

The Character of the Business:
Looking Through “Broken Windows” for Liability
in Mass Shootings & Other Third-Party Criminal Acts

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*“One unrepaired broken window is a signal that no one
cares, and so breaking more windows costs nothing.”
-James Q. Wilson¹*

INTRODUCTION

A. Cascade Mall

On September 23, 2016, at 6:52 p.m., Arcan Cetin, armed with a .22-caliber Ruger rifle, walked through the doors of Macy’s women’s department store at Cascade Mall in Burlington, Washington.² Within a few steps, he randomly opened fire, beginning with 16-year-old Sarai Lara who was standing by the clothing racks.³ The shooter, advancing further into the store, then shot Wilton “Chuck” Egan, who was attempting to run to his wife, before walking to the cosmetics counter and shooting Shayla Martin.⁴ Then, at close range, he shot Belinda Galde and her 95-year-old mother, Beatrice Dotson.⁵ The shooter placed the rifle on the top of the

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1. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/G349-JRPR>].

2. Casey McNerthney, *Cascade Mall Shooting in Burlington: A Timeline of Events*, KIRO 7 NEWS (Sept. 26, 2016), <http://www.kiro7.com/news/local/cascade-mall-shooting-in-burlington-a-timeline-of-events/449864123> [<https://perma.cc/54WV-KC82>].

3. *Id.*

4. *Id.*

5. *Id.*

cosmetics counter and left the store.⁶ Two minutes and fifty seconds—in that time, one man was able to *casually* walk into the store with a clearly visible semiautomatic weapon and murder five people in cold blood before *casually* leaving the building.⁷ By the time the authorities were first called at 6:58 p.m., he was long gone. He was not caught until the following night in Seattle, Washington—nearly twenty-four hours later.⁸

Cascade Mall is an enclosed shopping center located in Burlington, Washington, which opened in 1990.⁹ From 1999 to 2017, Cascade Mall was owned by Macerich, a Real Estate Investment Trust (REIT) that is one of the largest owners and operators of shopping centers in the United States and is headquartered in Santa Monica, California.¹⁰ Following the shooting, in January 2017, the mall was sold to Merlone Geier Partners, a predominantly West Coast retail real estate investment firm based in Washington and California.¹¹ Like most malls, Cascade Mall contains department stores, a food court, a movie theater, and kitschy cart vendors. However, unlike most malls owned in 2016 by companies such as Macerich and Merlone Geier Partners, Cascade Mall was quickly becoming a low-grossing relic of 1990s mall culture.¹² Members of the

6. *Id.*

7. Surveillance from inside Macy's was later released with clear footage of the shooter, weapon, and shooting. For a time and security perspective, see Video Leak Police, *Video Shows Panic Inside Burlington Mall Shooting*, YOUTUBE (Nov. 3, 2016), <https://www.youtube.com/watch?v=bnO-vj8Yp8I> [<https://perma.cc/END3-9WNQ>]. Please note that this is graphic and sensitive material. Viewer discretion is advised.

8. Kelling & Wilson, *supra* note 1.

9. Veronica Grecu, *Macerich Sells Two Regionals Malls for \$170M*, COMMERCIAL PROP. EXECUTIVE (Jan. 23, 2017), <https://www.cpexecutive.com/post/macerich-sells-two-regional-malls-for-170m/> [<https://perma.cc/FNC5-9YM2>]; see also *Cascade Mall Tops Burlington Projects*, SKAGIT VALLEY HERALD (Mar. 8, 1991), <http://www.skagitriverhistory.com/FEMA/1991-3-8%20SVH%20article.pdf> [<https://perma.cc/QY93-WNDW>].

10. Mike Rosenberg, *Cascade Mall Sold a Few Months After Mass Shooting*, SEATTLE TIMES (Jan. 23, 2017), <https://www.seattletimes.com/business/real-estate/cascade-mall-sold-a-few-months-after-mass-shooting> [<https://perma.cc/U9BR-TSC9>]; *Cascade Mall Tops Burlington Projects*, *supra* note 9; *Company Overview of Macerich Company*, BLOOMBERG, (Mar. 2, 2019), <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=332172> [<https://perma.cc/6JB5-T5W4>].

11. ARTHUR M. COPPOLA & THOMAS E. O'HERN, MACERICH ANNUAL REPORT 2016, at 5 (2016), http://www.annualreports.com/HostedData/AnnualReportArchive/m/NYSE_MAC_2016.pdf [<https://perma.cc/J587-P74P>]; MERLONE GEIER PARTNERS, <https://www.merlonegeier.com/> [<https://perma.cc/CZ8T-F9BY>].

12. See ARTHUR M. COPPOLA & THOMAS E. O'HERN, MACERICH ANNUAL REPORT 2013, at 10 (2013), http://www.annualreports.com/HostedData/AnnualReportArchive/m/NYSE_MAC_2013.pdf [<https://perma.cc/6CT8-24E4>]; ARTHUR M. COPPOLA & THOMAS E. O'HERN, MACERICH ANNUAL REPORT 2014, at 13 (2014), http://www.annualreports.com/HostedData/AnnualReportArchive/m/NYSE_MAC_2014.pdf [<https://perma.cc/P5W3-4M42>]; ARTHUR M. COPPOLA & THOMAS E. O'HERN, MACERICH ANNUAL REPORT 2015, at 17 (2015), http://www.annualreports.com/HostedData/AnnualReportArchive/m/NYSE_MAC_2015.pdf [<https://perma.cc/TEN7-G6G5>]; ARTHUR M. COPPOLA & THOMAS E. O'HERN, MACERICH ANNUAL REPORT 2016, at 6 (2016),

Burlington community described Cascade Mall as “creepy,” “like it’s been abandoned.”¹³ One stated that it “is a shadow of it’s [sic] glory days in the late 90s early 2000s. It once was th[e] focal point for every teen in the Skagit Valley. Now it’s just like some desolate catacombs”¹⁴ Notably, even the community’s youth have taken notice of the mall’s ongoing declining state, reporting that “the mall seems like an empty wasteland soon to collapse on itself,” and have expressed concern that “it’s not a very secure place to settle.”¹⁵ These descriptions continue to remain true as of mid-2018—the mall houses numerous empty storefronts while Merlone Geier provides limited updated property leasing information or indication as to future opportunities at Cascade.¹⁶

The state of Cascade Mall in 2016 is relevant for a crucial reason: it signaled *vulnerability*. The actual and perceived state of a community is a “window” into the safety of a community. Appearances of abandonment and neglect reflect breaks in those “windows,” exposing untended property and community breakdown. As a result, these broken windows are further indicators that community barriers and controls are lessened or “cracked”—thus presenting a vulnerable area to the opportunistic criminal. This was particularly, and tragically, true in the case of Cascade Mall. The vulnerable state of the mall is relevant because, on the evening of September 23, 2016, one man decided that this mall was a good target, or—at the very least—an easy target.

The Cascade Mall shooting is particularly notable because it came in the wake of another Washington State shooting case that presented a crucial legal clarification of the state’s definition and potential interpretation of the “Prior Incidents Test”—*McKown v. Simon Property Group, Inc.*¹⁷

B. Context Preceding the Shooting

Under Washington law, to show that a landowner’s obligation to protect business invitees from third-party criminal conduct arises from past experience, the plaintiff must generally prove that a history of prior

http://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_MAC_2016.pdf [https://perma.cc/J8MZ-RHM4].

13. See *Cascade Mall-13 Reviews*, YELP, <https://www.yelp.com/biz/cascade-mall-burlington> (last visited Jan. 8, 2018).

14. *Id.*

15. Diego Bueno, *Cascade Mall’s Numbers Continue to Drop*, CUB (Nov. 14, 2018), <https://thecub.swsdonline.com/2575/community/cascade-malls-numbers-continue-to-drop/> [https://perma.cc/D7RB-P5XD].

16. Scott Danielson, *Many Stores Inside Cascade Mall Sit Empty*, SKAGIT BREAKING COMMUNITY NEWS (June 27, 2018), <https://www.skagitbreaking.com/2018/06/27/many-stores-inside-cascade-mall-sit-empty/> [https://perma.cc/4EWT-6EJN].

17. See generally *McKown v. Simon Prop. Grp.*, 344 P.3d 661 (Wash. 2015).

similar incidents on the premises exists.¹⁸ In addition, if the criminal act injuring the plaintiff is not sufficiently similar in nature and location to prior acts of violence or not sufficiently close in time to those prior acts, or if the prior acts are not sufficiently numerous, then the third-party criminal act is likely unforeseeable as a matter of law.¹⁹ This current, very narrow, prior similar incidents test assures that businesses will be exposed to liability on this basis only when they have numerous past experiences of criminal conduct that make similar conduct on the premises foreseeable.

Unfortunately, Washington State is no stranger to mass gun violence. On November 20, 2005, Dominick Maldonado walked into the Tacoma Mall, in Tacoma, Washington, concealing a MAK-90 rifle and an Intratec Tec-9 pistol and opened fire on shoppers and mall employees, ultimately injuring seven people.²⁰ Brendan McKown, an employee at the mall, attempted to stop the shooter but was shot and wounded.²¹ Over a period of approximately eight minutes, Maldonado injured seven people, the last of whom was McKown.²² At the time of the shooting, there were four unarmed security guards on duty and no security cameras.²³ The mall was equipped with an intercom system, but the system was inaudible and inaccessible on the weekends, and the security guards were never trained to use it.²⁴

McKown brought a negligence action against the owner of the mall, Simon Property Group, Inc. (Simon), alleging that Simon failed to exercise reasonable care to protect him from foreseeable criminal harm.²⁵ Simon removed the case to federal court and successfully moved for summary judgment.²⁶ In granting Simon's motion, the district court applied a "prior similar acts" standard and found that there were no similar prior acts.²⁷ Although the court received evidence of six other shootings and three other gun-related incidents on the Tacoma Mall premises, it concluded that these other incidents were significantly different in "nature, scale, and location" from the mass shooting perpetrated by Maldonado.²⁸

18. *Id.* at 669.

19. *See id.* at 665.

20. *Id.* at 662.

21. *See generally* Curt Woodward, *Mall Shooting Victim Confronted Gunman, Family Says*, THE SEATTLE TIMES: LOC. NEWS (Nov. 22, 2005, 10:16 PM), <https://www.seattletimes.com/seattle-news/mall-shooting-victim-confronted-gunman-family-says/> [<https://perma.cc/5WT2-CE55>].

22. *Id.*

23. *McKown*, 344 P.3d at 662.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 663.

28. *Id.*

On appeal, the Ninth Circuit Court of Appeals certified several questions for the Washington Supreme Court, including (1) whether “prior similar acts” are a prerequisite to business owner liability for failure to prevent third-party criminal acts, and (2) if so, “how similar” must such prior acts be to the criminal conduct at issue in order to create a jury question on whether the criminal conduct was reasonably foreseeable?²⁹ With respect to the first question, the Washington Supreme Court responded that “prior similar acts” are not the exclusive means of establishing a duty on the part of a business owner; a known threat of imminent harm could also suffice.³⁰ As for the second question, the degree of similarity required in order to find a duty based on “prior similar acts,” the court stated,

[I]f the criminal act that injures the plaintiff is not sufficiently similar in nature and location to the prior act(s) of violence, sufficiently close in time to the act in question, and sufficiently numerous, then the act is likely unforeseeable as a matter of law under the prior similar incidents test.³¹

Thus, a business’s location in a high-crime area alone would be insufficient to impose a duty on the owner to protect patrons against violent crime perpetrated by third parties.³²

However, in its opinion, the Washington Supreme Court explicitly noted that it has not yet considered whether the *character of a business* could invoke such a duty.³³ The court suggested that future cases may inquire as to the circumstances under which the “place or character” of a business can give rise to a duty to protect invitees against third-party criminal conduct.³⁴ In *McKown*, Brendan McKown described the Tacoma Mall as a “soft target,”³⁵ whose place or character made the harm reasonably foreseeable. Aside from that assertion, however, he offered no explanation as to how or why the “character” of the mall necessarily made the mass shooting in the case “reasonably foreseeable.”³⁶ In order to explain what “character” truly refers to, the remainder of this Comment addresses and examines trends of analysis for foreseeability in order to discern whether “character of the business” may be incorporated expressly, implicitly, or theoretically.

29. *McKown v. Simon Prop. Grp.*, 689 F.3d 1086, 1087–88 (9th Cir. 2012), *certified question answered*, 344 P.3d 661 (Wash. 2015).

30. *McKown*, 344 P.3d at 667.

31. *Id.* at 669.

32. *Id.* at 667–68.

33. *Id.* at 668.

34. *Id.* at 664.

35. *Id.* at 668.

36. *Id.*

If one considers the state of Cascade Mall as a relic of the 1990s, which was largely abandoned with increasingly empty storefronts, under a “broken windows” theory there is room for argument that the mall was particularly vulnerable to attack. Given its declining state, the vulnerability of Cascade Mall made criminal acts against a soft target reasonably foreseeable. Character of the business should be read and applied as an expansion of how Washington State courts treat foreseeability of third-party criminal acts and serve as a response to the current, very narrow, prior similar incidents test. Character of the business is an opening for a definition of what types of “states” or “characters” put businesses or other premises on notice that they may be liable for third-party criminal acts.

Part I of this Comment provides an overview of the various state analyses for determining liability for third-party criminal conduct. This section highlights conservative and liberal aspects of each approach with a particular critique of each approach’s utility in the prevention of third-party criminal conduct. Part II provides a specific breakdown of how states have incorporated the concept of character of the business as a factor in liability analyses. This section outlines current competing definitions of character of the business and predicts a prevailing trend in interpretation. Part III(A) will provide commentary on potential interpretations of character of the business, which ought to be considered through the criminological perspective of the broken windows theory. This section also provides a comprehensive background of the broken windows theory itself, including its history and criticism. The broken windows theory provides a responsive framework to stave off future instances of third-party criminal conduct. Part III(B) discusses the implementation of a broken windows interpretation of character of the business, along with some alternatives and additions geared exclusively to Washington, to be used to expand the current business owner liability for third-party criminal conduct in Washington. This framework will provide an expansive program that will be far more effective not only in combating mass gun violence but also in the overall prevention of felonies. The program promotes the safe practice of community monitoring and maintenance in order to prevent businesses from becoming increasingly vulnerable and susceptible to attacks.

I. OVERVIEW OF STATE ANALYSES FOR THIRD-PARTY CRIMINAL CONDUCT LIABILITY

Traditionally, courts have not held business owners liable for third-party criminal acts because of the inherent unforeseeability of a random shooting or other acts of violence. In fact, many jurisdictions continue to

recognize the principle underscored in the Restatement (Second) of Torts that a “possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons”³⁷ However, case law regarding third-party criminal liability is inconsistent across the state jurisdictions. As the law evolves, certain jurisdictions have carved narrow exceptions that recognize third-party criminal acts as foreseeable based on the application of a “prior similar incidents test” or a test that considers whether the business owner had notice of imminent harm.³⁸ Yet, other jurisdictions are indicating a trend in the law that desires further expansion of the definition of foreseeability beyond merely the consideration of prior similar incidents by also applying a balancing or a totality of circumstances analysis.³⁹ This section outlines several different analyses for determining liability for third-party criminal conduct particular to various states, describing the analyses from restrictive to expansive.

A. The Specific Imminent Harm Test

The specific imminent harm test is one of the most conservative forms of analysis. The test recognizes, beyond the general torts concept, that a person does not have a duty to warn or protect another from the criminal acts of a third person, particularly when the “third person commits acts of assaultive criminal behavior because such acts cannot reasonably be foreseen,” nor does it require that there must be “an imminent probability of injury” from a third-party criminal act in order to impose a duty to protect or warn.⁴⁰ The following jurisdictions currently apply this test (in order of descending restrictiveness): Virginia, Michigan, and Arkansas.

In particular, Virginia has expressed a reluctance to impose a duty to warn or protect invitees even where there are prior incidents of crime.⁴¹ Instead, the court has recognized “imminent probability of harm,” as a “heightened degree of foreseeability that arises where the defendant ‘knows that criminal assaults against persons are occurring, or are about

37. RESTATEMENT (SECOND) OF TORTS § 344 cmt. d (AM. LAW INST. 1965).

38. Paul Caleo & Lynn Rivera, *Finding Random Acts of Violence Foreseeable, A Survey of States Regarding Liability for Third-Party Criminal Conduct*, IN-HOUSE DEF. Q., Fall 2016, at 32.

39. *Id.*

40. *Commonwealth v. Peterson*, 749 S.E.2d 307, 311 (Va. 2013).

41. *See Dudas v. Glenwood Golf Club, Inc.*, 540 S.E.2d 129, 133 (Va. 2001) (holding that two robberies within the month preceding the attack on plaintiff were not a “level of criminal activity” that would “have led a reasonable business owner to conclude that its invitees were in imminent danger of criminal assault”).

to occur, on the premises,' based upon 'notice of a specific danger just prior to the assault.'"⁴²

Analysis under the specific imminent harm test is highly fact-specific, with the court frequently concluding that facts relied upon in particular cases fail to establish a duty to protect against third-party criminal acts.⁴³ For instance, the court held that employee misrepresentations about the safety of an apartment complex—where in one year 656 crimes, including 113 against persons, had been reported—failed to give rise to the duty to warn or protect from harm because these facts failed to establish “an imminent probability of injury to [the plaintiff] from a” criminal act of a third-party.⁴⁴ Yet, five years later the court found that a criminal act was imminent where the employees of an innkeeper had contacted police ninety-six times to report criminal conduct including robberies, assaults, and shootings.⁴⁵ However, in this case, police had *specifically* advised the innkeeper that “its guests were at a specific imminent risk for harm to their persons from uninvited persons coming into or upon its property.”⁴⁶

In Virginia, it appears that “in only rare circumstances has [the] [c]ourt determined that the duty to protect against harm from third-party criminal acts exists.”⁴⁷ Notably, even in case of the Virginia Tech Massacre, the court found that there were insufficient facts to conclude that the duty to protect students against third-party criminal acts arose as a matter of law.⁴⁸

Like Virginia, Michigan has similarly refused to impose a broad definition of foreseeability for merchant liability for third-party crime. The Michigan Court of Appeals purports to ground such a refusal in public policy, holding that liability determination on the sole basis of “a foreseeability analysis is misbegotten,” and rationalizes that “because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere.”⁴⁹ In this application, emphasis is not put on the person in control of the premises, but in the crime prevention “because he is best able to provide a place of safety.”⁵⁰ Respective of these

42. *Peterson*, 749 S.E.2d at 311 (quoting *Thompson ex rel. Thompson v. Skate America, Inc.*, 540 S.E.2d 123, 127 (2001)).

43. *See, e.g., Dudas*, 540 S.E.2d at 133.

44. *Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134, 137–41 (Va. 2001).

45. *Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428, 430 (Va. 2006).

46. *Id.*

47. *Peterson*, 749 S.E.2d at 312.

48. *Id.* (giving significant weight to the fact that the defendants believed that the shooter had fled the area and posed no danger to others).

49. *See Graves v. Warner Bros.*, 656 N.W.2d 195, 202 (Mich. Ct. App. 2002).

50. *See id.* at 200–01; *see also Ross v. Glaser*, 559 N.W.2d 331, 334 (Mich. Ct. App. 1996); RESTATEMENT (SECOND) OF TORTS § 315 (AM. LAW INST. 1965).

realities, the court has described that “it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties.”⁵¹ Rather stringently, the court further explained that beyond reasonably aiding in police involvement, a merchant is under no obligation to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences.⁵² As such, liability will likely only be found in circumstances where a specific situation occurred on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. The court expressly stated that “it is only a present situation on the premises, not any past incidents, that creates a duty to respond.”⁵³ The court has found limited exception to the limited duty rule imposing liability, with the predominant circumstance being when a criminal perpetrator was an employee and the employer had notice of the employee’s propensity to commit the type of crime.⁵⁴

The specific harm test has also been implemented in a modified form. In Arkansas, a totality of the circumstances test was expressly disavowed in favor of a joint application of the specific harm test and the prior similar incidents test.⁵⁵ The deciding case of *Boren v. Worthen National Bank of Arkansas* involved a gun attack against two female patrons at a drive-through ATM, where the gunmen approached from hiding to fire into the vehicle of the victims and robbing them. In its consideration of the applicability of each test (totality of the circumstances, specific harm, or prior similar incidents), the court placed emphasis on *specific* business owner knowledge and awareness, to recognize that “the duty of a business owner to protect its patrons from criminal attacks,” exists “only where the owner or its agent was aware of the danger presented by a particular individual or failed to exercise proper care after an assault had commenced.”⁵⁶ In *Boren*, the court conducted analysis under each of the tests, ultimately concluding that under the specific harm and prior similar incidents tests that “two incidents of robbery at Worthen ATMs in the nearly eight years prior to the attack on Boren [were] not sufficient to

51. *Graves*, 656 N.W.2d at 202.

52. *Id.*

53. *Id.*

54. *See Weinstein v. Siemens*, 673 F. Supp. 2d 533, 553 (E.D. Mich. 2009).

55. *Boren v. Worthen Nat’l Bank of Ark.*, 921 S.W.2d 934, 941–42 (Ark. 1996) (rejecting the totality of the circumstances test but leaving open the question of which of the remaining two tests should be applied: specific harm or the prior similar incidents tests); *Willmon v. Wal-Mart Stores, Inc.*, 957 F. Supp. 1074, 1078 (E.D. Ark. 1997), *aff’d*, 143 F.3d 1148, 1151 (8th Cir. 1998).

56. *Boren*, 921 S.W.2d at 940.

impose a duty on Worthen to guard against the criminal acts of a third party.”⁵⁷

In contrast, the *Boren* court noted that it was only under a totality of circumstances test that the plaintiffs could have established a duty of care owed by Worthen. The court framed its analysis using “places or character of the business” language from the Restatement, and considered “the nature, condition, and location of the premises, in addition to any prior similar incidents, and a duty can be found where no prior criminal attacks have occurred.”⁵⁸ Under this test, the plaintiffs would have been owed a duty under the rationale that all ATMs carry an inherent risk due to their purpose and location.

Ultimately, the court used foreseeability and public policy to reconcile the difference in outcomes between the tests. “In all three tests, the foreseeability of the criminal act is a crucial element in determining whether a duty is owed.”⁵⁹ However, the court found that adoption of a totality of the circumstances test would impose responsibility for violent, non-foreseeable, third-party criminal conduct onto businesses.⁶⁰ In doing so, the court expressly laid out its priorities regarding community safety and responsibility in the final sentences of its opinion:

We also cannot say that it would be appropriate as a matter of policy to impose a higher duty on business owners who are willing to provide their services in “high crime areas” or “near a housing project”—most commonly the areas in which low and moderate income residents are to be found.⁶¹

Since *Boren*, one case has applied both specific harm and prior similar incidents tests; however, it remains unclear whether the joint application of these tests is conjunctive or disjunctive. In *Willmon v. Wal-Mart Stores*, the court adopted a *Boren* framework, only to conclude that a customer’s abduction from a store parking lot and subsequent rape and murder were unforeseeable under both specific harm and prior similar incidents tests with no comment on future application or alternative modes of recovery.⁶²

However, despite the unclear application of the specific harm and the prior incidents test from Arkansas courts, what remains clear is their sentiment as to public policy. Since *Willmon*, Arkansas has not departed

57. *Id.* at 941.

58. *Id.*; RESTATEMENT (SECOND) OF TORTS § 344, cmt. f (AM. LAW INST. 1965).

59. *Boren*, 921 S.W.2d at 940.

60. *Id.*

61. *Id.* at 941–42 (emphasis added).

62. *Willmon v. Wal-Mart Stores, Inc.*, 957 F. Supp. 1074, 1077 (E.D. Ark. 1997), *aff’d*, 143 F.3d 1148, 1151 (8th Cir. 1998).

from its characterization of a third-party claim as a “broad attempt to shift responsibility for police protection from the government to the private sector and as imposing limitless demands on business.”⁶³

B. The Prior Similar Incidents Test

The prior similar incidents test recognizes that “[o]ne who controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee.”⁶⁴ Foreseeability is determined through evidence of “specific previous crimes on or near the premises.”⁶⁵ There are a few states that generally adhere to this test: Texas, New York, and Washington.

In Texas, unless the business owner has “direct knowledge that criminal conduct is imminent,” the court evaluates foreseeable criminal conduct by applying a five-factor analysis (the *Timberwalk* factors).⁶⁶ The *Timberwalk* factors include (1) proximity of the crime to the business; (2) recency of the prior crimes; (3) frequency of the prior crimes; (4) similarity of the prior crimes; and (5) media coverage or other publicity of the prior crimes.⁶⁷ Thus, a large number of prior crimes would result in a finding that the crime was foreseeable, whereas few prior crimes would not.⁶⁸ However, in Texas, there is at least one case that references “[t]he nature and character of the premises” in addition to prior similar incidents.⁶⁹ In *Del Lago Partners, Inc. v. Smith*, the court found the *Timberwalk* factors were inapplicable and instead focused on “[t]he nature and character of the premises” as a factor making criminal activity more foreseeable.⁷⁰ In *Del Lago*, a fight occurred in a bar at closing time following ninety minutes of heated altercations among intoxicated patrons.⁷¹ In its analysis of “nature and character of the premises,” the court recognized that intoxication is often associated with aggressive behavior and held that Del Lago had a

63. Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1388 (2010).

64. Trammell Crow Cent. Tex., Ltd. v. Gutierrez, 267 S.W.3d 9, 15 (Tex. 2008).

65. *Id.* at 12.

66. See *Timberwalk Apartments, Partners v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998); see also *Del Lago Partners v. Smith*, 307 S.W.3d 762, 767–68 (Tex. 2010).

67. *Timberwalk*, 972 S.W.2d at 759 (holding sexual assault was not foreseeable where there was only one sexual assault on the premises in the prior year and only six assault-type crimes in neighboring complexes—none of which were reported in the media or to the defendant).

68. *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 657 (Tex. 1999) (concluding 190 violent crimes in the vicinity is some evidence of foreseeability); Caleo & Rivera, *supra* note 38, at 32.

69. *Del Lago*, 307 S.W.3d at 768 (holding risk of harm foreseeable in a bar even though there were few prior incidents involving criminal behavior because patrons were drunk and arguing for ninety minutes).

70. See *id.* at 767–68.

71. *Id.*

duty to protect if it had actual and direct knowledge that a violent brawl was imminent between drunk, belligerent patrons and if it had ample time and means to defuse the situation.⁷² Thus, the duty arose not because of prior similar criminal conduct but because the business owner was aware of an unreasonable risk of harm at the bar that very night.⁷³

New York conducts a similar factor-based analysis under the prior similar incidents test to determine whether there is a duty of care. The determination of foreseeability rests on the business owner's knowledge of prior criminal activities on his or her premises and is determined based on the (1) location; (2) nature and extent of previous criminal activities; (3) their similarity; (4) proximity; or (5) other relationship to the crime in question.⁷⁴ In addition, New York recognizes a "'common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third-party's foreseeable criminal conduct."⁷⁵

In premises security cases, "the question of what safety precautions may reasonably be required of the possessor of realty is generally a question of fact to be determined by the jury, taking into account such factors as, inter alia, the seriousness of the risk, the severity of potential injuries and the cost or burden imposed on the possessor by reason of each such precautionary measure. However, only those cases where there arises a real question as to the landowner's negligence should the jury be permitted to proceed. In all others, where proof of any essential element falls short, the case should go no further." In New York, a plaintiff's own conduct "demonstrating a lack of reasonable regard for his own safety" can serve as an intervening cause absolving the defendant of liability.⁷⁶

The predominant criticism of the prior incidents test is that it too often results in conflicting determinations of foreseeability as a result of inconsistent application and analysis of several factors, including the requisite number of prior crimes, the similarity of the crimes, and the

72. *Id.* at 769.

73. *Id.*

74. See generally *Jacqueline S. ex rel. Ludovina S. v. City of New York*, 614 N.E.2d 723 (N.Y. 1993); *Huyler v. Rose*, 451 N.Y.S.2d 478 (N.Y. App. Div. 1982); *Lauersdorf v. Supermarket Gen. Corp.*, 657 N.Y.S.2d 732 (N.Y. App. Div. 1997).

75. *Burgos v. Aqueduct Realty Corp.*, 706 N.E.2d 1163, 1164 (N.Y. 1998).

76. *Caleo & Rivera*, *supra* note 38, at 32. See also *id.*; *Benitez v. Paxton Realty Corp.*, 637 N.Y.S.2d 11, 12 (N.Y. App. Div. 1996) (finding that the plaintiff's opening of door after dark without first checking the peephole to see who was at the door was an intervening cause of the criminal act); *Elie v. Kraus*, 631 N.Y.S.2d 16, 18 (N.Y. App. Div. 1995); *Ruggerio v. Bd. of Educ.*, 298 N.Y.S.2d 149, 149 (N.Y. App. Div. 1969) (granting summary judgment for the defendants on the failure to supervise a claim because the plaintiff voluntarily engaged in a physical altercation that led to his injury).

temporal and geographic proximity of the prior crimes.⁷⁷ Further criticism disavows the prior similar incidents rule, arguing that it is in contravention of public policy and notions of fundamental fairness through its near requirement that a crime occurs before preventative measures be taken. In a sense, the approach allows for one “get out of liability card” by allowing the first crime to occur; thus, removing any incentive to take preventative measures until and if that crime occurs and that victim is denied recovery.⁷⁸

C. Superior Knowledge Test

A conservative enhancement to the traditional prior incidents test is the two-pronged superior knowledge approach.⁷⁹ The superior knowledge test, with similarities to the imminent harm test, observes that business owners cannot protect people from random third-party acts of violence unless they are on notice of a special danger as a result of their unique position as an owner of the business.⁸⁰ The superior knowledge test also incorporates the perspective and actual knowledge of the plaintiff as to whether he or she was aware of the risk of violence in a particular area before patronizing the business.⁸¹

Georgia’s strict analysis requires that the plaintiff show not only that the proprietor had a duty to protect him on the basis of foreseeability, but also show that the existence of that duty depends on the superior or unique knowledge of the proprietor.⁸² It follows that in the absence of foreseeability, a proprietor would not have superior knowledge of the danger. However, under this stringent approach, even if the criminal act is foreseeable, it may not necessarily be the case that the proprietor has superior knowledge, and thus, it has no duty to protect invitees.

Under Georgia’s analysis, determination of foreseeability reverts to a prior incidents test, which examines whether prior acts were substantially similar to the occurrence that caused harm by looking at factors including “the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question.”⁸³ To

77. *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 413–15 (Wyo. 1997).

78. *Id.* at 414; *Caleo & Rivera*, *supra* note 38, at 32.

79. *Whitmore v. First Fed. Sav. Bank of Brunswick*, 484 S.E.2d 708, 711 (Ga. Ct. App. 1997) (holding that “[i]f a criminal act is not foreseeable, it logically follows that the proprietor does not have superior knowledge of the danger of its occurrence. But even if the criminal act is foreseeable, it does not necessarily follow that the proprietor has superior knowledge, since the danger may be equally apparent to the plaintiff.”).

80. *See Wade v. Findlay Mgmt., Inc.*, 560 S.E.2d 283, 284 (Ga. Ct. App. 2002).

81. *Id.* at 285.

82. *See Whitmore*, 484 S.E.2d at 711. *See generally* *Days Inns of America v. Matt*, 454 S.E.2d 507 (Ga. 1995); *Lau’s Corp. v. Haskins*, 405 S.E.2d 474 (Ga. 1991).

83. *Vega v. La Movidia, Inc.*, 670 S.E.2d 116, 119 (Ga. Ct. App. 2008).

evaluate superior knowledge, courts examine (1) whether there is a history of substantially similar criminal acts at or near the same location readily known to the plaintiff or the public⁸⁴ and (2) whether the business owner had unique knowledge that a specific third party with a history of violence will be present at the business.⁸⁵

D. Totality of Circumstances Test

The vast majority of courts have abrogated a conservative analysis for determining liability in favor of a more liberal analysis: the totality of circumstances test. The following state courts have adopted the totality of the circumstances test: Kansas, Iowa, Missouri, Minnesota, Idaho, Nevada, South Dakota, Hawai'i, Florida, Indiana, Wyoming, Colorado, and Massachusetts.⁸⁶ Under a totality of the circumstances analysis, duty is imposed "where circumstances exist from which the owner could reasonably foresee that its customers have a risk of peril above and beyond the ordinary and that appropriate security measures should be taken."⁸⁷

In essence, the totality of circumstances rule is an expansion of the prior incidents test that considers not only prior similar incidents but other concomitant factors. The totality of circumstances test is more case-centric and requires a solid working knowledge of all of the attendant facts of the case at hand. However, in consideration of the circumstances of the particular case, there often must be a close connection or direct relationship between the harm sustained and the foreseeability of the conduct.⁸⁸ Pertinent "circumstances" may include, but are not limited to, (1) the location of the crime and a review of prior criminal activity in the area; (2) the condition of the premises; (3) the design of the premises, including adequacy of lighting and architectural design; (4) the nature of the business and its hours of operation; (5) the extent and quality of security measures taken by the owner such as safes, guards, locks, alarms or surveillance; (6) the business owner's knowledge of the intoxication or consistent use of alcohol and drugs on the premises; (7) prior warnings from law enforcement or employees regarding a threat on the premises; and (8) industry standards regarding security measures.⁸⁹

84. See *Wade*, 560 S.E.2d at 285.

85. See *B-T Two, Inc. v. Bennett*, 706 S.E.2d 87, 92 (Ga. Ct. App. 2011); *Norby v. Heritage Bank*, 644 S.E.2d 185, 187 (Ga. Ct. App. 2007); *Mason v. Chateau Cmty., Inc.*, 633 S.E.2d 426, 432 (Ga. Ct. App. 2006).

86. *Caleo & Rivera*, *supra* note 38, at 32.

87. *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1338 (Kan. 1993).

88. See *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 662 (Cal. 1985), *holding modified by* *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993); see also *Seibert*, 856 P.2d at 1339.

89. See *generally* *Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093 (D. Colo. 2014);

For example, consider a parking lot located in a high crime area; under a totality of the circumstances, the factor of location will be considered. The rationale is embodied in the public policy that “one should not be able to open an all-night, poorly lit parking lot in a dangerous high crime area of an inner city with no security and have no legal foreseeability until after a substantial number of one’s own patrons have fallen victim to violent crimes,” as under such circumstances, criminal activity is “not only foreseeable but virtually inevitable.”⁹⁰

In addition, in jurisdictions that apply the totality of circumstances test, it may also be necessary to determine state statutory requirements or limitations on liability specific to the type of business. For example, consider Florida Statute § 768.0705, which creates a statutory presumption against liability for the criminal acts of a third person if the owner or operator of a convenience business substantially implements the certain security measures.⁹¹ Likewise, under the Nevada Revised Statute § 651.020, innkeepers and bar owners who have fulfilled a duty to eject patrons reasonably are protected.⁹²

Not unsurprisingly, the prevailing critique of the totality of the circumstances tests centers on the heavy burden placed on business owners to foresee the risk of criminal attacks on their property, and it criticizes the imposition of “an unqualified duty to protect customers in areas experiencing any significant level of criminal activity.”⁹³ Still, other critics feel that the test invades the province of the jury as the fact-finder by attempting to determine foreseeability from all the facts and circumstances and erroneously equating the foreseeability of a specific act with previous occurrences of such an act.⁹⁴ As noted, the general principle that a business owner is not an insurer of the premises exists across jurisdictions. With that in mind, critics argue that in the face of increasingly frequent random mass shootings, no amount of security measures can protect against random acts of violence.⁹⁵ Imputing such a

Cause of Action Against Landlord for Failure to Protect Tenants Against Criminal Acts, in CAUSES OF ACTION SECOND SERIES, 34 COA2d 105 (2019); Caleo & Rivera, *supra* note 38, at 32; Uri Kaufman, *When Crime Pays: Business Landlords’ Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 S. TEX. L. REV. 89, 96–97 (1990).

90. *Seibert*, 856 P.2d at 1339.

91. FLA. STAT. § 768.0705 (West 2018).

92. NEV. REV. STAT. ANN. § 651.020 (West 2017); *Rodriguez v. Primadonna Co.*, 216 P.3d 793, 798 (Nev. 2009) (holding that commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron to third parties under certain circumstances).

93. *Posecai v. Wal-Mart Stores*, 752 So. 2d 762, 767 (La. 1999).

94. JOHN ELLIOT LEIGHTON, LITIGATING PREMISES SECURITY CASES § 2:10, Westlaw (database updated Nov. 2018).

95. Caleo & Rivera, *supra* note 38, at 32.

duty to prevent random violent crime would place a significant economic burden on business owners.⁹⁶

E. Other Tests

The balancing test is one of the more modern approaches implemented to date.⁹⁷ Under this test, business owners assume the duty to protect if the foreseeability and gravity of the harm outweigh the burden to protect their invitees—thus, a balancing test.⁹⁸ California was the first state to implement this approach, recognizing in a series of seminal opinions that:

In cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.⁹⁹

Further, “duty in such circumstances is determined by a balancing of ‘foreseeability’ of the criminal acts against the ‘burdensomeness, vagueness, and efficacy’ of the proposed security measures.”¹⁰⁰

For instance, in the case of *Ann M.*, the plaintiff had been raped at the photo store where she worked, and she sued the shopping plaza in which the store was located, claiming there was a duty to hire security guards to protect against such crimes.¹⁰¹ In its analysis, the court balanced the foreseeability of the criminal act against the burden, vagueness, and efficacy of the proposed security precaution.¹⁰² While some evidence of prior crimes in the shopping plaza existed—including bank robberies, purse snatchings, and a man pulling down a woman’s pants—there was no evidence rising to the severity of rape.¹⁰³ In that case, the court found that the burden of hiring security guards was so high that the requisite foreseeability to trigger the burden could rarely, if ever, be proven without prior similar incidents.¹⁰⁴ Interestingly, it appears that California courts engage a heightened standard of care in determining whether business owners have a duty to employ security personnel, as evidenced by their

96. *Id.*

97. California was the first state to implement this test in *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (Cal. 1993).

98. See *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993).

99. *Id.* at 215; *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 658 (Cal. 1985).

100. *Ann M.*, 863 P.2d at 215; *Wiener v. Southcoast Childcare Ctrs., Inc.*, 88 P.3d 517, 522–23 (Cal. 2004).

101. *Ann M.*, 863 P.2d at 210–211.

102. *Id.* at 215.

103. *Id.*

104. *Id.*

reluctance to impose a duty in the absence of prior similar incidents in that location.

In addition to California, Louisiana and Tennessee have also adopted the balancing test. In an analysis identical to California's, Louisiana weighs the foreseeability of the risk of crime on the business owner's property and the gravity of the risk to determine the existence and the extent of the defendant's duty.¹⁰⁵ The court has expressly indicated that determinations must "make a policy decision in light of the unique facts and circumstances presented."¹⁰⁶ Louisiana courts consider various

moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving.¹⁰⁷

Additionally, the Louisiana courts have explained that with respect to security measures, while a lower degree of foreseeability may impose a duty to implement security measures such as use and installation of security cameras or improved lighting, a very high degree of foreseeability is required to give rise to a duty to post security guards.¹⁰⁸

In its implementation of the balancing test, Tennessee also observes that risks are unreasonable and give rise to a duty to act with due care, if the probability of foreseeability and the gravity of harm posed by the defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.¹⁰⁹ In its analysis, the courts have considered several non-exclusive factors in determining the reasonableness of the risk, including:

[1] the foreseeable probability of the harm or injury occurring; [2] the possible magnitude of the potential harm or injury; [3] the importance or social value of the activity engaged in by defendant; [4] the usefulness of the conduct to defendant; [5] the feasibility of alternative, safer conduct and the relative costs and burdens

105. *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999).

106. *Id.*

107. *Id.*

108. *Pinsonneault v. Merchs. & Farmers Bank & Tr. Co.*, 816 So. 2d 270, 276 (La. 2002); *Posecai*, 752 So. 2d at 768.

109. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 901 (Tenn. 1996).

associated with that conduct; [6] the relative usefulness of the safer conduct; and [7] the relative safety of alternative conduct.¹¹⁰

Overall, the balancing test acknowledges that duty is a flexible concept and so seeks to balance the degree of foreseeability of harm against the burden of the duty to be imposed.¹¹¹ Moreover, the approach recognizes that the presence or absence of prior similar incidents of crime is an important factor in determining the degree of foreseeability.¹¹² Essentially, the flexibility of the balancing approach remedies the strictness of the prior similar incidents rules, thus avoiding “the pitfalls of that rule while solving the problems of [the] more liberal totality of the circumstances approach.”¹¹³

II. CHARACTER OF THE BUSINESS AS A FACTOR IN LIABILITY ANALYSIS

Character of the business as a factor in liability analysis is predominantly engaged through a totality of the circumstances approach. Character of the business originates from Restatement (Second) of Torts § 344. Comment f to § 344 provides that “[i]f the place or character of [a business owner’s] business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it.”¹¹⁴ This Comment underscores certain factors to be considered under Restatement § 344, including the nature of the business location, the character of the business, and past crimes in the area.¹¹⁵ Liability of a business for the criminal acts of third persons is based on whether that business had reason to know, from past experience or from the character of the business, that there was a likelihood of danger to the safety of any visitor.¹¹⁶ “Character,” in this regard, has survived multiple interpretations, including the nature, condition, and location of the premises, in addition to whether any prior similar incidents occurred on the premises, and a duty can be found where no prior criminal attacks have occurred.¹¹⁷

110. *McClung*, 937 S.W.2d at 901.

111. *Id.*

112. *Id.*

113. *Id.*; Donna Lee Welch, Ann M. v. Pacific Plaza Shopping Center: *The California Supreme Court Retreats from Its ‘Totality of the Circumstances’ Approach to Premises Liability*, 28 GA. L. REV. 1053, 1069 (1994).

114. RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (AM. LAW INST. 1965) (emphasis added).

115. *MacQuarrie v. Howard Johnson Co.*, 877 F.2d 126, 130 (1st Cir. 1989); *Richardson v. QuikTrip Corp.*, 81 S.W.3d 54, 60–61 (Mo. Ct. App. 2002).

116. *Boren v. Worthen Nat’l Bank of Arkansas*, 921 S.W.2d 934, 939 (Ark. 1996).

117. *See Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 658 (Cal. 1985); *Hills v. Bridgeview Little League Ass’n*, 745 N.E.2d 1166, 1186–88 (Ill. 2000); *Torres v. United States Nat’l Bank*, 670 P.2d 230 (Or. 1983); *see also Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 216 (Cal. 1993)

In recent years, an increasing number of courts across state jurisdictions have incorporated character of the business into their analysis. To date, at least California, Illinois, Missouri, New Jersey, Oregon, Texas, and Wisconsin have incorporated this factor. In Wisconsin, courts have repeatedly held that in amusement facilities, taverns, and businesses where a crowd or a large number of people assemble on a business owner's property for purposes of financial gain, a business owner assumes an ordinary duty of care to protect the individuals from reasonably foreseeable injury.¹¹⁸ For instance, when a patron of a bar exited following expulsion of several unruly customers and sustained a head injury as a result of an ensuing assault, the court noted a tavern owner owes a duty to patrons "because the owner has superior knowledge of dangers that the place and character of the . . . [tavern] may pose."¹¹⁹

In Illinois, a court likewise looked to character of the business in its determination that a restaurant owed a duty to aid or protect customers against the unreasonable risk of physical harm posed by negligent acts of third persons after a vehicle crashed through a wall of a restaurant and struck and killed a patron.¹²⁰ In its analysis, the court looked to the restaurant's location, various aspects of its design, and evidence of an absence of safety precautions to prevent out of control vehicles from entering the restaurant.¹²¹

New Jersey has also repeatedly used character of the business in applying a totality of the circumstances analysis. While typically a prior similar incidents test would reject evidence of substantial thefts as putting a business owner on notice for kidnapping and murder, in *Clohesy v. Food Circus Supermarkets, Inc.*, the New Jersey Supreme Court found that the kidnapping and murder of a supermarket customer from a parking lot were sufficiently foreseeable. Looking at the nature of the offense and specific characteristics of the location (a parking lot), the court held that

(1) theft offenses frequently escalate into more violent crimes, (2) the crime rate in the defendant's area had increased substantially in the

(noting that the character of some business establishments open to the public, such as a parking garage or an all-night convenience store, creates an especial temptation and opportunity for criminal misconduct that helps give rise to, and affects the scope of, the duty to protect).

118. See *Alonge v. Rodriguez*, 279 N.W.2d 207, 211 (Wis. 1979); *Flynn v. Audra's Corp.*, 796 N.W.2d 230, 233 (Wis. Ct. App. 2011). See generally *Pfeifer v. Standard Gateway Theater, Inc.*, 48 N.W.2d 505 (Wis. 1951); *Emerson v. Riverview Rink & Ballroom*, 290 N.W. 129 (Wis. 1940).

119. *Flynn*, 796 N.W.2d at 233.

120. *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1062 (Ill. 2006).

121. *Id.* (finding that location in an area with a "high traffic count" and design aspects, including its "brick half wall" and sidewalk, rendered the restaurant susceptible to penetration by out-of-control automobiles; that defendants took no precautions, such as installing "vertical concrete pillars or poles," to prevent automobiles from entering the restaurant; and that defendants had knowledge of all of the foregoing gave rise to a duty to protect).

previous two years, and (3) recent crime statistics indicated that approximately 757,000 violent crimes such as rape, robbery, and assaults occurred in parking lots located throughout the nation.¹²²

While the court was cognizant of the potential impact its decision may have had on the question of duty owed to customers by small business owners near large businesses such as malls, it reasoned that risk determination was a case-by-case analysis.¹²³ Thus, the decision represented not a major change in the law, but rather a definitive “nudge” forward.¹²⁴

Similarly, Oregon recently clarified what characteristics give rise to a reasonable inference that a “place or character” imputes liability onto a business owner for third-party criminal acts. The court expressly articulated that “*specific factual support*—as opposed to relying on generalized abstractions about the existence of criminal activity” or a theoretical possibility that such a harm might occur was required in order to impute liability.¹²⁵

In sum, when employing a character of the business test in a totality of the circumstances analysis, courts tend to focus on whether the place and character of a location or business “invited” the criminal behavior or if the defendant’s business, by its nature, made it particularly attractive to crime, thus imposing a duty to protect customers. Jurisdictions across the country have found that bars, amusement parks, and other large gathering businesses owe an ordinary duty of care to their patrons.¹²⁶ In analyzing character of the business, some jurisdictions go further still by looking to the precise location of the business and security implementations in an attempt to prevent an “open all-night, poorly lit parking lot in a dangerous high crime area of an inner city with no

122. Peguero v. Tau Kappa Epsilon Local Chapter, 106 A.3d 565, 574 (N.J. Super. Ct. App. Div. 2015); *see also* Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1027 (N.J. 1997) (the court gave heavy weight to a United States Justice Department report in 1994, which stated that approximately 757,000 violent crimes such as rape, robbery, and assaults occurred in parking lots located throughout this country).

123. *Clohesy*, 694 A.2d at 1030.

124. *Id.*

125. *Stewart v. Kids Inc. of Dallas*, 261 P.3d 1272, 1283 (Or. Ct. App. 2011) (explaining that the plaintiff’s complaint alleging that family restaurant business should know that widely advertising an event with minors would attract sexual predators was “nothing more than a theoretical possibility” in the absence of evidence in fact that “sexual assault occurs at these types of sites, or among gatherings of teenagers in public places, or that sexual assault is a ‘hazard inherent’ in this type of activity”); *see also* *Piazza ex rel. Piazza v. Kellim*, 354 P.3d 698, 707–08 (Or. Ct. App. 2015), *aff’d sub nom.* *Piazza v. Kellim*, 377 P.3d 492 (Or. 2016).

126. *See* *Alonge v. Rodriguez*, 279 N.W.2d 207, 211 (Wis. 1979); *Flynn v. Audra’s Corp.*, 796 N.W.2d 230, 233 (Wis. Ct. App. 2011). *See generally* *Pfeifer v. Standard Gateway Theater, Inc.*, 48 N.W.2d 505 (Wis. 1951); *Emerson v. Riverview Rink & Ballroom*, 290 N.W. 129 (Wis. 1940).

security” with no legal foreseeability until after a substantial number of one’s own patrons have fallen victim to violent crimes.¹²⁷

The majority of criticism befalling character of the business argues that the approach paints foreseeability in broad strokes. Critics find that with the standard comes a risk of restricting certain businesses and imposing significant burdens on the owners of those businesses as a result. This is particularly evident in the context of banks. For example, the Oregon Court of Appeals in *Torres v. United States National Bank* held that a customer injured in a holdup did not need to allege previous assaults or robberies at the particular bank night depository.¹²⁸ Rather, they explained that generalized evidence would suffice to establish a duty on the part of the bank, “including evidence of similar incidents at other local night depositories, the effect of an obscured location on the chance of a robbery, or any other circumstances tending to show the risk inherent in an invitation to do banking business after regular hours.”¹²⁹ The court’s utilization of a multi-factor approach that considered the purpose or “status” of the business in determining customer safety and business liability, in essence, applied a duty of reasonable care under the circumstances considering the purpose or character of a bank and nature of the bank–patron relationship.¹³⁰

Inherent in this criticism is an acknowledgment that “place and character of the business” and “nature of the business” are subject to varying and wide interpretation. The application from the jurisdictions remains unclear. While some jurisdictions look narrowly to the actual purpose of the business, others look to the disposition and conditions surrounding the business. What is clear, however, is that character of the business remains not a dispositive indicator of liability but a mere factor. With a new jurisdiction prime to interpret just what character of the business means,¹³¹ we must inquire about the role of public policy behind this factor and in the liability analysis of third-party criminal acts as a whole. In jurisdictions employing more liberal approaches, such as totality of the circumstances and the balancing test, public policy prefers crime

127. *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1339 (Kan. 1993).

128. *Torres v. U.S. Nat’l Bank of Or.*, 670 P.2d 230, 235–36 (Or. Ct. App. 1983).

129. *Id.*; see also Richard E. Vogel, *Institutional Liability for Attacks on ATM Patrons*, U. ILL. L. REV. 1009, 1024 (1994).

130. The logic continues that unlike other types of stores or commercial enterprises, banks exist to receive, hold, and distribute money. As such, members of the public generally believe themselves to be in a safe place when transacting with banking business. This is also contrasted with the fact that banks hold and deal with substantial amounts of cash and the high-profile nature of bank-related crime. Altogether, these “status” factors pose a certain risk to members of the public and thus oblige banks to take measures to afford reasonable safety. Vogel, *supra* note 129, at 1024. For another application of this logic, see *Stalzer v. European Am. Bank*, 448 N.Y.S.2d 631, 635–636 (Civ. Ct. 1982).

131. *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 664 (Wash. 2015).

prevention. However, in jurisdictions employing a more conservative analysis, such as specific imminent harm, superior knowledge, or prior incidents tests, public policy prefers lessened economic burdens on business owners. In a climate where third-party violence, and in particular, mass shooting violence, continues to increase, Washington is in a pioneering position to move towards maximizing safety and compensation to injured parties and away from conventional notions of fault determinations. By interpreting character of the business broadly to consider the disposition of the surrounding conditions of a business, Washington has the chance to promote social welfare by enhancing safety and ensuring compensation to those harmed in the course of third-party violence.

III. COMMENTARY ON POSSIBLE INTERPRETATION: A SOCIOLOGICAL PERSPECTIVE AND THE BROKEN WINDOWS THEORY

Character of the business has been repeatedly interpreted in several jurisdictions as broadly evaluative of the nature and surrounding conditions of a business.¹³² Encompassed in this interpretation are considerations of what should be seemingly obvious factors, which are too often dismissed under the other conservative liability analyses. The factors include (1) crime rate in the precise area, including petty and other non-violent property crime; (2) apparent security measures; (3) vulnerability as a large patron gathering space; and (4) overall appearance of the premises. To further stress the necessity of such considerations, the following section reviews the criminological theory of broken windows, providing a sociological basis for focus on larger crime rates, apparent security measures, and disorder as a way to not only quell the commission of third-party criminal violence, but also to hold businesses liable when it does occur.

This framework will provide an expansive program that will be far more effective in combating not only mass gun violence but the overall prevention of felonies. The program promotes the safe practice of community monitoring and maintenance in order to prevent businesses from becoming increasingly vulnerable and susceptible to attack. If implemented, the resulting broad interpretation of character of the business could encourage the maintenance and security of businesses, such as Cascade Mall, so that they are no longer predatory areas but protected ones.

132. See generally *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993); *Marshall v. Burger King Corp.*, 856 N.E.2d 1048 (Ill. 2006); *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332 (Kan. 1993); *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017 (N.J. 1997).

A. Broken Windows: The Theory

In 1982, James Q. Wilson and George L. Kelling introduced the broken windows theory into the lexicon in an article in *The Atlantic Monthly*.¹³³ Based on a 1969 field study conducted by Phillip Zimbardo, a Stanford psychologist, the broken windows theory is a criminological theory that focuses on the effects of sociological concepts—norm-setting and signaling of urban disorder, disturbance, and vandalism—on more serious crimes and anti-social behavior.¹³⁴ In his study, Zimbardo abandoned two comparable cars, each without license plates and parked with their hoods up, one on the street in Bronx, New York and the other on a street in Palo Alto, California.¹³⁵ Remarkably, within ten minutes of “abandonment,” the vehicle in the Bronx was attacked by “vandals” who removed the radiator and battery.¹³⁶ Within twenty-four hours, everything of value had been removed: windows were smashed, parts torn off, upholstery ripped, and children began to use the car for a playground.¹³⁷ At the same time, in Palo Alto, the vehicle remained untouched for over a week.¹³⁸ Then Zimbardo did something unusual and unconventional—he smashed part of the Palo Alto car with a sledgehammer.¹³⁹ Within a few short hours, passersby had joined in the destruction, and the car was utterly destroyed—just as the car in the Bronx had been.¹⁴⁰

This field study demonstrated—very simply—how neglect, abandonment, and the appearance of disorder can make something quickly become a vulnerable target for criminals. In the article, Kelling and Wilson synthesized that a broken window or other visible signs of disorder or decay, such as loitering, graffiti, prostitution, or drug use, can send the signal that a neighborhood is uncared for.¹⁴¹ A brief summary of the theory comes from the following passage:

We suggest that “untended” behavior also leads to the breakdown of community controls. A stable neighborhood of families who care for their homes, mind each other’s children, and confidently frown on unwanted intruders can change, in a few years or even a few months,

133. Kelling & Wilson, *supra* note 1.

134. *Id.* at 4.

135. *Id.* The distinction between these two locations is relevant. In the first, at the time the Bronx was a predominantly low-income, crime-ridden section of New York City. In contrast, Palo Alto was a fairly affluent neighborhood outside of San Francisco in California. *Id.*

136. *Id.*

137. *Id.* at 5.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

to an inhospitable and frightening jungle. A piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in. Teenagers gather in front of the corner store. The merchant asks them to move; they refuse. Fights occur. Litter accumulates. People start drinking in front of the grocery; in time, an inebriate slumps to the sidewalk and is allowed to sleep it off. Pedestrians are approached by panhandlers.¹⁴²

According to the theory, maintaining and monitoring urban environments would aid in the prevention of small crimes such as vandalism, public drinking, and crimes against property by fostering an appearance of law and order, thereby preventing more serious crimes from happening. “The idea [is] that once disorder begins, it doesn’t matter what the neighborhood is, things can begin to get out of control.”¹⁴³ In the Palo Alto study, it took just one hit from a sledgehammer to the vehicle to attract disorder. If one sledgehammer hit can cause an empty *car* to be completely destroyed by vandals and mere passersby, it is concerning to think what years of depreciation and neglect could cause to a business.

Kelling and Wilson proposed that police departments change their focus. Officers should try to clean up the streets and maintain order rather than channeling most resources into solving major crimes.¹⁴⁴ “Untended property becomes fair game” and the mere opportunity of disorder invites people to participate who may not have otherwise considered it.¹⁴⁵ Thus, neglect and abandonment demonstrate a lack of care that in turn fosters an atmosphere of increased abandonment by community members out of fear for safety. It is these areas that are particularly vulnerable to criminal activity.¹⁴⁶ Overall, Kelling and Wilson’s broken windows model focuses on the role that disorder and appearance of disorder play in generating and sustaining more serious crime.¹⁴⁷ Disorder is not directly linked to serious crime; rather, disorder leads to increased fear and withdrawal from residents, which then allows more serious crime to move in because of decreased levels of informal social control and increased vulnerability of those locations as a target.

142. *Id.*

143. Shankar Vedantam et al., *How a Theory of Crime and Policing Was Born, and Went Terribly Wrong*, NPR (Nov. 1, 2016, 12:00 AM), <http://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong> [https://perma.cc/378J-PAT8].

144. *Id.*

145. *Id.*

146. *Id.*

147. Kelling & Wilson, *supra* note 1, at 15.

B. “Broken Windows” Application and Implementation

In its initial recommendation and acceptance, the broken windows theory was wholly targeted at policing and the traditional role that the police force plays in crime control and crime prevention. As a result of the broken windows theory, police were encouraged to focus their efforts on less serious crime in neighborhoods that had not yet been overtaken by serious crime.¹⁴⁸ Targeting efforts in this way has the effect of reducing resident fear and withdrawal.¹⁴⁹

Washington State has an opportunity to broadly define character of the business as expressly noted by the court in *McKown v. Simon Properties*. However, at its current progression, the case law suggests that Washington is gravitating from a prior incidents test toward a specific harm test. This is in large part suggested through Washington’s express rejection of the concept that a business owner owes a duty to invitees merely because the business is located in a high crime area: “if the premises are located in an area where criminal assaults often occur, imposition of a duty could result in the departure of the businesses from urban core areas—an undesirable result.”¹⁵⁰ Furthermore, the Washington Supreme Court applies an enhanced prior incidents analysis, which requires that a criminal act must be “sufficiently similar in nature and location to the prior acts of violence, sufficiently close in time to the act in question, and sufficiently numerous” for the act to be considered foreseeable.¹⁵¹

Particularly in the wake of multiple incidents of mass gun violence, both within the state of Washington and the United States, the focus must return to maximizing safety and compensating injured parties and away from narrowly imposing liability out of concern for economic burden. Washington has the opportunity to offset the stringency of its current prior incidents test by interpreting character of the business to include surrounding conditions—including petty crime rate, apparent security, and disposition of the business—in determining foreseeability. Incorporation of such an interpretation is not only supported by the case law of fellow states but grounded through the thesis of the criminological broken windows theory. By taking into account petty crime rate, apparent security measures, and disposition of the business, the courts could engage

148. *Id.*

149. David Weisberg & Cynthia Lum, *Broken Windows Policing*, CTR. EVIDENCE BASED CRIME POL’Y (2013), <http://cebc.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/> [<https://perma.cc/MA2G-GXQK>].

150. *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 668 (Wash. 2015) (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 802 F.2d 1360, 1370 (Wash. 1991)).

151. *Id.* at 669.

in crime prevention by holding businesses liable for third-party criminal attacks when they fail to keep their premises safe with adequate security and permit a disorderly condition.

Especially with respect to malls, movie theaters, and schools—or any place where a large gathering of persons occurs—there should be a standard of foreseeability that reflects the vulnerability of such businesses. The introduction of this Comment began with the case of Cascade Mall. In addition to its purpose as a gathering location, Cascade Mall had several indicators of vulnerability: abandoned storefronts, low population, and high crime statistics in the immediate area.¹⁵² As explained through the broken windows theory, the appearance of disorder leads to increased fear and withdrawal from residents, which then allows more serious crime to move in because of decreased levels of informal social control and increased vulnerability of those locations as a target. Sadly, in this case, at least one man *did* take advantage of Cascade Mall's vulnerability. Using the broken windows theory as a means to interpret character of the business as a factor in determining the duty to protect in Washington would be an expansive move. But it would be a move that affords an opportunity to combat situations like Cascade Mall—and hopefully prevent further violence, particularly mass gun violence, from occurring again.

CONCLUSION

Washington State has the opportunity to clarify and expand the definition of character of the business in an unfortunate climate where mass violence and third-party criminal acts are increasing in prevalence. Washington's current prior incidents liability analysis does not fully address public policy concerns of safety. Moreover, narrow enhancements in Washington's prior incidents test indicate a conservative turn that all but curtails a determination of foreseeability in a case of third-party criminal acts. These restrictions limit the liability of businesses for failing to protect their patrons and leave injured plaintiffs uncompensated for harms sustained.

This Comment provides an overview of the various state analyses for determining liability for third-party criminal conduct and specifically breaks down how states have incorporated the concept of character of the business as a factor in liability analysis. The criminological theory of broken windows introduced how the appearance of disorder could lead to further crime. Combined with case law across the jurisdictions, the broken windows perspective provides a sociological basis for expanding the

152. *Cascade Mall-13 Reviews*, *supra* note 13.

definition of character of the business to include circumstances surrounding the nature and condition of the business.

The time has come for an expansive standard to be established. Such a standard would not single out business owners by imposing an absolute duty upon them to perform society's work but at the same time would not allow business owners with clearly inadequate security to escape responsibility. Adoption of a standard that incorporates a sociological understanding of the effects of an atmosphere of crime, such as the one proposed through the inclusion of the character of the business factor, is a feasible solution towards the difficult balancing of victims' compensation and protection of business owners. By embracing a more expansive definition, Washington would increase its ability to stave off future instances of third-party criminal conduct. Furthermore, promoting safe practices of community monitoring and maintenance in order to prevent businesses from becoming increasingly vulnerable and susceptible to attack would serve as a strong indication that Washington cares for its citizens and wants to keep them safe.