holding a business inviter accountable for the criminal acts of others if those acts occurred off the business inviter's land—on land adjacent to or far removed from the business premises. Notwithstanding the

15. These decisions hold that the inviter caused the invitee's injuries due to his negligence in failing to protect the invitee from third-party criminal acts.
16. See, e.g., Moye v. A.G. Gaston Motels, Inc., 499 So. 2d 1368 (Ala. 1986) (holding motel owner not liable for shooting of invitee that occurred on the sidewalk in front of motel in light of the absence of prior criminal incidents and the owner's lack of knowledge of any prior criminal acts at the motel that might indicate that the act was foreseeable); Ballard v. Bassman Event Sec., Inc., 210 Cal. App. 3d 243, 258 Cal. Rptr. 343 (1989) (stating that the security guard service hired to protect a restaurant's customers was not liable for the alleged kidnap and sexual assault of a customer that occurred after the customer left the restaurant premises as she approached her car parked across the street from the restaurant); Donnell v. California W. School of Law, 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 (1988) (holding that the law school was not responsible for injuries sustained by a student, which occurred as a result of a criminal attack on the adjoining city-owned sidewalk, since the school established the absence of ownership, possession and control of the property where the student was injured); Steinmetz v. Stockton City Chamber of Commerce, 169 Cal. App. 3d 1142, 214 Cal. Rptr. 405 (1985) (holding that a local business that hosted a "mixer" did not owe a duty of care to a guest who was fatally stabbed in a nearby parking lot after the "mixer" because the business neither owned, possessed, nor controlled the premises on which the injuries were sustained); Walton v. Spidle, 137 Ill. App. 3d 249, 484 N.E.2d 469 (1985)
early reluctance of courts to hold an inviter liable for the criminal acts of others, whether occurring on or off the premises, a contrary line of decisions holds that an inviter can be held liable even though the criminal activity occurred off the inviter's land. Indeed, whether or not and under what circumstances a business inviter has a duty to protect his invitees from harm occurring off the inviter's property has been a topic of much judicial debate.

(holding that a tavern owner owed no duty to protect a patron who was standing on the steps of the building housing the tavern when the patron was hit by a thrown brick); Ralls v. Noble Roman's Inc., 491 N.E.2d 205 (Ind. Ct. App. 1986) (finding that restaurant owner owed no duty to warn a patron, who was shot by a police officer off the owner's premises, of the undercover operation of which owner was aware); State v. Flanigan, 489 N.E.2d 1216 (Ind. Ct. App. 1986) (stating that flea market operators owed no duty to protect a customer from being struck by a vehicle when the customer was walking along the highway toward the flea market after parking the vehicle along the highway).

17. E.g., Southland Corp. v. Superior Court, 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 (1988) (holding that an inviter could be liable for failing to protect his invitee from criminal attack on vacant lot adjacent to inviter's premises); cf. Banks v. Hyatt Corp., 722 F.2d 214 (5th Cir. 1984) (holding that Hyatt Hotel was liable for the shooting and subsequent death of a hotel guest that occurred outside the hotel, four feet from the entrance). It should be noted that while the hotel owner in Banks did own the property on which the shooting took place, that area served as a public sidewalk and, for that reason, the case is included in this analysis. For a discussion of Southland, see infra notes 211-24 and accompanying text.

18. Compare Banks v. Hyatt Corp., 722 F.2d 214 (5th Cir. 1984) and Tarshis v. Lahaina Inv. Corp., 480 F.2d 1019 (9th Cir. 1973) (stating that a hotel owner has a duty to warn guests about the existence of a powerful, surging surf located on the beach fronting the hotel's property, when such surf represents an unapparent, dangerous condition about which the hotel knew and of which it failed to warn the guest adequately) and Schwartz v. Helms Bakery Ltd., 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967) (stating that the owner of a doughnut truck could be held liable for all foreseeable injuries sustained by a four-year-old child attempting to cross the street to buy a doughnut) and Garrett v. Grant School Dist. No. 124, 139 Ill. App. 3d 569, 487 N.E.2d 699 (1985) (holding that a school district had a duty to select a bus discharge point that did not needlessly expose students to serious hazards and thus they were liable for a high school student's injuries that were sustained while the students crossed railroad tracks after having been dropped off by the school bus) and Poe v. Tate, 161 Ind. App. 212, 315 N.E.2d 392 (1974) (holding that a restaurant owner had a duty to invitees to keep the sidewalk adjacent to the restaurant in proper condition for passage by customers) and Piedalue v. Clinton Elementary School Dist. No. 32, 214 Mont. 99, 692 P.2d 20 (1984) (holding that the owner has a duty to warn of an unsafe ingress to and egress from his property even though such condition lies beyond the premises actually owned by the invitee) and Mostert v. CBL & Assoc., 741 P.2d 1090 (Wyo. 1987) (finding that theater lessees owed a duty to warn invitees of a foreseeable off-premises risk of flash flooding) with Moyer v. A.G. Gaston Motels, Inc., 499 So. 2d 1368 (Ala. 1986) (holding that a motel owner was not liable for the shooting of an invitee that occurred on the sidewalk in front of the motel). In reaching this decision, the court considered the absence of prior criminal incidents and the owner's lack of knowledge of prior criminal acts at the motel that might indicate that the act was foreseeable) and Ollar v. Spalzes, 269 Ark. 488, 601 S.W.2d 868 (1980) (stating that a restaurant owner was not liable for injuries sustained by a customer who was approaching the restaurant because it was not shown that the owner had actual or
Section II of this Note discusses the historical development of the duty imposed upon a business proprietor to protect invitees from harm caused by criminal activity occurring on the inviter's premises. Section III discusses the imposition of that duty when the injury occurs off the inviter's property, and proposes guidelines for determining liability under these circumstances. In Section IV, this Note concludes that some courts are expanding the inviter's duty to encompass responsibilities that are overly burdensome, thus making the inviter the ultimate insurer of his customers.

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constructive knowledge of the danger of injury to his invitees) and Ballard v. Bassman Event Sec., Inc., 210 Cal. App. 3d 243, 258 Cal. Rptr. 343 (1989) (stating that the security guard service hired to protect a restaurant's customers was not liable for the alleged kidnap and sexual assault of a customer that occurred after the customer left the restaurant premises and was approaching her car parked across the street from the restaurant) and Donnell v. California W. School of Law, 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 (1988) (holding that a law school was not responsible for injuries sustained by a student, which occurred as a result of a criminal attack on the adjoining city-owned sidewalk, since the school established the absence of ownership, possession and control of the property where the student was injured) and Owens v. Kings Supermarket, 198 Cal. App. 3d 379, 243 Cal. Rptr. 627 (1988) (holding that a supermarket owed no duty to a customer injured by a third party's negligence in a public street adjacent to the supermarket premises) and Steinmetz v. Stockton City Chamber of Commerce, 169 Cal. App. 3d 1142, 214 Cal. Rptr. 405 (1985) (holding that a local business that hosted a "mixer" did not owe a duty of care to a guest who was fatally stabbed in a nearby parking lot after the "mixer" because the business neither owned, possessed, nor controlled the premises on which the injuries were sustained) and Nevarez v. Thriftmart, Inc., 7 Cal. App. 3d 799, 87 Cal. Rptr. 50 (1970) (stating that a supermarket owes no duty of care to a child who was struck by an automobile on an adjacent street while attempting to reach the supermarket) and Walton v. Spidle, 137 Ill. App. 3d 249, 484 N.E.2d 469 (1985) (holding that a tavern owner owed no duty to protect a patron who was hit by a thrown brick while standing on the steps of the building housing the tavern) and Ralls v. Noble Roman's Inc., 491 N.E.2d 205 (Ind. 1986) (finding that a restaurant owner owed no duty to warn a patron, who was shot by police officer off the owner's premises, of an undercover operation of which the owner was aware) and State v. Flanigan, 489 N.E.2d 1216 (Ind. Ct. App. 1986) (stating that flea market operators owed no duty to protect a customer who was struck by a vehicle while he was walking along the highway toward the flea market after parking his car along the highway) and George v. Western Auto Supply Co., 527 So. 2d. 428 (La. Ct. App. 1988) (holding that a store's failure to notify an invitee about the hazardous condition of a sidewalk off its premises did not violate the store's duty to provide invitee safe ingress to and egress from its premises) and Fuhrer v. Gearhart-By-The-Sea, Inc., 306 Or. 434, 760 P.2d 874 (1988) (holding that in order to be liable for the invitee's injuries, the owner of hotel must have known of the dangerous ocean surf located on the adjacent beach).

19. See infra notes 22-97 and accompanying text.
20. See infra notes 98-231 and accompanying text.
21. See infra notes 232-34 and accompanying text.
I. THE LANDOWNER'S DUTY TO GUARD AGAINST CRIMINAL ACTIVITY

A. Social and Economic Reasons for Imposing a Duty Upon the Business Inviter

Commercial establishments are subject to varying degrees of criminal attack.22 Hardest hit seem to be retail stores and proprietary parking structures.23 Some commentators believe that the lack of adequate security measures contributes directly and significantly to the crime problem.24 By imposing a legal duty upon landowners to protect invitees from foreseeable attacks, it is hoped that landowners will increase their expenditures on security measures, which would reduce the amount of crime in these areas.25

Several methods have been advanced to promote a safer environment for invitees.26 Many of these methods are aimed at deterring the criminal act itself.27 A landowner can increase lighting in dark and unattended areas, leading a criminal to believe that there is a better chance that he will be seen and apprehended by the police.28 In addition, the landowner can increase surveillance at his establishment, which will have similar effects upon a criminal's conduct.29

23. Id. at 728; see also C. JEFFERY, CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN 191-92 (rev. ed 1977); S. SCHAFFER, THE VICTIM AND HIS CRIMINAL: A STUDY IN FUNCTIONAL RESPONSIBILITY 92-94 (1968).
26. See infra notes 28-32 and accompanying text.
27. Bazyler, supra note 22, at 733; see C. JEFFERY, supra note 23, at 223; W. CLIFFORD, PLANNING CRIME PREVENTION 34-36 (1976); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 62 (1973) [hereinafter NATIONAL STRATEGY]. See generally O. NEWMAN, DEFENSIBLE SPACE (1972) (discussing the concept of "defensible space," which refers to the use of architectural design for preventing criminal activity).
28. Bazyler, supra note 22, at 733; Note, A Landowner's Duty, supra note 24, at 263; see NATIONAL STRATEGY, supra note 27, at 62 (noting that many crimes are crimes of opportunity); UNDERSTANDING CRIME PREVENTION, supra note 24, at 113-14.
29. B. POYNER, DESIGN AGAINST CRIME 12 (1983); see O. NEWMAN, supra note 27, at
Other more elaborate methods for securing an area have also been recommended. One method, advocated by architect and planner Oscar Newman, stresses the effectiveness of architectural design as a way to prevent criminal activity. The idea behind security devices is that many potential criminals will not attempt criminal activity if there is a high probability that they will be apprehended in the process.

A cost-benefit analysis can be utilized to determine whether imposing a duty upon a landowner to guard against criminal attacks is reasonable. Under this analysis, liability would be imposed upon a landowner when the cost, monetary or otherwise, to the patron, of not implementing security procedures outweighs the burden or cost to the landowner of adopting such precautionary measures.

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78-101.
30. See O. Newman, supra note 27.
31. Id. Newman advocates the use of defensible space:

A defensible space is a living residential environment which can be employed by inhabitants for the enhancement of their lives, while providing security for their families, neighbors, and friends. The public areas of a multi-family residential environment devoid of defensible space can make the act of going from street to apartment equivalent to running the gauntlet. The fear and uncertainty generated by living in such an environment can slowly eat away and eventually destroy the security and sanctity of the apartment unit itself. On the other hand, by grouping dwelling units to reinforce associations of mutual benefit; by delineating paths of movement; by defining areas of activity for particular users through their juxtaposition with internal living areas; and by providing for natural opportunities for the visual surveillance, architects can create a clear understanding of the function of a space, and who its users are and ought to be. This, in turn, can lead residents of all income levels to adopt extremely potent territorial attitudes and policing measures, which act as strong deterents to potential criminals. In the area of crime prevention, physical design has been traditionally relegated the role of mechanical prevention, leaving intact the structure of motivation and attitudes which eventually lead to the criminal event. Defensible space design, while it uses mechanical prevention, aims at formulating an architectural model of corrective prevention.

Id. at 3-4 (emphasis in original).
32. Bazyler, supra note 22, at 733; Note, A Landowner’s Duty, supra note 24, at 263. It has been argued that deterring criminal activity by these methods does not reduce the crime rate, but rather only displaces the crime by shifting the act from a secure high-risk area to an unprotected low-risk area. Bazyler, supra note 22, at 733 n.41 (citing NATIONAL STRATEGY, supra note 27, at 64-65). However, this argument has been countered by two opposing responses: (1) crimes against patrons are usually crimes of opportunity such that when the opportunity is removed, the crime will no longer be committed; and (2) criminals usually restrict their activity to their own neighborhoods and tend not to travel very far to locate a less secure establishment. Id.
34. See R. Posner, supra note 33, at 147-48; Note, A Landowner’s Duty, supra note
assume that patrons of "Sam's Saloon and Sunning Salon" lose one hundred fifty dollars per week as a result of criminal activity at the business establishment. Further, assume that a security guard can be hired for one hundred dollars per week and that all crime against patrons would cease as a result of such hiring. Hiring the guard would, therefore, produce a net social gain to society of fifty dollars per week. The economic cost-benefit analysis would suggest that a duty should, therefore, be imposed upon the landowner to adopt security measures. If, on the other hand, hiring the guard costs the proprietor two hundred dollars per week, then, all else being equal, a net social loss of fifty dollars result. In this situation, a duty to implement the security measure would not be imposed upon the business owner. Thus, by utilizing such an analysis, a landowner might be able to predict whether or not he has a duty to protect his invitees from harm. While it could be argued that the landowner should bear the cost at any price since he is receiving the economic gain in the consumer transaction, Judge Posner has noted a realistic criticism of such a contention: "If the [inviter] is [always] liable, the [invitee] will have no incentive to take preventive measures because he will be fully compensated for his injury, and the efficient solution will not be obtained." In addition, it is often thought that the party best able to prevent the loss should bear the consequences for failing to do so. In the

24, at 263. The burden of taking security measures is the actual monetary cost of those methods, whereas the cost of not implementing the security procedures is the dollar magnitude of the potential loss multiplied by the probability of criminal attack. Note, A Landowner's Duty, supra note 24, at 263. As Learned Hand prescribed: "[t]he owner's duty . . . to provide against resulting injuries is a function of three variables: (1) the probability [that the criminal act will occur]; (2) the gravity of the resulting injury . . . ; (3) the burden of adequate precautions." U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

35. See R. POSNER, supra note 33, at 148 (providing examples of this analysis).
36. See id.
37. Note, A Landowner's Duty, supra note 24, at 263; see Zacharias, supra note 25, at 703-4, 707; see Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1096-97 (1972). This analysis, however, is more complex than it might first appear. It is often difficult to determine what security precautions would have, in fact, prevented the criminal act from occurring. In addition, determining the damages that were proximately caused by the landowner's failure to implement security methods can also prove to be a perplexing task.
38. R. POSNER, supra note 33, at 154.
39. Note, A Landowner's Duty, supra note 24, at 263; see G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (5th ed. 1970); Note, Foster v. Winston-Salem Joint Venture: Duty of Mall Owners to Take Measures to Protect Invitees from Crimi-
case of a commercial landowner, it would appear that the landowner is in a better position than his invitee to prevent a loss that might occur on his property. The owner is better able to assess the crime problem in the area and determine what security devices should be utilized because he has more information than his patrons concerning the history of crimes in the area and the expenses related to security precautions.

Another reason for imposing a duty upon landowners is that they are operating businesses for profit and are thus better able to spread the costs of security and insurance among all of their patrons. This argument, however, falls short of addressing the underlying public policy warranting the imposition of such a duty. Since the policy is to spread the cost over a broader class of victims, the most logical response would be to spread the cost among members of the community as a whole. After all, crime really is a societal problem rather than merely the problem of individual landowners. In fact, many state legislatures have responded to the problems suffered by crime victims by passing legislation that provides funds to cover their medical expenses, lost work time, and property loss and damage. Clear-
ly, these programs alleviate a sometimes serious burden thrust upon many crime victims.\textsuperscript{47} Thus, there seems to be a strong emphasis recently to place the burden of the cost of crime upon government and thereby spread such cost among the population as a whole.

Individuals who live in high crime areas are often forced to do so out of economic necessity.\textsuperscript{48} Therefore, these customers are least likely to be able to afford the added cost of increased security.\textsuperscript{49} Thus, spreading the cost among low-income customers only forces

\textsuperscript{47} J. MAR. L. REV. 459, 462 n.17 (1982) (citing sources that discuss state compensation programs).


\textit{But cf.} Papp, \textit{Is Compensation Board Failing In Its Job to Help Crime Victims?}, Toronto Star, Aug. 13, 1990, at A11 (stating that, while Ontario's Criminal Injuries Compensation Board had an annual budget of approximately $10 million to help "victims of violent crime deserving payment for their suffering," many people are unaware of its existence. Despite this fact, the Board distributes approximately $9 million per year). Ontario's victim compensation program has been utilized to a great extent by police officers injured in the line of duty. During the first six months of 1990, "about 9 percent of applicants were officers seeking money for injury." \textit{Id}. It should also be noted that the federal Office for Victims of Crime "reimburses states up to 40 percent of the amount paid to compensate crime victims." LaFraniere, \textit{No Justice for a Boss in Justice: Hill Law Gives Power to Subordinate in Grant-Dispensing Bureaus}, Wash. Post, Feb. 13, 1991, at A17, col. 4, col. 6.

\textsuperscript{48} See \textit{Publishing Rape Victim's Name Adds to Trauma; Help is Available}, N.Y. Times, Apr. 17, 1990, at A24, col. 4, col. 5 (Editorial Desk) (account by an assault and rape victim describing the "overwhelming relief" she felt when hearing that she could be financially compensated for her medical expenses by the New York State Crime Victims Board).

\textsuperscript{49} See \textit{Note, A Landowner's Duty, supra note 24, at 265 (stating that it is unrealistic to expect individuals of limited means and mobility to travel a significant distance to shop at a safer establishment).}

\textsuperscript{49} Zacharias, \textit{supra} note 25, at 705; \textit{Note, A Landowner's Duty, supra note 24, at 265; see also Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 591, 186 A.2d 291, 298 (1962) (noting that, since "the incidence of crime is greatest in the areas in which the poor must live, they, and they alone, will be singled out to pay for their own police protection. The burden should be upon the whole community and not upon the segment of the citizenry which is least able to bear it.").
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them to choose between two evils: having to pay more for a product in order to cover the cost of security or having to travel to distant shopping areas that provide the same goods and services at prices not affected by security costs.\(^{50}\)

It has been argued that a landowner whose business is located in a high crime area should be liable for criminal attacks on invitees because the inviter should not be allowed to “adopt an intolerable degree of apathy by refusing to deal with the crime problem.”\(^{51}\)

Taken to an extreme, however, adopting this policy would thrust upon an individual proprietor the responsibility of solving a crime problem that is the result of societal apathy.\(^ {52}\) Such a responsibility would likely prove overly burdensome and might result in the further deterioration of poor urban communities by forcing small, independent proprietors out of high-crime areas or out of business entirely.\(^ {53}\)

It would seem that this cost-benefit analysis is inextricably tied to the issue of foreseeability. Indeed, patrons would benefit by such a result, since the inviter’s decision of whether or not to increase security at its business will assuredly have an effect upon prices.

B. Development of a Duty of Care

The existence of a duty is essential to recovery in a negligence action.\(^ {54}\) Foreseeability is generally thought to define the duty owed.\(^ {55}\) Early cases held that criminal acts were intervening events that broke the causal connection and were thus unforeseeable.\(^ {56}\) Therefore, no duty to guard against such acts was ever established.\(^ {57}\)

Some courts still hold that there is no duty to protect against third-
party criminal attacks. These decisions are based primarily upon the inviter's lack of actual or constructive knowledge of an impending criminal attack in the absence of prior criminal activity.

Judicial reluctance to finding a landowner liable for criminal acts occurring on his premises centered upon the distinction between nonfeasance and misfeasance. In other words, courts felt more justified in imposing liability upon the landowner when he acted in a negligent manner rather than when he was negligent in not acting at all. However, because of the growth of criminal activity and the need to provide some protection to those who expected a safe environment when entering upon someone else's property, a duty to exercise due care in guarding against criminal attacks on invitees began to be imposed upon proprietors.

58. See supra note 14.
59. See, e.g., Moye v. A.G. Gaston Motels Inc., 499 So.2d 1368, 1371 (Ala. 1986) (stating that a "duty may be imposed . . . to take reasonable precautions to protect invitees from criminal attack in the exceptional case where the store owner possessed actual or constructive knowledge that criminal activity . . . was a probability"); Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962).
60. "The 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." RESTATEMENT (SECOND) OF TORTS § 314 (1965). Under the common law, private parties had no duty at all to guard against criminal attacks upon others, id. at § 314, unless a special relationship existed between the parties such as that of innkeeper-guest, carrier-passenger, or inviter-invitee. Id. at § 314A.

This traditional "no duty" rule was based on several factors: (1) since the criminal act was viewed as an intervening cause of harm, the elements of a negligence cause of action could not be satisfied; (2) a criminal act was thought to be unforeseeable; (3) the standard of care that the landowner was required to meet was unclear; (4) imposing such a duty upon a landowner might inflict harsh economic restraints; and (5) requiring landowners to protect citizens might contravene the notion that this is the job of government. See Napier v. Kincade, 666 S.W.2d 858, 860 (Mo. Ct. App. 1984) (stating policy reasons for not imposing a duty upon a business owner to protect invitees from criminal attack by a third person); accord Compropst v. Sloan, 528 S.W.2d 188, 195 (Tenn. 1975).
61. See, e.g., Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 49, 539 P.2d 36, 41, 123 Cal. Rptr. 468, 473 (1975); Wright v. Arcade School Dist., 230 Cal. App. 2d 272, 40 Cal. Rptr. 812 (1964); see RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965) (stating that "courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act").

Nonfeasance refers to the failure to take steps to protect another from harm, whereas misfeasance means active misconduct causing positive injury to others. Compropst v. Sloan, 528 S.W.2d 188, 191 (Tenn. 1975).
63. See generally Comment, Inviters' Duty, supra note 24, at 885-88 (describing the
Many courts now hold that the relationship between the business owner and the customer creates a duty upon the owner to protect the customer against an unreasonable risk of physical harm. Indeed, this principle is incorporated into section 344 of the Restatement (Second) of Torts, which pertains specifically to commercial landowners:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
(a) discover that such acts are being done or are likely to be done, or
(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Although many courts rely on section 344 to impose a duty upon the inviter, interpretation of this section varies from jurisdiction to jurisdiction.

C. Foreseeability Test for Determining if Duty is Owed

Rather than impose liability upon the inviter for any and all injuries occurring on his premises, many courts have decided to limit such liability. One way to do this is by implementing a foreseeability test. The Restatement (Second) of Torts clearly supports the use of nature and extent of the business invitee victimization problem).


66. See supra note 64.

67. Compare Morgan, 428 F. Supp at 550 (stating that, pursuant to the Restatement, an inviter must take reasonable measures to control the conduct of third persons) with Cornpropst, 528 S.W.2d at 198 (stating that a duty to protect invitees from criminal acts of third parties arises only if the inviter knew or had reason to know that such acts were about to occur).

68. See infra notes 69-74 and accompanying text.
such a test. Comment f of Restatement section 344 provides that a possessor of land has

no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.69

Thus, despite the argument that a criminal act is an intervening event that breaks the causal chain,70 many courts have abandoned the traditional approach of no-duty and now hold that the inviter has a duty to protect invitees from criminal acts of third-parties when those acts are reasonably foreseeable.71

The law imposes a duty only when the primary element of foreseeability is proven.72 In fact, a landowner usually has no obligation to guard against criminal conduct of others unless he has reason to believe that such acts are about to occur.73 Thus, the majority of courts in this country continue to impose a duty upon the landowner only when the particular conduct was reasonably foreseeable.74

69. RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965).
70. See supra note 61 and accompanying text.
71. See Comment, Inviters' Duty, supra note 24, at 891. But cf. Moye v. A.G. Gaston Motels, Inc., 499 So. 2d 1368, 1371 (Ala. 1986) (refusing to adopt Restatement section 344 and stating that generally there is no duty upon the owner of the premises to protect against the criminal acts of a third party). The Moye court, however, recognized an exception to this general rule when the particular criminal act is foreseeable. Id.; accord Henley v. Pizitz Realty Co., 456 So. 2d 272, 276 ( Ala. 1984).
72. W. PROSSER & P. KEETON, supra note 1, § 43, at 284-90 (noting that foreseeability is relevant when defining the limits of both duty and proximate cause).
73. See RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965) (stating that the possessor of land "is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of a third person are occurring, or about to occur.").
74. See Comprost v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (holding that where the inviter did not know or have reason to know that criminal acts of a third party, which were occurring or about to occur, would pose imminent probability of harm to invitee, no duty was owed to guard against such acts); cf. Comment, Inviters' Duty, supra note 24, at 891, 911 (defining foreseeability to encompass when a person "knew or had reason to know" that some harm was occurring or about to occur, and concluding that the adoption of an unqualified duty-to-protect rule is warranted).
1. Prior Similar Incidents Rule

A common method used by courts to determine whether an act was foreseeable is by looking at whether there were prior incidents of a similar nature. This method has been referred to as the "prior similar incidents rule." The rationale behind this rule is that if prior similar acts had occurred, the landowner was on notice and thus had a duty to warn and protect his invitees from potential harms.

The seminal case imposing liability on a landlord for a criminal attack upon his tenant is Kline v. 1500 Massachusetts Avenue Apartment Corp. In Kline, the tenant was assaulted in the common hallway of a large office-apartment building. The landlord had notice of repeated criminal assaults and robberies in the common areas of the building. The court, therefore, held that the landlord was liable for failing to take reasonable steps to protect tenants from attack. Relying on Kline, many jurisdictions now require the existence of prior similar incidents before concluding that the criminal attack was sufficiently foreseeable so as to justify imposing a duty upon the landowner. Thus, where there has been no proof of prior similar incidents, many courts have barred recovery.


76. Note, A Landowner's Duty, supra note 24, at 250-52.

77. Id.

78. The "prior similar incidents" rule is derived in part from concepts of landlord-tenant law. See infra notes 79-85 and accompanying text.


80. Id. at 478.

81. Id. at 483.

82. Id. at 487.


84. See supra note 83. The factors needed to constitute a "prior similar incident," however, vary from jurisdiction to jurisdiction. See Fernandez v. Miami Jai-Alai, Inc., 454 So. 2d 1060 (Fla. Dist. Ct. App. 1984) (requiring "like crimes of violence"); McCoy v. Gay, 165 Ga. App. 590, 302 S.E.2d 130 (1983) (holding that two prior crimes occurring on the premises but not in the parking lot were insufficient to constitute foreseeability; incidents compared must be "substantially similar"); Taylor v. Hocker, 101 Ill. App. 3d 639, 428 N.E.2d...
2. Totality of Circumstances Approach

Complete reliance upon the prior similar incidents rule for imposing liability has been abandoned by several courts.\textsuperscript{85} For instance, the California Supreme Court, in Isaacs v. Huntington Memorial Hospital,\textsuperscript{86} found that, while prior similar incidents might help to show foreseeability, such incidents are not necessarily required in order to find liability.\textsuperscript{87}

In Isaacs, the victim had been shot in a hospital parking lot located in a high crime area.\textsuperscript{88} Several threatened assaults had previously occurred across from the parking lot in the emergency room area.\textsuperscript{89} There had also been thefts in the vicinity and numerous incidents involving harassment.\textsuperscript{90} According to the Isaacs court, foreseeability can be established by evidence other than prior similar incidents. See, e.g., Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985); Samson v. Saginaw Professional Bldg., 393 Mich. 393, 224 N.W.2d 843 (1975) (transforming the duty of protection from the landlord-tenant setting into the commercial realm, although still involving a landlord-tenant relationship).


86. \textit{Id.} at 121, 695 P.2d at 655, 211 Cal. Rptr. at 358.
ability, although required, is merely one factor among several that should be weighed when determining liability.\footnote{91} In situations where the cost of preventing the harm is high, a greater level of foreseeability might be required.\footnote{92} When, however, the cost of avoiding the harm is very low, the level of foreseeability required might also be low.\footnote{93} Thus, since “foreseeability is a somewhat flexible concept,”\footnote{94} the Isaacs court found that a rule limiting evidence of foreseeability to prior similar incidents was too restrictive.\footnote{95} Therefore, Isaacs is commonly thought to embody a “totality of circumstances”\footnote{96} approach, where evidence of a prior similar incident is but one factor analyzed in determining whether the landowner owed a duty to his invitee.\footnote{97}

II. THE BRIDGE TO OFF-PREMISES LIABILITY

At first glance, it might appear that the transition from holding an inviter liable for criminal acts occurring on his business premises to that of holding him liable for such acts occurring off his premises is one requiring a great stretch of the imagination. As discussed previously, courts have been reluctant to impose liability upon a landowner when the invitee was injured off the inviter’s premises.\footnote{98} Some courts, however, find that the inviter has a duty to protect his invitees when they are harmed on property not owned by the inviter.\footnote{99} Most of these cases involve situations other than criminal attacks,\footnote{100} but several courts do address situations involving such at-
tacks.\textsuperscript{101}

Although the \textit{Restatement (Second) of Torts} refers to an “area of invitation” that the inviter must make reasonably safe for his invitees,\textsuperscript{102} it does not define such an area. Professor Prosser explained that the

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a hotel owner has a duty to warn guests about the existence of a powerful, surging surf located on the beach fronting the hotel’s property, when such surf represents an unapparent, dangerous condition about which the hotel knew and of which it failed to warn the guest adequately; Ollar v. Spakes, 269 Ark. 488, 601 S.W.2d 868 (1980) (stating that a restaurant owner was not liable for injuries sustained by a customer who was approaching the restaurant because it was not shown that the owner had actual or constructive knowledge of the danger of injury to his invitees); Schwartz v. Helms Bakery Ltd., 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967) (stating that the owner of doughnut truck could be held liable for all foreseeable injuries sustained by a four-year-old child who was attempting to cross the street to buy a doughnut); Owens v. Kings Supermarket, 198 Cal. App. 3d 379, 243 Cal. Rptr. 627 (1988) (holding that a supermarket owed no duty to a customer injured by the negligence of a third party in a public street adjacent to the supermarket premises); Nevarez v. Thriftmart, Inc., 7 Cal. App. 3d. 799, 87 Cal. Rptr. 50 (1970) (stating that a supermarket owes no duty of care to child who, while attempting to reach the supermarket, was struck by an automobile on an adjacent street); Garrett v. Grant School Dist. No. 124, 139 Ill. App. 3d 569, 487 N.E.2d 699 (1985) (holding that the school district had a duty to select a bus discharge point that did not needlessly expose students to serious hazards. The school was held liable for a high school student’s injuries that were sustained while crossing railroad tracks after being dropped off by a school bus); State v. Flanigan, 489 N.E.2d 1216 (Ind. Ct. App. 1986) (stating that fleamarket operators owed no duty to protect a customer from being struck by a vehicle while the customer was walking along the highway on his way to the fleamarket after having parked his vehicle along the highway); Poe v. Tate, 161 Ind. App. 212, 315 N.E.2d 392 (1974) (holding that a restaurant owner had a duty to an invitee to keep the sidewalk adjacent to his restaurant in proper condition for passage by customers); George v. Western Auto Supply Co., 527 So. 2d. 428 (La. Ct. App. 1988) (holding that the store’s failure to notify an invitee about the hazardous condition of the sidewalk on its premises did not violate its duty to provide the invitee safe ingress to and egress from its premises); Piedalue v. Clinton Elementary School Dist. No. 32, 214 Mont. 99, 692 P.2d 20 (1984) (holding that an inviter has a duty to warn of an unsafe ingress to and egress from his property even though such condition lies beyond the premises actually owned by the inviter); Fuhrer v. Gearhart-By-The-Sea, Inc., 306 Or. 434, 760 P.2d 874 (1988) (holding that, in order to be liable for the injuries of an invitee, the owner of the hotel must have known of the dangerous ocean surf located on the adjacent beach); Mostert v. CBL & Assocs., 741 P.2d 1090 (Wyo. 1987) (finding that theater lessees owed a duty to warn invitees of foreseeable off-premises risk of flash flooding).


\textsuperscript{102} \textit{Restatement (Second) of Torts} § 332 comment 1 (1965).
"area of invitation" will of course vary with the circumstances of the case. It extends to the entrance to the property, and to a safe exit after the purpose [of the visit] is concluded; and it extends to all parts of the premises to which the purpose may reasonably be expected to take him . . . .

With regard to off-premise liability, this explanation has been interpreted to mean that the landowner must provide a safe “ingress and egress” to the business premises. Therefore, courts have typically viewed this interpretation as extending liability for criminal acts occurring beyond the boundaries of the premises only in limited circumstances. For example, in Banks v. Hyatt Corp., the Fifth Circuit held that Prosser’s description extended liability to a hotel owner for the shooting of a patron four feet from the entrance way of the hotel. In justifying the imposition of liability upon an inviter for criminal attacks based on the inviter’s ability “to identify and carry out cost-justified [reasonable] preventive measures on the premises,” the Banks court held that the duty can extend to adjacent property if the inviter has “sufficient control” of and “is aware of a dangerous condition on the adjacent property.”

A. The Issue of Control

Several courts have applied the same foreseeability test used to determine liability when a criminal act is committed on the inviter’s premises to the situation in which those acts occur off of the inviter’s property. However, other factors are also considered when such a situation arises. Courts have held that possession of and the right to control a piece of property creates a duty to protect those entering upon that property. According to the court in Peterson v. San

103. W. PROSSER & P. KEETON, supra note 1, § 61, at 424 (citations omitted).
104. 722 F.2d 214, 222 (5th Cir. 1984).
105. Id. at 222, 227 (noting that an inviter must “minimize the risk to his guests within the sphere of his control.”). As noted at supra note 18, the hotel owner in Banks owned the property on which the shooting occurred; however such property served as a public sidewalk, which, arguably, was neither under the control of the inviter nor within the scope of the invitee’s invitation. See id. at 215, 222.
106. Id. at 226.
107. See supra note 74 and accompanying text.
108. For example, whether or not the inviter has “control” of the property on which the injury was sustained. See supra notes 113-49 and accompanying text.
109. Southland Corp. v. Superior Court, 203 Cal. App. 3d 656, 664, 250 Cal. Rptr. 57, 61 (1988) (stating that the “duty to take affirmative action to protect persons coming upon
Francisco Community College District,110 there is a special duty on a landowner to protect his customers from criminal acts of third parties.111 In an attempt to prevent too broad a reading of Peterson, the court in Isaacs v. Huntington Memorial Hospital,112 held that a landowner is not responsible for injuries caused by a defective or dangerous condition on property not owned, possessed or controlled by him.113 This holding appears to be completely in line with section 344 of the Restatement (Second) of Torts, which extends liability to a "possessor of land who holds it open to the public for entry for his business purposes."114 The principle enunciated in Isaacs is frequently utilized by courts when the injury to an invitee occurs off the inviter's premises.115 In such a situation, there is clearly an absence of ownership.116 Thus, a discussion that relies on the Isaacs factors centers primarily on the issue of control.117

1. The "Elastic" Application of the Control Test

One case focusing on the control issue, Schwartz v. Helms Bakery Ltd.,118 gives an "elastic" scope to the concept of control.119 In Schwartz, a four-year old child was injured when struck by a car

the property 'is grounded in the possession of the property and the attendant right to control and manage the premises.' " (quoting Sprecher v. Adamson Cos., 30 Cal. 3d 358, 368, 636 P.2d 1121, 1126, 178 Cal. Rptr. 783, 788 (1981)).


111. Id. at 806, 685 P.2d at 1196, 205 Cal. Rptr. at 845.


113. Id. at 134, 695 P.2d at 664, 211 Cal. Rptr. at 367; accord Southland, 203 Cal. App. at 664, 250 Cal. Rptr. at 61 (1988). According to BLACK'S LAW DICTIONARY 1046 (5th ed. 1979), "possess" can mean "[t]o occupy in person; to have in one's actual physical control; to have the exclusive detention and control of; to have and hold as property; to have a just right to; to be master of; to own or be entitled to." Courts tend to base a discussion of off-premise liability on the control factor rather than the possess factor, possibly due to this broad definition.

The Isaacs court stated that "[w]here the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper." 38 Cal. 3d at 134, 695 P.2d at 664, 211 Cal. Rptr. at 367.

114. RESTATEMENT (SECOND) OF TORTS § 344 (1965). This section is reprinted in the text accompanying supra note 65.

115. See infra notes 118-65 and accompanying text.

116. If this were not true, a formula for determining off-premise liability would not have to be utilized.

117. Possession is an ambiguous term that has not been analyzed by the courts with any depth or specificity. See supra note 113.

118. 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967).

while crossing the street in the middle of a block to buy a doughnut from a bakery truck. The child had, several minutes prior to the accident, requested that the driver wait for him while he ran home to get money and the driver agreed. When the child returned from his home, he attempted to reach the bakery truck across the street by darting between two parked cars.

The court stated that, since the driver had "invited the child to become a customer of his business," a legal relationship was created that imposed a duty upon the inviter to exercise ordinary care for his invitees and "to avoid the creation of unreasonable risks of foreseeable harm" that might occur upon the inviter's premises. The *Schwartz* court noted that

[The physical area encompassed by the term "the premises" does not, however, coincide with the area to which the invitee possesses a title or a lease. The "premises" may be less or greater than the invitee's property. The premises may include such means of ingress and egress as a customer may reasonably be expected to use. *The crucial element is control.*

Furthermore, the court stated that as long as the injury is caused by a dangerous condition or unreasonable risk of harm within the inviter's control, the inviter can be held liable, even though the

120. 67 Cal. 2d at 235, 430 P.2d at 70, 60 Cal. Rptr. at 512. The "street vendor" cases have been limited to the unique operation of a traveling business. E.g., Steinmetz v. Stockton City Chamber of Commerce, 169 Cal. App. 3d 1142, 214 Cal. Rptr. 405 (1985); Nevarez v. Turfimart, Inc., 7 Cal. App. 3d 799, 87 Cal. Rptr. 50 (1970).

121. *Schwartz*, 67 Cal. 2d at 235, 430 P.2d at 70, 60 Cal. Rptr. at 512.

122. *Id.*

123. *Id.* The court also noted that several courts have held that street vendors must adhere to a high duty of care for the safety of children invitees. *Id.* at 237, 430 P.2d at 71, 60 Cal. Rptr. at 513. In fact, a higher degree of care must be exercised when a child is involved as opposed to when an adult is involved. *Id.* at 240, 430 P.2d at 75-76, 60 Cal. Rptr. at 517-518.

As an alternative theory for imposing liability, the court held that the driver entered into a legal relationship with the child by undertaking to direct his conduct and thus owed the child a duty to protect him from unreasonable risks of foreseeable harm under this theory as well. *Id.* at 236, 430 P.2d at 70, 60 Cal. Rptr. at 512.

124. See, e.g., *id.* at 239 n.5, 430 P.2d at 73 n.5, 60 Cal. Rptr. at 515 n.5.

125. See, e.g., *id.* at 239 n.6, 430 P.2d at 73 n.6, 60 Cal. Rptr. at 515 n.6.

126. *Schwartz*, 67 Cal. 2d at 239, 430 P.2d at 73, 60 Cal. Rptr. at 515 (emphasis added).

127. It should be noted that, while the *Southland* court relied on *Schwartz's* interpretation of "control," *Southland* refers to the inviter's control over the non-owned property, while *Schwartz* refers to the inviter's ability to control the risk of injury.
injury occurred off the inviter’s premises.\textsuperscript{128} Therefore, in \textit{Schwartz},
the driver had the duty of exercising reasonable care for the child’s
safety “in the immediate vicinity of the truck as would be expected
of an ordinarily prudent man in the same circumstances.”\textsuperscript{129} The
\textit{Schwartz} court held that the driver had breached this duty because he
had failed to take reasonable steps to protect the child from foreseeable
injury.\textsuperscript{130}

Interestingly, the court did note that the driver had attempted to
prevent the child from running across the street by yelling a warning
to the child as the child began to cross the street.\textsuperscript{131} Despite this
fact, the court found that the driver did not take reasonable steps to
protect the child. Under the \textit{Schwartz} theory, it could be argued that
the driver must predict the path of every child invitee and act to
prevent any foreseeable harm to the child, a duty which is perhaps overly burdensome.\textsuperscript{132} Thus, this “elastic” scope may be too broad in
its application.

The issue of control was further analyzed in \textit{Southland Corp. v. Superior Court.}\textsuperscript{133} In \textit{Southland}, the plaintiff had parked in a vacant, unpaved lot adjacent to the defendant’s 7-Eleven store.\textsuperscript{134} On
his way back to his car after going into the store, the plaintiff was
attacked by three unknown persons on the adjacent lot.\textsuperscript{135} The California Court of Appeals held that an inviter’s duty might extend to
property over which he exercises actual or apparent control even though he neither owns nor possesses the property.\textsuperscript{136}

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\textsuperscript{128} \textit{Schwartz}, 67 Cal. 2d at 243 n.10, 430 P.2d at 75 n.10, 60 Cal. Rptr. at 517 n.10.
\textsuperscript{129} \textit{Id.} at 243, 430 P.2d at 75, 60 Cal. Rptr. at 517.
\textsuperscript{130} \textit{Id.} The court held that the driver could have avoided liability by observing the child before he crossed the street and by (1) conveying to the child to stop and then telling him when it was clear to cross the street, (2) stopping traffic to allow the child to cross the street, (3) delivering a doughnut to the child so he would not have to cross the street, or (4) driving the bakery truck to the other side of the street. \textit{Id.}
\textsuperscript{131} \textit{Id.} at 236, 430 P.2d at 70, 60 Cal. Rptr. at 512. As the child stepped onto the street, the driver started to say, “Don’t run across the street.” \textit{Id.}
\textsuperscript{132} This is not to say that California courts have interpreted \textit{Schwartz} as standing for this analysis, but merely indicates that \textit{Schwartz} confers a duty that is difficult for an inviter to fulfill. In addition, the \textit{Schwartz} court itself noted that street vendors must adhere to a higher duty of care for the safety of children purchasing their wares. \textit{Id.} at 236, 430 P.2d at 71, 60 Cal. Rptr. at 513.
\textsuperscript{133} 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 (1988).
\textsuperscript{134} \textit{Id.} at 660, 250 Cal. Rptr. at 58.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 664, 250 Cal. Rptr. at 61. The defendant did have a contractual right to use the adjacent lot on a non-exclusive basis subject to the non-exclusive rights of others. \textit{Id.} at 661 n.1, 250 Cal. Rptr. at 58-59 n.1. The defendant, however, also had the same right to the
The injured invitee in Southland argued that even though the inviter, 7-Eleven, did not own or possess the vacant, unpaved lot adjacent to his business premises, the inviter had the power to control loitering on the lot. The plaintiff argued that an inviter "may owe a duty to patrons 'off the business premises' when the circumstances causing the injury are within the range of [the inviter's] reasonable supervision and control." In supporting the plaintiff's position that the inviter had the ability to control the lot, the court found that the inviter had exercised control over the vacant lot on a number of previous occasions by requesting police assistance to remove juveniles loitering on the store's premises and the adjacent lot.

The dissenting opinion in Southland, however, recognized the overly burdensome effect of the majority's ruling and stated that, while the inviter's actions might have the effect of exercising control over the lot, he should not be penalized for having previously attempted to protect invitees using his premises.

adjacent sidewalk and roads, which, presumably, were not owed by the lessor. Id. Further, it is clear that the owner of the vacant lot, Roy Gump, was not the lessor of the inviter's premises. Id. at 662 n.3, 250 Cal. Rptr. at 59 n.3. Thus, it is unclear whether the lessor had authority to give the lessee of the 7-Eleven any rights over the vacant lot.

The court in Southland held that several factors must be weighed to determine whether one owes a duty to another: (1) "the foreseeability of harm to the plaintiff"; (2) "the degree of certainty that the plaintiff suffered injury"; (3) "the closeness of the connection between the defendant's conduct and the injury suffered"; (4) "the moral blame attached to the defendant's conduct"; (5) "the policy of preventing future harm"; (6) "the extent of the burden to the defendant and [the] consequences to the community of imposing a duty to exercise care with resulting liability for breach"; and (7) "the availability, cost, and prevalence of insurance for the risk involved." Id. at 664, 250 Cal. Rptr. at 61 (citing Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 806, 685 P.2d 1193, 1196, 205 Cal. Rptr. 842, 845 (1984)).

137. 203 Cal. App. 3d at 664, 250 Cal. Rptr. at 61. This argument is irrelevant because even if the inviter could control loitering on the adjacent lot, there is no evidence that he had any control over criminal attacks occurring on this lot.
139. Southland, 203 Cal. App. 3d at 665, 250 Cal. Rptr. at 61. It should be noted that the circumstances in Schwartz were significantly different from those in Southland. The victim in Schwartz was a young child, whereas in Southland, the victim was an adult. See supra notes 123 & 132. Moreover, Southland involved a criminal act by a third party, while no criminal activity was present in Schwartz.
140. Id. at 666-67, 250 Cal. Rptr. at 62-63.
141. See id. at 670, 250 Cal. Rptr. at 65 (Arabian, J., dissenting). In addition, while the inviter in Southland might have had the ability to control loitering on the vacant lot, it by no means follows that he had the same power to prevent third-party criminal assaults upon his invitees occurring on this lot.
2. The Ability to Control the Premises

Another California case that attempted to define the boundaries of the "control" test was *Donnell v. California Western School of Law.* In *Donnell,* a student was attacked while walking alongside the law school's buildings on the public sidewalk after leaving the school. The student was heading toward his car, which was parked in the school's faculty parking lot, when he came upon his assailant breaking into another car parked on a city street. The student asserted that the school "had the power to 'control' the sidewalk" by placing lights on its own building in order to illuminate the sidewalk and monitoring the sidewalk so the students are aware of street activity prior to leaving the school's property. *Southland* court refused to impose a duty upon the landowner, noting that the student incorrectly thought that the term "control over property" should be stretched to cover a situation in which an adjoining landowner merely had the "ability to influence or affect such property." *Southland*

The *Southland* court, while relying on *Donnell,* tried to distinguish the facts by noting that the 7-Eleven's management had previously called the police to remove loiterers from the vacant lot, which, the court asserted, was an exercise of control over the lot. *Southland* can be distinguished from *Donnell* in two ways: first, it involves a landlord-tenant relationship; and second, the type of control exercised is qualitatively different from that exercised in *Southland.* As in *Donnell,* no evidence was presented that the inviter in *Southland* assumed "any responsibility for or exercised control over the means of lighting" the adjacent premises. *Southland,* 203 Cal. App. 3d at 666-67, 250 Cal. Rptr. at 63; accord *Johnston v. De La Guerra Properties, Inc.,* 28 Cal. 2d 394, 401, 170 P.2d 5,9 (1946) (holding a tenant liable for injuries sustained by a business invitee even though the injuries occurred in a common passageway outside the leased area, because the tenant exercised a limited right of control over this area by adding lighting and a neon sign in this entranceway). *Johnston* can be distinguished from *Southland* in two ways: first, it involves a landlord-tenant relationship; and second, the type of control exercised is qualitatively different from that exercised in *Southland.*

As in *Donnell,* no evidence was presented that the inviter in *Southland* assumed "any responsibility for or exercised control over the means of lighting" the adjacent premises. *Donnell,* 200 Cal. App. 3d at 722, 246 Cal. Rptr. at 203. But see *Southland,* 203 Cal. App. 3d at 667 n.8, 250 Cal. Rptr. at 63 n.8 (noting that, although not presented to the trial court, and thus not an issue on appeal, the invitee, in oral argument, stated that flood lights that had been attached to the 7-Eleven building provided illumination for customers parking their...
ever, if a car accident occurred on the street outside the 7-Eleven, the owner could hardly be said to be exercising control over the street by calling the police. It seems apparent that the 7-Eleven’s management was only concerned with the effect that these loiterers might have on the store’s premises and its patrons. It is doubtful that the 7-Eleven’s owner cared about a vacant, unpaved lot since the loiterers could do little to damage it. In addition, if the school’s administration in Donnell had heard a fight ensuing in the street and then called the police, it would be stretching the meaning of “control” to say that they had exercised control over the parking areas provided on the street. The school in Donnell would have been acting solely to protect its own property and out of concern for society, which is arguably what had motivated the owner of the 7-Eleven in Southland. Thus, the decision in Southland “has the practical effect of discouraging activities which benefit the victims amongst us.”

3. The Extent to Which Southland Departs from Previous Case Law

The Southland court distinguishes its decision from others involving similar situations where the courts have held that the inviter was not liable, stating that in those previous cases, the inviter “did not and could not exercise control over the property” where the invitee received the injuries. However, the Donnell court intimated that whether or not a business owner could exercise control over the adjacent property was unimportant. In addition, the inviter in several of the cases cited by Southland could have exercised control over

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148. The threats against society include noise pollution and damage to property, which will ultimately be paid for by the taxpayers, and physical harm caused to others.
150. See supra note 18 (comparing cases involving injury to an invitee due to the criminal conduct of a third party occurring off the inviter’s property).
the property where the injuries had occurred if it had so desired.\footnote{153} For instance, in Donnell,\footnote{154} the school could have easily affixed lights to its building to illuminate the street better. In addition, the school could have provided security persons to transport the students safely to and from their vehicles.\footnote{155} Similarly, in another case cited by Southland, Steinmetz v. Stockton City Chamber of Commerce,\footnote{156} the inviter, whose business was located in and leased from the owner of an industrial park,\footnote{157} could have provided invitees transportation from the “mixer” to their cars parked elsewhere in the park. Therefore, contrary to what the Southland court attempted to suggest, the mere fact that the inviter “could have” exercised control over the property is not sufficient to confer a duty upon him.\footnote{158} The Donnell\footnote{159} and Steinmetz\footnote{160} decisions might have instead involved notions of fairness;\footnote{161} the idea that it would be unfair to hold an inviter liable for the acts of third parties that occur off the inviter’s property.

\footnote{153} See infra notes 154-57 and accompanying text.
\footnote{155} It seems clear that if, in fact, the inviter in Donnell had owned the dirt under the sidewalk along the side of the school, it could have such a duty.
\footnote{156} 169 Cal. App. 3d 1142, 214 Cal. Rptr 405 (1985). In Steinmetz, the decedent had attended a “mixer,” sponsored by the Chamber of Commerce, for owners of local businesses. The “mixer” was held on property located in an industrial park that was leased by the California Human Development Corporation from the owner of the park. After leaving the “mixer,” the decedent was fatally stabbed in a nearby parking lot located off the Chamber’s premises but within the park. Id. at 1144, 214 Cal. Rptr. 406. The Steinmetz court held that neither the sponsor of the “mixer” nor the lessee of the premises owed a duty to protect their invitees from injuries suffered on premises not owned, possessed or controlled by either of them. Id. at 1148, 214 Cal. Rptr. at 409.
\footnote{157} Id. at 1144, 214 Cal. Rptr. at 406.
\footnote{158} See Donnell, 200 Cal. App. 3d at 720, 246 Cal. Rptr. at 201.
\footnote{161} Such fairness notions might be based upon the idea that an inviter should not be responsible for the acts of third parties that occur off of the inviter’s property. See generally Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291, 296 (1962) (rejecting an analysis turning on foreseeability and, instead, examining the fairness of the proposed duty. The court concluded that the duty a landowner owes “is one of fairness in light of the nature of the relationship, the nature of the hazard, and the impact of such a duty on the public interest.”). The Goldberg court reasoned that the property owner should not be liable if he does not provide police protection to deter invading criminals unless it is also decided that the landowner has a right to provide a police force to that end. Id. Further, the court stated that, since the government is vested by statute with the power to form police forces, the landowner does not also have this right. Id. Indeed, it would be ludicrous to allow a landowner, even a commercial landowner, the right to form a police force and then proceed to direct that force to patrol areas outside the business premises.
Furthermore, the fact that the inviter was aware that his or her invitees used the area where the crimes occurred does not distinguish Southland from Donnell. In Southland, the court argued that the inviter was aware that its customers regularly used the lot and took no action to limit or discourage such acts. In Donnell, however, the law school's administration was also aware that the students used the street to park and did not discourage such action, yet the court did not find the existence of a duty. This decision, although not explicit in the Donnell opinion, may have been made in part because of the difficult task of discouraging or limiting the use of property that the inviter does not own.

In determining whether or not the inviter owes his invitees a duty to protect them from criminal acts occurring off his premises, a finding that the inviter had "control" of the adjacent premises should be limited to those situations in which the inviter exercised more than a mere scintilla of control.

B. The Issue of Foreseeability

Generally, an inviter has a duty to protect his invitees from the criminal acts of third parties only when such acts are reasonably foreseeable. There appears to be general agreement that "what is required to be foreseeable is only the 'general character' or 'general type' of the event or the harm, and not its 'precise' nature, details, or above all manner of consequence." The plaintiff in Southland argued that the assault that had taken place off of the inviter's property was foreseeable by the inviter, and the court held that foresee-

162. 203 Cal. App. 3d at 667, 250 Cal. Rptr. at 62.
163. It should be noted that, in Southland, it was recognized that the inviter's right of control over the adjacent property was more apparent than actual, 203 Cal. App. 3d at 667, 250 Cal. Rptr. at 63, while in Donnell, there probably was not even the appearance that the school controlled the adjacent public sidewalk.
164. See supra note 161 (discussing the establishment, by the inviter, of a police force to patrol unowned areas).
165. This standard is admittedly not a "bright line" test, but neither is the current standard. The approach suggested here merely serves to indicate that the present standard used by some courts to define what constitutes "control" is too broad. For a discussion concerning the elements of a suggested control test, see infra notes 226-30 and accompanying text.
166. See supra notes 12-15 and accompanying text.
167. W. PROSSER & F. KEETON, supra note 1, § 43, at 299 (citations omitted); see RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965) (reprinted supra in the text accompanying note 65).
168. 203 Cal. App. 3d at 662, 250 Cal. Rptr. at 59.
ability was a triable question of fact for the jury to decide. Even though the 7-Eleven had had previous experiences with loiterers and fist fights among them, an incident similar to the attack in this case had never occurred. In addition, in the seven years prior to the injury sustained in Southland “there were no other crimes, no other claims, and no other injuries reported.” Still, the court held that the criminal attack that had occurred could have been foreseeable. While it is always possible that loiterers will commit assaults upon invitees, it is difficult to conclude from the facts of Southland that such conduct was foreseeable, especially when no assaults had ever before occurred. It cannot be said that either the “general type” or “general character” of the incident was foreseeable. Southland, in this respect, has taken advantage of the “margin of leeway . . . left for the unusual and the unexpected” to be designated foreseeable. This is an example of the type of case to which Professors Prosser and Keeton were referring when they stated that “what the ordinary person would regard as freakish, bizarre, and unpredictable has crept within the bounds of liability by the simple device of permitting the jury to foresee at least its very broad, and vague, general outlines.”

At least one court has recognized the difference between the duty owed by the inviter with respect to criminal acts as opposed to other negligent acts. In Cornpropst v. Sloan, the court stated that “it is a mistake to equate the duty of shopkeepers with respect to criminal acts with the duty of shopkeepers with respect to careless acts.” As the Cornpropst court recognized, in the former situation the inviter’s duty should normally be of a lesser degree than in the latter case. This rationale stems from the notion that the inviter’s lack of actual or constructive knowledge of an impending criminal attack justifies not imposing a duty upon him to protect his invitees.

The Arkansas Supreme Court, in Ollar v. Spakes, utilized an

169. Id. at 669, 250 Cal. Rptr. at 64.
170. Id. at 662, 250 Cal. Rptr. at 59.
171. Id.
172. Id. at 669, 250 Cal. Rptr. at 64.
173. W. PROSSER & P. KEETON, supra note 1, § 43, at 299.
174. Id.
175. Cornpropst v. Sloan, 528 S.W.2d 188, 197 (Tenn. 1975).
176. Id.
177. Id. at 197-98.
178. See id. at 198.
179. 269 Ark. 488, 601 S.W.2d 868 (1980).
arguably more effective foreseeability test than the approach taken in *Southland*. In *Ollar*, an invitee fell while approaching the inviter's restaurant and was injured.\(^{180}\) The invitee tripped on a railroad tie located on adjacent property. The owner of the property used the tie to keep the inviter's customers from parking on her lot.\(^{181}\) The inviter knew that these barriers existed and that they inconvenienced his customers when they attempted to reach the restaurant from the adjacent lot.\(^{182}\)

The *Ollar* court recognized that an inviter might be liable for injuries sustained by his invitees off his premises, but stated that before a property owner can be extraterritorially liable, there must be evidence that the owner knew of the specific danger of injury.\(^{183}\) Thus, the court held that because no other person had been injured due to the positioning of the railroad ties, and since the inviter had no knowledge of the danger of injury, he was not liable for the invitee's injuries.\(^{184}\)

1. Should Prior Similar Incidents be Required?

Several courts have argued that requiring evidence of prior similar incidents in all circumstances is unfair because it precludes the first-injured plaintiff from recovering.\(^{185}\) The *Isaacs* court, for example, stated that "a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property."\(^{186}\) While this might seem logical when the criminal act has occurred on

\(^{180}\) Id. at 490, 601 S.W.2d at 869.

\(^{181}\) Id.

\(^{182}\) Id. at 492, 601 S.W.2d at 871.

\(^{183}\) Id. at 493, 601 S.W.2d at 870. In addition, the court noted that "the owner of the premises must have known of the dangerous condition or could have, in the exercise of reasonable care, discovered such dangers before he will be held liable." Id. at 494, 601 S.W.2d at 871. Presumably, if the inviter knows of a specific danger on adjacent property, he can either attempt to remove the danger, warn his invitees of the danger, or put up a fence to deter invitees from entering upon that property.

\(^{184}\) Id. at 493, 601 S.W.2d at 871.

\(^{185}\) Holiday Inn, Inc. v. Shelburne, 576 So. 2d 322, 331 (Fla. Dist. Ct. App. 1991); see supra note 86 and accompanying text.

\(^{186}\) 38 Cal. 3d at 126, 695 P.2d at 658, 211 Cal. Rptr. at 361. The *Isaacs* court examined a shooting incident that took place in a high crime area where there had been prior incidents of threatened assaults, thefts and harassments. Id. In *Southland*, however, the only incident occurring prior to the assault on plaintiff was loitering. 203 Cal. App. 3d at 661, 250 Cal. Rptr. at 59. Apparently, in *Isaacs*, even though the prior incidents were not exactly the same as what had occurred, they were sufficiently similar to a shooting as to say that such shooting was foreseeable in the absence of a prior shooting.
the landowner's property, it should not be extended to acts occurring off the inviter's premises. Arguably, notions of fairness dictate that when the criminal act occurs off the inviter's premises, evidence of prior similar acts is necessary to overcome the fact that the inviter does not own that property.

Additionally, since the plaintiff in *Southland* had frequently visited the 7-Eleven, he was presumably aware that juveniles regularly loitered around the area. The plaintiff, therefore, could have predicted the assault to the same degree as could the defendant. Professor Prosser has stated that "there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent that he may reasonably be expected to discover them." Although beyond the scope of this Note, elements of contributory negligence and assumption of risk are implied by the foregoing assertions.

Taking prior similar acts into account only seems logical when trying to determine whether an act was foreseeable. For instance, in *Banks v. Hyatt Corp.* an invitee was fatally shot four feet from the entrance of a hotel. Refco Poydras Hotel Joint Venture ("Refco") owned and operated the Poydras Plaza Mall and owned the Hyatt Hotel. Hyatt Corporation ("Hyatt") was the lessee and operator of the hotel. The court, in holding that Refco was not liable, stated that

> [t]he owner or operator of a business owes a duty to invitees to exercise reasonable care to protect them from injury. This duty does not extend, however, to unforeseeable or unanticipated criminal acts by an independent third person. "Only when the owner or manage-

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187. 203 Cal. App. 3d at 661, 250 Cal. Rptr. at 59.
188. Cf. Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36, 43 (1981) (Carlton, J., dissenting) (stating that the owner should not be burdened with a duty to protect the patron from criminal acts when the criminal activity is obvious to the patron).
189. W. PROSSER & P. KEETON, supra note 1, § 61, at 427 (citations omitted).
190. See generally R. POSNER, supra note 33, at 154-56 (describing contributory and comparative negligence and assumption of risk and their differences).
191. See, e.g., Banks v. Hyatt Corp., 722 F.2d 214 (5th Cir. 1984) (taking into account prior armed robberies outside of a hotel entrance).
192. Id.
193. Id. at 215.
194. Id. Although Refco owned the property that the invitee was on, the property also served as a public sidewalk. Id. at 217. As such, although the analysis of Refco's liability concerned criminal acts occurring on the premises, Hyatt's liability involved an analysis of criminal conduct that occurred off the inviter's (Hyatt's) property.
195. Id.
ment of a business has knowledge, or can be imputed with knowledge, of a third person's intended criminal conduct which is about to occur, and which is within the power of the owner or management to protect against, does such a duty towards a guest arise.\textsuperscript{196}

However, in finding Hyatt liable, the \textit{Banks} court noted that the Louisiana Supreme Court has held that innkeepers owe their guests a higher duty than that of ordinary or reasonable care.\textsuperscript{197} Under this view, an innkeeper "may be liable if he fails to take reasonable precautions to deter the type of criminal activity which resulted in a guest's injury."\textsuperscript{198} In finding that Hyatt did not take reasonable precautions, the court relied heavily upon evidence of prior criminal incidents.\textsuperscript{199} In the three months prior to the invitee's death, reported incidents occurring both on and off the premises included eleven armed robberies and five simple robberies.\textsuperscript{200} In addition, in the three years prior to the shooting involved in \textit{Banks}, another person had been shot and four others had been robbed at gunpoint at the same entrance where the invitee was shot.\textsuperscript{201} Clearly, in \textit{Banks}, prior similar incidents were present that could have placed the inviter on notice of the likelihood of future criminal acts by third parties.

Even courts that follow the \textit{Isaacs} "totality of circumstances" approach do so only to prevent limiting evidence of foreseeability solely to prior similar incidents.\textsuperscript{202} In \textit{Holiday Inn, Inc. v. Shelburne},\textsuperscript{203} an invitee was shot by another invitee off the business premises, in an adjacent parking lot, shortly after the two parties left the business establishment, a bar. The \textit{Shelburne} court noted that proof of foreseeability should not be limited by law to evidence of knowledge of a particular assailant's propensity for actual or constructive violence, but also should include evidence of "a tavern owner's actual or constructive knowledge, based upon past experi-

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\textsuperscript{196} \textit{Id.} at 220 (quoting Davenport v. Nixon, 434 So. 2d 1203, 1205 (La. App. 1983)).
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.} at 220-21 (quoting Reichenbach v. Days Inn, Inc., 401 So. 2d 1366, 1367 (Fla. Dist. Ct. App. 1981)). The distinction between the liability of an innkeeper and that of other businesses is "no doubt rooted in the belief that business patrons of innkeepers . . . have entrusted their personal security to the innkeeper." \textit{Id.} at 221.
\textsuperscript{199} \textit{See id.} at 218.
\textsuperscript{200} \textit{Banks}, 722 F.2d at 218.
\textsuperscript{201} \textit{Id.}
\textsuperscript{203} \textit{Id.}
\end{flushright}
ence, that there is a likelihood of disorderly conduct by third persons in general which may endanger the safety of his patrons."\textsuperscript{204}

This Note does not criticize the above assertion. However, such an assertion is simply a reiteration of Comment \textit{f} of the \textit{Restatement (Second) of Torts} which, as previously noted, stated that an inviter has no duty to protect invitees from criminal acts of third parties unless he knows that there is a "likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual."\textsuperscript{205} Relying on the above interpretation, the \textit{Shelburne} court held that evidence of foreseeability should not be limited to merely similar criminal activity, but should be expanded to include all criminal activity.\textsuperscript{206} In doing so, the court concluded that "the fifty-eight offense reports pertaining to prior criminal incidents at the . . . bar [were] evidence of [the inviter's] knowledge of 'a likelihood of disorderly conduct by third persons in general which may endanger the safety of his patrons.'"\textsuperscript{207} These prior criminal acts, which the court implies are not similar to the shooting that took place in the case, and which clearly established foreseeability of the shooting, included "reports of an aggravated assault with a knife, an attempted sexual battery, discharging a firearm in public, an aggravated battery, twenty reports of burglary-grand theft . . . and numerous reports of batteries and criminal mischief," all of which occurred in the eighteen months preceding the shooting.\textsuperscript{208} The \textit{Shelburne} court distinguished its case from one in which the only prior criminal acts were homosexual activity, illicit drug dealing and arson attempts.\textsuperscript{209} In that case, the invitee had been shot during an attempted robbery. However, no other violent crimes had been reported in the area during the preceding two years.\textsuperscript{210} The court determined that, based upon the prior criminal acts, the criminal assault was not foreseeable by

\textsuperscript{204} Id. at 330 (emphasis added) (quoting Stevens v. Jefferson, 436 So. 2d 33, 35 (Fla. Dist. Ct. App. 1983)).

\textsuperscript{205} \textit{Restatement (Second) of Torts} § 344 comment \textit{f} (1965); see supra text accompanying note 65.

\textsuperscript{206} See supra note 204.

\textsuperscript{207} Id. at 331.

\textsuperscript{208} Id.

\textsuperscript{209} Id. (distinguishing Ameijeiras v. Metropolitan Dade County, 534 So. 2d 812 (Fla. Dist. Ct. App. 1988)).

\textsuperscript{210} Ameijeiras, 534 So. 2d at 813.
the inviter.211

In Southland, in the seven years prior to the injury sustained, “there were no other crimes, no other claims, and no other injuries reported.”212 Proclaiming to be adhering to the “totality of circumstances” approach espoused in Isaacs,213 the Southland court, in determining whether the attack was foreseeable, appears to have looked for the occurrence of any prior acts that might be classified as criminal, while ignoring the absence or the non-occurrence of any prior criminal acts (similar or not).214 This interpretation of Isaacs produces a test that is, on its face, unfair to proprietors because it implies that regardless of whether or not prior criminal acts, similar or otherwise, have occurred, the proprietor should foresee future acts of a criminal nature. But if no prior criminal acts had ever occurred, it is questionable by what means the proprietor can, in fact, act upon such illusory foreseeability. Assuming that the Shelburne approach is the correct one, the Southland court misinterpreted the Isaacs “totality of circumstances” approach. Rather than merely “not limiting evidence of foreseeability to prior similar incidents” the Southland court decided that a criminal act could be deemed foreseeable regardless of the non-existence of practically any prior criminal acts whatsoever.

C. The Extent to Which Economics is at Issue

The court in Southland reasoned that, to the extent that a greater parking capacity increased sales at the defendant’s 7-Eleven, the store realized a commercial benefit from such use of the vacant lot.215 While it was true that the parking lot that the defendant provided had only eight parking spots,216 the mere fact that something benefits a proprietor does not thereby impose a duty upon him.217 In Donnell v. California Western School of Law, the students of the school had to park on the street because the school did not provide any parking for its students.218 Clearly, the school in Donnell benefitted finan-

211. Id. at 813-14.
213. See supra notes 85-97 and accompanying text.
214. See Southland, 203 Cal. App. 3d at 668-69, 250 Cal. Rptr. at 63-64.
215. 203 Cal. App. 3d at 667, 250 Cal. Rptr. at 63.
216. Id. at 666, 250 Cal. Rptr. at 62.
218. 200 Cal. App. 3d at 718, 246 Cal. Rptr. at 200. The Donnell court reasoned that,
cially from the parking provided on the street because if the students could not park on the street, they would be unable to attend classes. The Donnell court held, however, that "the law of premises liability does not extend so far as to hold Cal Western liable merely because its property exists next to adjoining dangerous property and it took no action to influence or affect the condition of such adjoining property." Similarly, the 7-Eleven in Southland should not be liable for criminal acts occurring on the adjacent lot since their having occasionally called the police to remove loiterers from the area did not constitute "action to influence or affect the condition of such adjoining property."

One of the major reasons for holding a landowner liable for criminal acts occurring on his property is that the plaintiff deserves to be compensated for his injuries. This rationale is weakened when

because the defendant's law students were adults, not minors, they should be regarded as its business invitees. Id. at 719, 246 Cal. Rptr. at 201. Thus, Donnell can be closely analogized to Southland even though it seems clear that the main purpose of a school is to educate, while the primary goal of a 7-Eleven is to make a profit. A benefit that advances the goals of that particular establishment is thus derived in both cases, despite the fact that the benefit in Donnell is not strictly financial. For a further discussion of this issue, see infra note 219.

219. In response to the argument that everyone benefits from using public streets and sidewalks, as opposed to the adjacent parking lot in Southland, which benefitted primarily the 7-Eleven owner, it should be noted that the school does not benefit any less merely because others also derive a benefit from the same road or sidewalk. In addition, several cases have held a business liable for injuries sustained by their invitees on adjacent sidewalks. See, e.g., Banks v. Hyatt Corp., 722 F.2d 214 (5th Cir. 1984). But see Brown v. Autry Greer and Sons, Inc., 551 So. 2d 1049 (Ala. 1989); George v. W. Auto Supply Co., 527 So. 2d 428 (La. Ct. App. 1988).

If the school in Donnell had been a not-for-profit institution, it might be argued that it did not have the same economic incentive as did the 7-Eleven in Southland to have their invitees utilize the adjacent available parking facilities. Presumably, however, the school still desired to enable its students to attend classes by having them park their cars on the street. In addition, it would be naive to assume that a law school does not have similar incentives to provide parking for its invitees. Most, if not all, law schools wish to attract professors and students who have received high accolades within both the professional and academic realms. By doing this, the school increases the value of the education that it provides, which enables the school both to charge higher tuition and to pay greater salaries to keep highly respected professors on the faculty. Although providing parking is clearly not on the same level as keeping highly qualified professors teaching at the school, both serve an economic purpose: to attract and retain students. If there is no parking at a school, many students would be discouraged or even prevented from attending that institution. Thus, economic factors are involved to at least as great an extent as in a commercial proprietorship.

220. 200 Cal. App. 3d at 720, 246 Cal. Rptr. at 201.

221. See supra note 219 and accompanying text.

222. See Treadway v. Ebert Motor Co., 292 Pa. Super. 41, 436 A.2d 994 (1981); W. PROSSER & F. KEETON, supra note 1, § 61, at 422 (5th ed. 1984) (stating that there is an implied representation by the inviter that reasonable care has been exercised to make the
considered in cases of injuries sustained off the inviter's premises. Permitting recovery from the inviter allows the plaintiff to be compensated from two sources: the inviter; and the person who owns the premises on which the injury occurred. In fact, in Southland, the plaintiff, in addition to bringing suit against the owner of the 7-Eleven, recovered from the person who owned the vacant lot. If the property on which the invitee was injured is owned by someone other than the inviter, it would seem necessary that the court at least analyze whether or not the owner of the premises had the requisite control over the property and foreseeability of injury so as to make him solely responsible for injuries occurring on his premises. Instead, since the property owner had already settled with the victim in Southland, the court apparently seemed to think that such a discussion was moot.

D. Suggested Standard for Imposing Liability

A proprietor should not be the ultimate insurer of his customers against criminal acts that do not occur on the business' property even if the proprietor is aware that his customers frequently utilize that area in coming or going to his store. Although the imposition of a duty upon the inviter is reasonable under limited circumstances, there are many problems with extending inviter liability beyond the boundaries of the business premises. In fact, some courts argue that the relationship between the invitee and inviter in most cases ceases to exist once the invitee steps off of the inviter's property. Acceptance of this principle, however, results in an arbitrary and false limitation.

When deciding, in a particular case, whether or not an inviter has a duty to protect an invitee from criminal acts occurring off the

223. 203 Cal. App. 3d at 662 n.4, 250 Cal. Rptr. at 59 n.4. It is unclear from the Southland decision how much the plaintiff recovered from the owner of the property on which he was injured; equally unclear is to what extent, if any, such recovery would reduce any subsequent sum the plaintiff might receive through a jury verdict against the inviter.

224. The Southland court's lack of any discussion on this topic seems to support this point.

225. See supra note 1. The proprietor, however, should still be required to provide adequately safe ingress to and egress from his property, provided that the entrance or exit is one that can reasonably be expected to be utilized by a majority of the invitees.

226. See Steinmetz, 169 Cal. App. 3d at 1147, 214 Cal. Rptr. at 408-09 (indicating that to carry the inviter's liability beyond his property would demonstrate "the futility of attempting to impose and define such a duty").
inviter's premises, courts should consider several factors. In applying a "control" standard, a more narrow approach should be utilized than the one presently used by certain courts. An inviter should be found to have "control" of premises that he does not own only if there is clear evidence that he did exercise control over that property. In other words, the inviter should be found to have exercised significant control over the property on which the criminal act occurred. Factors to be analyzed in making such a finding might include: (1) the extent to which the inviter made such property accessible from his or her own business premises; (2) the degree to which the inviter affected the conditions existing on the adjacent property; and (3) the extent to which invitees were required to utilize the adjacent property in order to patronize the inviter's business.

Further, in order to impose liability upon the inviter for criminal acts of third parties occurring off the premises, the criminal act should be foreseeable, and an absence of prior similar incidents should be an indication of an absence of foreseeability.

This Note does not suggest that statutes such as crime victims compensation statutes should take the place of the imposition of liability upon negligent business proprietors for injuries caused on their premises. However, in deciding how far to stretch inviter liability, the fact that forty-six states have such statutes, which reimburse victims for many losses suffered due to criminal activity, should be taken into consideration.

CONCLUSION

The inviter's duty is being expanded by some courts to encompass responsibilities that are overly burdensome and, therefore, unfair. Ultimately, this expansion will hurt both consumers and proprietors because proprietors will be forced to raise prices to meet the costs of

227. See discussion of the California courts' interpretation of "control," supra notes 118-41 and accompanying text.
228. See supra note 165 and accompanying text.
229. For example, whether or not the proprietor erected any type of fence or sign on the property indicating that his or her customers could utilize that area, or if the proprietor took care of the property as if it were effectively owned by him or her by gardening, replacing broken fences and otherwise tending to the upkeep of that area.
230. This factor is discussed at supra notes 215-21 and accompanying text.
231. Except when the prior acts are so closely related, as in Isaacs, as to be considered sufficiently similar. See supra notes 88-90 and accompanying text.
232. For a discussion of such statutes, see supra notes 46-47 and accompanying text.
security precautions,\textsuperscript{233} while customers will either be subject to paying higher prices or be compelled to travel elsewhere to find lower prices.\textsuperscript{234} Therefore, this duty should be one that limits the inviter's liability to an extent that can be more easily defined and predicted by both courts and inviters alike. Furthermore, this duty should not penalize an inviter who attempts to protect invitees using his premises by exercising very limited control over the property adjacent to his business premises.\textsuperscript{235}

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\textsuperscript{233} These security precautions would necessarily have to be overly expansive to assure that proprietors' unpredictable duty towards their customers has been met.

\textsuperscript{234} For a discussion of these problems, see supra notes 48-50.

\textsuperscript{235} See supra note 141 and accompanying text.