N.Y.U. Journal of Legislation and Public Policy
QUORUM

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TENANT SCREENING IN AN ERA OF MASS INCARCERATION: A CRIMINAL RECORD IS NO CRYSTAL BALL

March 3, 2015

Abstract: This article focuses on Washington landlord liability in the tenant screening context and increasing housing access for rental applicants with criminal records. Part I examines the concept of foreseeability as it pertains to potential landlord liability for renting to an applicant with a criminal record whose actions harm another tenant. Part II surveys the relevant sociological research on the relationship between a criminal record and the ability to meet the obligations of tenancy. Based upon this review, we conclude that there is no empirical evidence establishing a relationship between a criminal record and an unsuccessful tenancy. Part III posits that since research demonstrates that a criminal record is not a reliable indicator for future tenant behavior, it should not serve as a proxy to determine future tenant dangerousness. Washington landlords should not be liable for future harm to tenants based solely upon renting to an applicant with a criminal record. Refusing to hold landlords liable in this way, would increase housing opportunities for this population which in turn will reduce recidivism thereby increasing public safety and promoting the rehabilitation of people with a criminal history.

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Published by the 2014–15 Editorial Board of the N.Y.U. Journal of Legislation and Public Policy.

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INTRODUCTION

Here in prison I understand that my name comes with a number and I am paying for my poor choices, but at the end of my time am I not paid in full? I lose the number and gain a box marked felon. I leave here in a year and I am told unless I know a private landlord who's willing to rent to me that it will be next to impossible to rent.[1]

The writer is not alone; her fear is real.[2] Every year the Washington Department of Corrections releases seven to eight thousand prisoners and even more cycle through county jails.[3] Estimates are that one in four, or approximately 65 million, people in the United States have a criminal record.[4] Upon release, many cannot obtain rental housing because of the stigma of a criminal record.[5] The ex-

[1] Letter from prisoner at Wash. Corr. Ctr. for Women to author (June 4, 2013) (on file with author).

[2] *See* Journey v. State, 895 P.2d 955, 959 (1995) ("Courts, commentators, and legislatures have recognized that a person with a criminal record is often burdened by social stigma, subjected to additional investigation, prejudiced in future criminal proceedings, and discriminated against by prospective employers.") (footnotes omitted).

[3] WASH. DEP'T OF CORRS., NUMBER OF PRISON RELEASES BY COUNTY OF RELEASE (2013), http://www.doc.wa.gov/aboutdoc/docs/msPrisonReleases.pdf.

[4] MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), *available at* http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1.

[5] HOUS. LINK, TENANT SCREENING AGENCIES IN THE TWIN CITIES: AN OVERVIEW OF TENANT SCREENING PRACTICES AND THEIR IMPACT ON RENTERS 40 (2004), *available at* http://www.housinglink.org/Files/Tenant_Screening.pdf ("[T]he increasingly popular use of tenant screening reports has resulted in a new class of people who are unable to access rental housing be-

perience of incarceration and the stigmatizing effect of a criminal record erect formidable barriers to accessing safe, affordable housing.[6] Many landlords routinely refuse to rent to applicants with a criminal record based upon a belief that a criminal record is a reliable indicator of a tenant's inability to meet rental obligations.[7] Tenant screening websites reinforce this belief through dire warnings about potential lawsuits and damage awards against landlords who rent to an applicant with a criminal record who may later harm another tenant.[8]

As detailed in this article, the notion that individuals with criminal conviction histories pose a future threat to people or property may seem superficially persuasive, but past criminal history is not predictive of future criminal activity. Moreover, landlord policies that ban admittance to applicants with a criminal history may violate fair housing law by negatively and disproportionately impacting

cause of past credit problems, evictions, poor rental histories or criminal backgrounds."); John Wildermuth, *Ex-offenders Compete for Low-Income Housing*, S.F. GATE (Feb. 17, 2013, 9:01 PM), http://www.sfgate.com/bayarea/article/Ex-offenders-compete-for-low-income-housing-4286606.php (reporting that nearly fifty percent of San Francisco prisoners who recently have been released under a statewide prison realignment effort are without permanent housing).

[6] *See* MARTA NELSON ET AL., VERA INST., THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY (1999); CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INST., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 31 (2004), *available at* http://www.urban.org/UploadedPDF/411096_taking_stock.pdf; Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 SOC. SCI. RES. 1196, 1198 (2011); *cf.* KATHARINE BRADLEY ET AL., CMTY. RES. FOR JUSTICE, NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER 9 (2001), *available at* http://b.3cdn.net/crjustice/a5b5d8fa98ed957505_hqm6b5qp2.pdf (describing the difficulties that convicted criminals face finding housing following release from prison).

[7] *See* Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. 4, 6 (2011) (citing David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5, 12 (2008)) ("In 2005 four out of five members of the National Multi-Housing Council engaged in criminal records screening.").

[8] *See* Heidi Lee Cain, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 149–50 (2003) (citing Shelley Ross Saxer, *Am I My Brother's Keeper?: Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 NEB. L. REV. 522, 561–69 (2001)) (observing that a private landlord may be fearful of the possibility that he might be held liable for criminal acts committed by his tenants); *FAQ – Landlord Responsibilities: Criminal Activities*, FINDLAW, http://realestate.findlaw.com/landlord-tenant-law/faq-landlord-responsibilities-criminal-activities.html ("In increasing numbers, landlords are being brought to court by tenants that have been injured by criminals while in their rental properties. Settlements from these cases often reach into the millions of dollars, especially when a similar assault or crime occurred on the same rental property in the past."); Paul Prudente, *Background Check Quality & Landlord Liability*, MY SCREENING REPORT BLOG (Nov. 4, 2011, 1:28 PM), http://www.myscreeningreport.com/blog/archive/2011/11/04/negligent-leasing-theory-tenant-screening.aspx ("[A]n injured party (employee, another resident or others) may bring an action against a landlord arguing that the landlord failed to exercise sufficient care in conducting background checks on prospective tenants.").

black or Latino men.[9] These restrictive policies "create a racial caste system"[10] with no evidence that they achieve any safety goals.[11] In fact, sociological research suggests that criminal history does not provide reliable information about the potential for housing success.[12] Similarly, research shows that stable housing reduces the incidence of future criminal activity.[13] This research should inform the way courts consider negligence claims against landlords based upon harm caused by a tenant who had a criminal record. Under current negligence standards, an actor is only responsible for harm he could reasonably have foreseen and prevented. Based upon social science research, a criminal record cannot reliably indicate the risk of future problematic tenant behavior.[14] Therefore, the presence of a criminal record does not equal foreseeability of harm and should not by itself lead to liability.

Washington needs a rational research-based tort law standard that clearly sets out the boundaries of landlord liability for the criminal acts of third parties that harm tenants. A landlord should be liable only if he or she fails to maintain a habitable and secure premises that results in reasonably foreseeable harm to tenants by third-party criminal acts. A criminal record should not be considered evidence of a foreseeable risk of dangerousness or harm that creates landlord liability. We propose that future harm to tenants by an applicant with a criminal record should be unforeseeable as a matter of law. As shown in detail below, a landlord should not be held liable solely upon renting to an applicant with a criminal record. The need for tenant safety and the societal goals of reduced recidivism, public safety and fairness can be met by adopting this standard.

This article focuses on Washington tort law and landlord liability. Part I examines the concept of foreseeability as it pertains to potential landlord liability for renting to an applicant with a criminal record whose actions harm another tenant. Part II surveys the relevant sociological research on the relationship between a criminal record and the ability to meet the obligations of tenancy. Based upon this review, we conclude that there is no empirical evidence establishing a relationship between a criminal record and an unsuccessful tenancy. Part III posits that since research demonstrates that a criminal record is not a reliable indicator for future tenant behavior, it should not serve as a proxy to determine future

[9] *See* Mireya Navarro, *Lawsuit Says Rental Complex in Queens Excludes Ex-Offenders*, N.Y. TIMES, Oct. 30, 2014, at A25, *available at* http://www.nytimes.com/2014/10/31/nyregion/lawsuit-says-rental-complex-in-queens-excludes-ex-offenders.html?_r=0 (describing a lawsuit alleging that a landlord's policy of rejecting applicants with criminal histories violates fair housing laws due to the policy's disproportionate impact on black and Latino men); *infra* note 145.

[10] *Id*.

[11] *See infra* Part II.

[12] *Id*.

[13] *Id*.

[14] *Id*.

tenant dangerousness. Washington landlords should not be liable for future harm to tenants based solely upon renting to an applicant with a criminal record. Refusing to hold landlords liable in this way would increase housing opportunities for this population. Once housed, it is likely that the person's chances for recidivism will decrease, thereby increasing public safety and promoting the rehabilitation of people with a criminal history.[15]

I. CURRENT STATE OF THE LAW: NO LANDLORD LIABILITY FOR CRIMINAL ACTS OF THIRD PARTIES WITHOUT FORESEEABILITY

> *One morning while showering, Ms. Griffin heard a loud noise in her apartment. She found dirt and debris on her floor near the closet and in it. She saw that the board covering the crawl space above was askew. She immediately went to her property manager's office to report her observations. The property manager sent out two maintenance men who then screwed a two-by- four across the much larger opening of the crawl space. Two weeks later, she was attacked by her next door neighbor after he entered her apartment through that same crawl space. She filed suit against her landlord and the assailant. The jury found the landlord's attempted repair negligent, but awarded Ms. Griffin no monetary damages from the landlord*.[16]

These facts are from the only Washington case that has analyzed liability for the criminal acts of third parties in the landlord-tenant context. This Section first reviews current negligence law to understand whether the above landlord should be liable for the injuries the tenant sustained in the attack and then considers whether negligence liability should attach if her attacker had a criminal record that her landlord knew about when she rented him the apartment.

A. A landlord is not the insurer of a tenant's safety, but might have a duty to protect tenants from foreseeable harm

To establish negligence under Washington law, "the plaintiff must prove duty, breach, causation, and damages."[17] The legal analysis of a tenant's negligence claim for harm resulting from the criminal act of a third party centers on whether a landlord has a duty to protect tenants and the scope of that duty.[18] Prior

[15] *Id*.

[16] *See* Griffin v. W. RS, Inc., 984 P.2d 1070, 1072 (Wash. Ct. App. 1999), *rev'd*, 18 P.3d 558 (Wash. 2001).

[17] *See* Nivens v. 7-11 Hoagy's Corner, 943 P.2d 286, 289 (Wash. 1997).

[18] *Griffin*, 984 P.2d at 1073 (noting that, as a threshold matter, the court had to determine whether landlords owe heightened duties of care to their tenants in order to resolve the case at bar).

to 1970, the above tenant's claim would fail, as historically a landlord had no duty to protect tenants from injuries caused by the criminal acts of third parties.[19] However, this principle began to erode as the nature of the landlord-tenant relationship evolved from simply leasing a piece of land to renting a dwelling unit with complicated infrastructures such as heating, lighting, and plumbing that could only be maintained by the landlord.[20] By the 1970s, many states, including Washington, required landlords to adequately maintain these systems and keep the rental premises fit for human habitation.[21]

Once this duty to maintain the rental premises was established, courts began to hold landlords liable for the criminal acts of third parties in cases where landlords failed to maintain the physical premises and that failure facilitated the commission of a crime that injured a tenant.[22] For example, in a New Jersey case, a landlord failed to provide adequate locks on the front door to the building which resulted in a mugger entering the building and attacking a tenant.[23] The court found that the landlord breached his duty by failing to secure the building's front entrance.[24] The court held the landlord liable for the tenant's injuries be-

[19] *See Nivens*, 943 P.2d at 290 n.3, 292 (noting that landowners who invited others onto premises had a duty to protect these persons from foreseeable criminal acts of third persons based on a special relationship, but observing that this duty had been applied narrowly because courts had found only rarely that criminal acts were foreseeable); 17 WILLIAM STOEBUCK & JOHN WEAVER, WASH. PRACTICE, REAL ESTATE: PROPERTY LAW § 6.36 (2d ed. 2004) (Washington landlord was traditionally not liable to a tenant for injuries due to defective conditions on the premises); Corey Mostafa, Note, *The Implied Warranty of Habitability, Foreseeability, and Landlord Liability For Third-Party Criminal Acts Against Tenants*, 54 UCLA L. REV. 971, 974–75 (2007). However, all courts have rejected claims of strict liability in this and similar contexts. *See* Peterson v. Superior Court, 899 P.2d 905, 909–911 (Cal. 1995) (overturning previous ruling that landlords were strictly liable based upon the rule, adopted in the majority of other states to have considered the issue, that landlords are not strictly liable for to tenants caused by defective conditions of premises); Lincoln v. Farnkoff, 613 P.2d 1212, 1213 (Wash. Ct. App. 1980), *abrogated on other grounds by* Dexheimer v. CDS, Inc., 17 P.3d 641 (Wash. Ct. App. 2001) (concluding landlord not strictly liable for harm caused by a defect on his premises).

[20] *See* Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Mostafa, *supra* note 19, at 975.

[21] *See* Foisy v. Wyman, 515 P.2d 160, 164 (Wash. 1973) (en banc) ("[I]n all contracts for the renting of premises, oral or written, there is an implied warranty of habitability . . . ."). The term "warranty of habitability" means that "the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling." *Id*. at 164; WASH. REV. CODE ANN. § 59.18.060 (LexisNexis 2014) (landlord must maintain building's structural components and common areas and make repairs).

[22] *See, e.g.*, *Kline*, 439 F.2d at 481; Rosenbaum v. Sec. Pac. Corp., 50 Cal. Rptr. 2d 917, 921 (Cal. Ct. App. 1996) ("[A] landlord's duty to take reasonable steps to secure common areas of the premises against foreseeable criminal acts of third parties has become well established law in California."); Trentacost v. Brussel, 412 A.2d 436, 440 (N.J. 1980). *See also* 17 STOEBUCK & WEAVER, *supra* note 19, § 6.36.

[23] *See Trentacost*, 412 A.2d at 443 (holding that landlord had breached implied warranty of habitability by not securing front entrance in any way, which led to tenants' injuries by permitting access to the "criminal element.")

[24] *Id*.

cause there was ample evidence that criminal activity affecting the premises was reasonably foreseeable.[25]

Another court ruled that although the landlord is not an "insurer" of the tenant's safety, he has a duty to minimize the risk of harm to tenants from third party criminal attacks. Specifically, where:

> [T]he landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.[26]

A landlord does not have an absolute duty to ensure a tenant's safety, but may be liable where a criminal attack is the reasonably foreseeable result of the landlord's failure to properly maintain the rental premises. Although no Washington court considering landlord liability for the criminal acts of third parties has based its holding on a violation of a landlord's duty to maintain the premises,[27] other states' courts have done so.[28] Most courts based these decisions on the theory that if a landlord violates his duty to maintain or secure the premises and that failure facilitates the commission of a crime that injures the tenant, then he is liable for those injuries.[29]

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[25] *Id*.

[26] *Kline*, 439 F.2d at 481.

[27] *See* Griffin v. W. RS, Inc., 984 P.2d 1070 (Wash. Ct. App. 1999) (basing landlord's potential liability for tenant's injury on the special relationship between landlord and tenant in a residential setting).

[28] *See, e.g.*, Duncavage v. Allen, 497 N.E.2d 433 (Ill. App. Ct.1986) (holding that a landlord could be liable where he breached duty to maintain areas of the building including lighting and weeds that could hide an intruder); Brichacek v. Hiskey, 401 N.W.2d 44 (Iowa 1987); Ward v. Inishmaan Assocs., 931 A.2d 1235, 1238 (N.H. 2007) (quoting *Walls v. Oxford Mgmt. Co.*, 633 A.2d 103, 106 (N.H. 1993)) ("[A] duty may arise 'when a landlord has created, or is responsible for, a known defective condition on a premises that foreseeably enhance[s] the risk of criminal attack.'"); *Trentacost*, 41 A.2d at 443 (holding that landlord breached implied warranty of habitability by not securing front entrance in any way, thus permitting access to the "criminal element").

[29] *See, e.g.*, *Duncavage*, 497 N.E.2d at 438 ("Illinois law also supports finding that defendant had a duty under the circumstances of this case to protect decedent from criminal acts of third persons."); *Brichacek*, 401 N.W.2d at 48 (holding that landlords can be held liable for criminal attacks on their tenants under some circumstances); *Ward*, 931 A.2d at 1238 (recognizing "four possible exceptions to the general rule that landlords have no duty to protect tenants from criminal attack"); *Trentacost*, 41 A.2d at 443 ("Under modern living conditions, an apartment is clearly not habitable unless it provides a reasonable measure of security from the risk of criminal intrusion."). *See also* 17 STOEBUCK & WEAVER, *supra* note 19, at 346.

Courts will hold landlords liable if the facilitation of a criminal act was the foreseeable result of the landlord's unreasonable failure to perform his duty.[30] Whether the harm to the tenant was reasonably foreseeable is a primary factor in determining liability.[31]

Foreseeability is the frame setting the boundaries of a landlord's liability for the criminal acts of third parties.[32] Many courts will not find a defendant negligent unless the plaintiff establishes foreseeable risk.[33] Courts that impose a duty on landlords to protect tenants from harm limit the scope of that duty to foreseeable harm.[34] Harm is foreseeable only if there is "some probability or likelihood, not a mere possibility, of harm sufficiently serious that ordinary men would take precautions to avoid it."[35] Criminal conduct can be foreseeable where "the result of the [criminal act] is within the ambit of the hazards covered by the duty imposed upon [the] defendant."[36]

But, whether a landlord has a duty to protect tenants from the criminal conduct of third parties and when that criminal conduct is foreseeable is in flux in Washington. The Washington Supreme Court has recognized that business own-

[30] 17 STOEBUCK & WEAVER, *supra* note 19, at 347 (noting that "no post-1970 decision has been found in which the landlord has not been held to be liable for foreseeable criminal injuries caused by an unreasonable failure to perform that duty").

[31] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 (2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."). There is disagreement among tort law scholars about whether foreseeability analysis should be a question of duty, breach, or causation. S*ee* W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739 (2005). For purposes of this article, we focus on foreseeability as a part of the analysis of the duty element.

[32] *See* David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1307 (2009) ("No one should doubt that foreseeability is an explicit, central consideration in evaluating whether a person's conduct should be blamed . . . .").

[33] *See* Browning v. Browning, 890 S.W.2d 273 (Ark. 1995); Cunis v. Brennan, 308 N.E.2d 617 (Ill. 1974); Mitchell v. Hadl, 816 S.W.2d 183 (Ky. 1991); Colvin v. A R Cable Servs.-ME, Inc., 697 A.2d 1289 (Me. 1997); Mang v. Eliasson, 458 P.2d 777 (Mont. 1969); Poelstra v. Basin Elec. Power Coop., 545 N.W.2d 823 (S.D. 1996). *See generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. g (2010).

[34] *See* McKown v. Simon Prop. Grp., 689 F.3d 1086, 1092 (9th Cir. 2012) (discussing the Washington Supreme Court's conclusion that there is a duty between a business owner and invitees to protect them from reasonably foreseeable criminal conduct by third person); Gurren v. Casperson, 265 P. 472 (Wash. 1928) (holding the innkeeper liable for attack of one guest on another where owner knew of possibility of assault); Griffin v. W. RS, Inc., 984 P.2d 1070, 1077 (Wash. Ct. App. 1999) (recognizing that a residential landlord has a duty to protect its tenant against *foreseeable* criminal acts of third parties).

[35] Thomas v. Hous., 426 P.2d 836, 839 (Wash. 1967) (citing Hammontree v. Edison Bros. Stores, Inc., 270 S.W.2d 117, 126 (Mo. Ct. App. 1954)).

[36] *McKown*, 689 F.3d at 1092.

ers, but not specifically landlords, owe a duty to invitees to protect them from reasonably foreseeable criminal conduct by third persons.[37] However, the scope of that duty is unclear.[38] Four lower courts have limited this duty to circumstances where there is evidence that prior similar criminal conduct[39] occurred on the premises.[40] Under this analysis, third party criminal conduct is not reasonably foreseeable as a matter of law without proof of prior similar acts.[41] The business owner must know or have reason to know from "past experience" or the "place or character of his business" that he should "reasonably anticipate . . . criminal conduct on the part of third persons."[42] In *McKown*, a Washington federal district court found that prior acts were not similar enough because they occurred outside a mall rather than inside it.[43] The acts were "too dissimilar in location" to meet the Washington's "prior similar acts on the premises test."[44] Whether knowledge of prior similar acts off the premises would be sufficient to impose liability on an owner is unclear in Washington. The Ninth Circuit certified this question to the Washington Supreme Court, but, that Court has not yet affirmed or rejected this standard.[45]

Although, the Washington Supreme Court has not analyzed whether a landlord has a duty to protect tenants from the criminal acts of third parties in the

[37] *Id*.

[38] *Id*.

[39] Past criminal conduct can constitute a prior similar act when it is of the same nature as current act. For example, in *McKown*, the court gave McKown an opportunity to present evidence acts similar to the shooting that took place in that case. The court received eighty-six pages of information such as news articles, police reports, and courts records that demonstrated six shootings in the eight years prior. *Id*. at 1089–90. There was also evidence of three incidents involving guns at the mall. *Id*. at 1090. The district court ruled that these incidents were not evidence of prior similar acts because they were too remote in time (five years prior), occurred outside rather than inside the mall, and too dissimilar because the violent acts were directed at a specific person rather than at random people. *Id*. at 1090–91.

[40] *Id*. at 1093 (citing Wilbert v. Metro Park Dist., 950 P.2d 522 (Wash. Ct. App. 1998)).

[41] *Id*.

[42] *Id*. at 1092 (citing RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965)).

[43] *Id*. at 1091.

[44] *Id*. at 1089–91.

[45] *Id*. The Washington Supreme Court accepted a certified question from the Ninth Circuit in *McKown* on whether prior similar acts are a necessary element to establish the foreseeability of third-party criminal conduct, and heard oral argument on February 21, 2013. *See Supreme Court Docket, Winter 2013*, WASHINGTON COURTS, *available at* http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2013&file=docwin13#A12 (last visited Feb. 17, 2015). As of February 9, 2015, the court has not issued an opinion. The Second Restatement's standard is: "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." RESTATEMENT (SECOND) OF TORTS § 344 (1965).

landlord-tenant context, one Washington court of appeals has done so.[46] The next section takes an in-depth look at the seminal Washington case on this issue regarding a landlord's duty—*Griffin v. West.*

B. No definitive tort standard established for Washington landlord liability for criminal acts of third parties

There is a movement in many courts around the country to erode the common law edict that a landlord owed no duty to protect tenants from the foreseeable criminal acts of third parties. It remains to be seen whether Washington courts will follow this trend. Thus far, no Washington court has definitively determined a landlord's duty in this context. However, *Griffin* and *Faulkner* give some indication that if a duty to protect tenants from the criminal acts of third parties exists in Washington, the scope of that duty—as in other states that have addressed the issue[47]—would be limited to only foreseeable criminal acts arising from a failure to secure or maintain the physical premises.[48] A discussion of the case law demonstrating the lack of a current tort law standard on this issue is set out below.

In *Griffin v. West*, a Washington jury held a landlord liable for the criminal acts of a third party based on the facts set out at the beginning of this Section. These facts are egregious—Ms. Griffin immediately reported to her landlord her suspicions regarding a possible intruder, the landlord failed to properly secure the crawl space entrance, and she was injured shortly thereafter by an attacker entering through that space.[49] The jury found that the corporation that owned Ms. Griffin's building failed in its duty to properly repair the premises and was negligent.[50] Yet, the jury decided that the landlord owed Ms. Griffin no damages because the attacker, rather than the landlord's failed repair, ultimately caused her injuries.[51]

Ms. Griffin appealed, arguing that the trial court gave the jury an incorrect instruction regarding a landlord's duty in these circumstances.[52] She requested this instruction: "[The landlord] had a duty to take reasonable steps to protect Christie Griffin from foreseeable criminal conduct of a third party." [53] Instead, the trial court gave its own instruction: "A landlord may be negligent if it under-

[46] *See* Faulkner v. Racquetwood Vill. Condo. Ass'n, 23 P.3d 1135, 1137 (Wash. Ct. App. 2001); Griffin v. W. RS, Inc., 984 P.2d 1070, 1077 (Wash. Ct. App. 1999).
[47] *See Faulkner*, 23 P.3d at 1137; *Griffin*, 984 P.2d at 1077.
[48] *See Griffin*, 984 P.2d at 1077.
[49] *Id*. at 1072.
[50] *Id*. at 1073.
[51] *Id*. at 1072.
[52] *Id*. at 1073.
[53] *Id*.

takes to protect a tenant against a danger of which it knows or in the exercise of ordinary care ought to know, and fails to exercise ordinary care in its efforts, and if the tenant reasonably relied upon the landlord's actions and therefore refrained from taking actions to protect herself."[54]

The appeals court agreed with Ms. Griffin that the trial court's instruction was incorrect. It held that Washington landlords have an affirmative duty to protect tenants from the foreseeable criminal acts of third parties where the landlords failed to properly repair or maintain the property.[55] The court said this was the same duty as that set out by the Washington Supreme Court for a business owner to its invitee since the invitee, like a tenant, "entrusts himself or herself to the control of the business owner over the premises."[56] The court reasoned that although the landlord "is not the insurer of the tenant's safety on the premises,"[57] the tenant "entrusts to the landlord the responsibility to deal with issues that arise from the landlord's control of the common areas of the premises."[58] As a result, the landlord, like a business owner, had a duty to protect Ms. Griffin from "foreseeable criminal conduct of third persons on the premises."[59] Thus, the trial court's instruction gave the jury the wrong standard regarding the duty the landlord owed to the tenant.[60] Moreover, the court reasoned that because duty and causation are intertwined, it could not be sure that the jury properly determined causation because it was incorrectly instructed on duty.[61]

On review, the Washington Supreme Court upheld the jury's verdict.[62] It refused to address the issue of whether a landlord has a duty to protect tenants from the criminal acts of third parties – not even in dicta.[63] Instead, the Court focused on causation.[64] The Court stated that the determination of causation is the same regardless of the type of duty imposed on the landlord.[65] Thus, the scope of the landlord's duty to the tenant was irrelevant given the jury's factual finding that the criminal conduct of the third party caused the tenant's injury rather than

[54] *Id*.
[55] *Id*. at 1076.
[56] *Id*.
[57] *Id*.
[58] *Id*. at 1077.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] Griffin v. W. RS, Inc., 18 P.3d 558, 558 (Wash. 2001).
[63] *Id*.
[64] *Id*. at 562.
[65] *Id*.

the landlord's negligent repair.[66] As a result, the negligent landlord was not held liable for the criminal acts of a third party that attacked a tenant on its premises.[67]

Since *Griffin*, the Washington Supreme Court has only addressed the issue of a landlord's duty to protect tenants from third-party criminal acts in dicta. In a 2001 criminal case regarding a public housing landlord's right to exclude certain guests, the Court noted that the common law rule that a landlord had no duty to protect tenants from the criminal acts of third parties had eroded, but the Court had "never squarely addressed the issue."[68] The Court then posed, but did not answer, the question, "[s]hould a landlord be held liable for the foreseeable criminal acts of third parties causing injury to the landlord's tenant?"[69] The Court of Appeals has not found itself bound by any Supreme Court dicta. In a later case, it reiterated its holding in *Griffin* that a landlord may have a duty to protect the tenant from foreseeable criminal conduct but only in areas where the landlord exerts control over that area.[70] The appeals court imposed no liability in that case because the attack was in an area outside the landlord's control.[71] The Supreme Court refused review.[72]

Washington courts seem poised to adopt a tort law standard that would impose a duty on landlords to protect tenants from reasonably foreseeable criminal acts of third parties. The question remains as to the scope of that duty. Of interest for this article is whether such a duty would encompass requiring landlords to screen tenants for possible future dangerousness. The next Section explores the case law on this issue in the housing context. Due to the dearth of case law in this area, we look to tenant screening decisions in other states and negligent hiring

[66] *Id*.

[67] Ms. Griffin likely sued her landlord for money damages as well as her attacker because landlords likely have access to more funds than someone accused of a crime. *See* Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES (Aug. 23, 2013), http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?pagewanted=all&_r=0 (reporting that about ninety percent of federal criminal defendants qualify for a public defender); CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES (Nov. 2000) *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=772 (stating that approximately eighty-two percent of felony defendants in large counties that were accused of a violent crime were represented by a public defender).

[68] City of Bremerton v. Widell, 51 P.3d 733, 738 (Wash. 2001) (citing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 63, at 442–43 (5th ed. 1984)). *See also* Tracey A. Bateman & Susan Thomas, Annotation, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R. 5th 207, 257 (1996) (addressing cases in which courts have held that a landlord has a duty to protect tenants against reasonably foreseeable criminal acts of third parties).

[69] *Widell*, 51 P.3d at 739. In *Widell*, the court considered the appropriateness of criminal trespass convictions for guests invited onto the property by tenants.

[70] Faulkner v. Racquetwood Vill. Condo. Ass'n, 23 P.3d 1135, 1136 (Wash. Ct. App. 2001).

[71] *Id*.

[72] *See* Faulkner v. Racquetwood Vill. Condo. Ass'n, 37 P.3d 291 (Wash. 2001).

cases to better understand how courts may analyze criminal records and foreseeability in the housing context.

C. Tenant screening process—likely no landlord duty to screen tenants

1. Tenant Screening

Washington landlords have no statutory obligation to screen tenants for possible violent behavior.[73] There is also no Washington case law regarding a landlord's liability for negligent selection of tenants. This section considers the few cases from other states that consider a claim of negligent tenant screening.

Courts outside of Washington have not imposed a duty on landlords to affirmatively conduct tenant screening. In a Louisiana case, a court determined that a landlord owed no duty to protect the tenant from harm by conducting background investigations on prospective tenants.[74] The same court later considered whether a landowner could be liable for injuries to occupants when he allowed a person he knew or should have known had dangerous propensities to occupy the property.[75] The court determined that there was no liability for the landowner because it was not the occupant's mere presence on the property that caused the harm, but the person's unforeseeable act of shooting the tenant.[76] The California Supreme Court considered whether a landlord should be required to obtain criminal backgrounds on possible gang members.[77] The court rejected this argument because the landlord could not screen particular applicants without facing allegations of discrimination.[78] Ultimately, the landlord would be required to obtain full background checks on all applicants.[79] The court said that refusal to rent to those with arrests or convictions for any crime that could have involved a gang constituted – a "burden-

[73] Under the state Residential Landlord-Tenant Act, landlords are not required to screen tenants, but if they do then they must follow specific protocols. WASH. REV. CODE ANN. 59.18.257 (LexisNexis 2014) (stating that a landlord is required to provide prospective tenants information about the type of information reviewed, criteria considered and the name and address of the consumer reporting agency used, if any; and also providing that if the applicant is denied, the landlord must state in writing the reasons for the decision). Of course, landlords must comply with local, state, and federal fair housing laws. The lack of regulation and enforcement on tenant screening issues has created a myriad of problems. *See* Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential-Tenant Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 327–38 (2010) (discussing the problems caused by modern tenant screening practices such as errors and misleading information in tenant screening reports and unfair admission practices by landlords).

[74] *See* Robicheaux v. Roy, 352 So. 2d 766, 768 (La. Ct. App. 1977).

[75] *See* Dore v. Cunningham, 376 So. 2d 360, 362 (La. Ct. App. 1979).

[76] *Id*.

[77] *See* Castaneda v. Olsher, 162 P.3d 610, 618 (Cal. 2007).

[78] *Id*.

[79] *Id*.

some, dubiously effective and socially questionable obligation on landlords, at least absent circumstance making gang violence extraordinarily foreseeable."[80]

Only one state appellate court, in Georgia, found possible liability for a landlord who rented to an applicant with a criminal record who later harmed another tenant.[81] In *Stephens v. Greensboro Properties*, the court did not impose an affirmative duty on the landlord to screen tenants, but ruled that the landlord could be potentially liable for the shooting death of another tenant where it rented to *and* employed the perpetrator who had an extensive criminal record.[82] The management company "authorized him to engage in security-related activities which might reasonably result in altercations with co-tenants, notwithstanding knowledge of his long history of convictions and arrests for numerous violent crimes."[83] Under Georgia law, a prior similar criminal act is generally required to impose liability in these circumstances, but if the danger is "so obvious" then that act might be foreseeable even without a prior act.[84] Pursuant to this standard, the court permitted the case to go to the jury to determine if the harm to the tenant was foreseeable under these circumstances.[85]

No courts have imposed a duty on landlords to conduct background checks. Imposing this duty to protect other tenants would not "further the goals of the criminal rehabilitation system for 'ex-criminals' to be denied housing as they attempt to assimilate back into society."[86] Moreover, assessing whether a tenant might be violent in the future is challenging for even well-trained mental health experts let alone a landlord using a criminal background check.[87] Such a requirement may thwart fair housing laws by adversely impacting those with mental health issues, chemical dependency or racial minorities.[88] Only the *Stephens* court has allowed a jury to consider whether the tenant's harm was foreseeable given the specific facts in that case, which included employing and empowering the person with a criminal record.[89] There, foreseeability was the key

[80] *Id*.
[81] *See* Stephens v. Greensboro Props., Ltd., 544 S.E.2d 464 (Ga. Ct. App. 2001).
[82] *Id*.
[83] *Id*.
[84] *Id*. at 468.
[85] *Id*.
[86] *See* Saxer, *supra* note 8, at 565.
[87] *See id*. at 564–65.
[88] *See id*. at 564; *see also infra* Part III.B.
[89] *See* Saxer, *supra* note 8, at 567–68 (discussing Stephens v. Greensboro Props., Ltd., 544 S.E.2d 464 (Ga. Ct. App. 2001)).

issue in determining liability.[90] At this time, no appellate court has imposed liability for negligent renting.[91]

2. Employment Screening

Unlike landlords, employers have historically had a duty to foreseeable victims "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others."[92] This duty flows from the traditional "master-servant" relationship.[93] Most negligent hiring cases focus on duty and foreseeability.[94] However, there is little agreement among courts as to what constitutes a foreseeable act.[95] Courts usually employ either a totality of the circumstances, a prior similar incidents test, or a balancing test.[96] The totality of the circumstances test scrutinizes past criminal acts, the nature of the business and the condition of the premises.[97] In contrast, the prior similar incidents test only looks to "the proximity, time, number, and types of prior violent incidents" to determine foreseeability.[98] The balancing test examines the type of employment to determine if a more thorough background check is warranted.[99] Courts have not imposed this type of duty and resultant test for foreseeability on landlords, although at least one scholar argued they should do so in the late 1970s.[100]

[90] *Id*.

[91] We could only find one trial court in the country that has imposed liability on a landlord in this context, where the landlord did not follow its own screening policies. *See Jury rules city liable in murder of public housing resident*, WCNC.COM (Feb. 15, 2010), http://www.wcnc.com/story/news/local/2014/06/19/10946859/; *Jury issues verdict in wrongful death lawsuit*, WBTV.COM (updated Mar. 8, 2010, 2:07 PM), http://www.wbtv.com/story/11958156/jury-issues-verdict-in-wrongful-death-lawsuit (both sources describing case in which plaintiff argued that public housing authority failed to conduct a background check when renting to an applicant with a criminal record, and jury returned an award against PHA for $132,000 of the $10.4 million sought).

[92] *See* Niece v. Elmview Grp. Home, 929 P.2d 420, 426 (Wash. 1996).

[93] *See* Davis v. Clark Cnty., 966 F. Supp. 2d 1106, 1141 (W.D. Wash. 2013) (quoting *Niece*, 929 P.2d at 426).

[94] *See* Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 110 (1997).

[95] *Id*. (few guidelines exist to help employers define employee fitness or determine how sufficient a background check should be).

[96] *Id*. at 109.

[97] *Id*.

[98] *Id*.

[99] *See* Carlsen v. Wackenhut Corp., 868 P.2d 882, 887 (Wash. Ct. App. 1994) ("Past Washington decisions tend to employ a type of balancing test to determine if the given employment warrants the extra burden of a thorough background check.").

[100] *See* Charles W. Cunningham, Note, *The Duty of a Landlord to Exercise Reasonable Care in the Selection and Retention of Tenants*, 30 STAN. L. REV. 725 (1978) (arguing that landlords should be required to exclude foreseeably dangerous individuals from the premises). This proposed duty has not taken hold in the courts, as most have not found an affirmative duty for landlords to screen tenants. *See supra* Part I.B.

Washington courts generally use the balancing test.[101] With no duty on employers to conduct specific background checks, courts focus on all the information from the background check process, such as references, resumes, criminal history and interviews rather than on the specific questions asked.[102] If the job involves "a serious risk of great harm" to third parties, then an employer's responsibility to thoroughly investigate a future employee increases.[103] When an employer discovers inconsistencies on an employment application and a lack of information provided by an applicant, the next step is to make additional inquiries if the position requires interaction with the public.[104]

Scholars considering the issue of negligent hiring find that in most cases, an employer's knowledge of a criminal record alone will not impose negligent hiring liability.[105] "The mere fact that a person has a criminal record, even a conviction for a crime of violence, does not in itself establish the fact that that person has a violent or vicious nature so that an employer would be negligent in hiring him to meet the public."[106]

This same lack of foreseeability analysis should be applied to reject attempts to impose liability on landlords for merely renting to a person with a criminal record who harms another tenant. Employment law can help frame the standard in the landlord context. Just like a landlord, an employer reviews information about an applicant to determine if that applicant has the necessary qualifications for a particular job. Similarly, landlords obtain information from rental applicants to see if they have the qualifications necessary to meet tenant obligations. These inquiries include a criminal background check, but also include reference checks with prior landlords and usually an interview with the applicant.

[101] *But see* Niece v. Elmview Grp. Home, 929 P.2d 420, 427 (Wash. 1996) (employing a totality-of-the-circumstances test to find foreseeability of sexual assaults in an employer liability setting by considering prior sexual assaults, a policy against unsupervised contact with residents, and legislative recognition that sexual abuse is a problem in residential care facilities).

[102] *See* Rucshner v. ADT Sec. Sys., Inc., 204 P.3d 271, 279 (Wash. Ct. App. 2009) (citing La Lone v. Smith, 234 P.2d 893, 896 (Wash. 1951)) (holding that employer can assume person offering to perform simple work is qualified, but there can be a contractual obligation to do so).

[103] *See Rucshner*, 204 P.3d at 279.

[104] *See Carlsen*, 868 P.2d at 886.

[105] *See* Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 193–94 (2008); Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1286–87 (2002).

[106] Hersh v. Kentfield Builders, Inc., 189 N.W.2d 286, 289 (1971). *See also* Pruitt v. Pavelin, 685 P.2d 1347, 1354–55 (Ariz. Ct. App. 1984) (holding employer liable for the fraudulent actions of a real estate broker because it knew the employee had been convicted of passing bad checks and forging a signature on a document, and had lied to officers of the company about obtaining a real estate license); Betty Y. v. Al-Hellou, 988 P.2d 1031 (Wash. Ct. App. 1999) (holding employer not liable under negligent hiring theory where it knew of employee's conviction for third-degree child rape, but position was working on vacant apartments and contact with others was incidental).

Even though landlords have less control over the day-to-day behavior of tenants (they are not directly supervising tenant behavior and do not interact with a tenant several hours a day in the way an employer may), landlords still have control over who they do and do not accept as tenants. Given this, landlords should be subject to a similar tort standard as that imposed on employers.

II. SOCIAL SCIENCE RESEARCH: CRIMINAL RECORD NOT PREDICTIVE OF UNSUCCESSFUL TENANCY

Some courts have evaluated evidence intended to demonstrate an empirical link between a criminal history and propensity for dangerousness. In one such case, a city tried to argue that it was justified in refusing to issue a permit to an agency that facilitated the reentry of federal offenders into society because occupants of that residence were more likely to commit crimes than a person who had never been convicted of a crime.[107] The expert in that case was unable to provide conclusive research evidence to support this contention.[108] A later case considered whether the denial of a special zoning exception for a drug and alcohol treatment facility that accepted referrals from local prisons was constitutionally permissible.[109] The city based the denial in part on safety and security concerns.[110] The treatment provider appealed.[111] The court found that there was no evidence that the incidents presented to demonstrate a safety threat were "greater in number and intensity than incidents linked to similarly situated uses, such as dormitories, fraternities, or sororities."[112]According to the court "any safety concern related to the men being recovering addicts is therefore based upon unfounded fear, speculation, and prejudice."[113] This section reviews the recent social science research which supports the proposition that a criminal record is not predictive of a future threat.

The ostensible relationship between criminal history and an increased likelihood of a problematic tenancy is often cited by rental housing providers in defense of restrictive screening procedures and admissions policies.[114] Yet, there has been little discussion on the predictive value of a criminal record in the hous-

[107] *See* Bannum Inc., v. City of Louisville, 958 F.2d 1354, 1360–61 (6th Cir. 1992) (noting that city was unable to show that occupants who had been incarcerated more likely to commit crimes than those community residents without a criminal record).

[108] *Id*.

[109] *See* Open Homes Fellowship v. Orange Cnty, 325 F. Supp. 2d 1349, 1361 (M.D. Fla. 2004).

[110] *Id*. at 1354.

[111] *Id*.

[112] *Id*. at 1361.

[113] *Id*.

[114] *See* HOUSING LINK, *supra* note 5.

ing context.[115] A review of relevant scholarly research reveals there is no empirical basis for the assertion that a criminal record indicates a future problematic tenancy or a dangerous tenant.

This review describes the findings from academic studies in two areas: evaluations of supportive housing programs[116] and research on the relationship between housing status, incarceration and recidivism. Evaluations of supportive housing programs offer unique lessons regarding the predictive power of a criminal record in the housing context as they investigate how residents with criminal histories fare in those programs. Meanwhile, findings from studies exploring the impact of housing status on recidivism underscore the social imperative to expand housing access for the formerly incarcerated or those with criminal records.

A number of studies have evaluated the efficacy of supportive housing program serving populations at risk of homelessness.[117] More recently, some scholars have utilized evaluation data from such programs to investigate whether a criminal record or history of incarceration predicts program success.[118] Our broad survey of the relevant academic literature returned two large-scale, methodologically rigorous studies that compare program participants with and without criminal histories.[119]

[115] *See* Corinne Carey, *No Second Chance: People With Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 563 (2005) ("Curiously, there has been relatively little discussion among federal or local housing officials as to what, in fact, predicts a good tenant, much less the predictive value of a criminal record.").

[116] Supportive housing programs typically provide populations at risk of chronic homelessness with a variety of health and social services, including some form of subsidized housing. Those populations include those struggling with substance dependence and mental and physical health issues. Because these issues are relatively common among those that have had contact with the criminal justice system, supportive housing clients often include the formerly incarcerated or individuals with criminal conviction records. *See generally* Seena Fazel et al., *Substance Abuse and Dependence in Prisoners: A Systematic Review*, 101 ADDICTION 181 (2006) (discussing substance dependence among those who have been incarcerated); Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 LAW & SOC'Y REV. 275 (2008) (discussing the impact of criminal justice system contact on mental and physical health outcomes). Supportive housing programs are thus a relevant setting for research around the link between criminal history and tenant behavior. Nonetheless, findings from supportive housing programs may not be completely generalizable to other housing contexts on account of the unique resources and social services made available to residents.

[117] *See* H. Stephen Leff et al., *Does One Size Fit All? What We Can and Can't Learn from a Meta-Analysis of Housing Models for Persons with Mental Illness* 60 PSYCHIATRIC SERVS. 473 (2009); Debra J. Rog, *The Evidence on Supported Housing*, 27 PSYCHIATRIC REHAB. J. 334 (2004).

[118] *See* Edward S. Casper & Doris Clark, *Service Utilization, Incidents and Hospitalizations Among People with Mental Illnesses and Incarceration Histories in a Supportive Housing Program*, 28 PSYCHIATRIC REHAB. J. 181 (2004); Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVS. 224 (2009); Jack Tsai & Robert A. Rosenheck, *Incarceration Among Chronically Homeless Adults: Clinical Correlates and Outcomes*, 12 J. FORENSIC PSYCHOL. PRAC. 307 (2012). .

[119] *See* Malone, *supra* note 118; Tsai & Rosenheck, *supra* note 118. While Casper and Clark also addressed this question, the generalizability of the study's findings are very limited in light of the small

One study explored the impact of criminal history status on a wide range of outcomes among participants in a multi-city supportive housing program.[120] The researchers drew on a sample of 751 clients divided into three groups: those with no history of incarceration, those who had been incarcerated for one year or less and those who had been incarcerated for over one year.[121] Upon entering the program, the formerly incarcerated clients were markedly distinct from their never incarcerated counterparts; reporting higher levels of drug and alcohol dependence, longer histories of homelessness and lower levels of education.[122]After controlling for these baseline differences, researchers found that there were *no statistically significant differences* between the formerly incarcerated and never incarcerated study groups in program outcomes.[123] In light of their findings, the authors suggest that chronically homeless adults with incarceration histories can benefit as much from supportive housing as those without incarceration histories.[124]

In another study of the relevance of criminal history for successful supportive housing participation, Malone analyzed data collected from a Seattle housing program for homeless adults with behavioral health disorders.[125] The study drew on data from 347 housing clients, slightly more than half of whom

sample size and potential selection effects stemming from the fact that the formerly incarcerated participants were recruited as part of a jail-diversion program, in contrast to the voluntary recruitment of the never incarcerated participant group. Casper & Clark, *supra* note 118. For a review of statistical standards for generalizability, see JASON W. OSBORNE, BEST PRACTICES FOR QUANTITATIVE METHODS (2007).

[120] Tsai & Rosenheck, *supra* note 118, at 310 (examining community adjustment, substance abuse, employment, health status and utilization of health services for clients enrolled in a multisite supportive housing program implemented in eleven cities: Chattanooga, Tennessee; Chicago, Illinois; Columbus, Ohio; Denver, Colorado; Fort Lauderdale, Florida; Los Angeles, California; Martinez, California; New York, New York; Philadelphia, Pennsylvania; Portland, Oregon; and San Francisco, California).

[121] *Id*.

[122] *Id*. at 314–15 tbl.1 (showing baseline differences between participants with different incarceration histories).

[123] *Id*. at 316 (with the exception that clients who had been incarcerated longer than one year reported poorer physical health).

[124] *Id*. at 319 (citing Malone, *supra* note 118) ("The overall finding of no group difference in outcomes runs in contrast to our hypothesis, although it is similar to at least one previous study (Malone, 2009) and suggests chronically homeless adults with incarceration histories can benefit as much from supported housing as those with no incarceration histories. This finding may have particular implications for housing providers and policy makers who support practices that exclude those with criminal histories from applying for public housing.").

[125] Malone, *supra* note 118. The study defined success as the continuous retention of housing for two years. *Id*. at 224. The author focused on program success rather than recidivism in light of the research suggesting that much of the reoffending on the part of the formerly incarcerated—particularly those with mental illness—stems from low-level, nonviolent offenses. *Id*. at 225 (referencing R.A. Desai & Robert A. Rosenheck, *Childhood Risk Factors for Criminal Justice Involvement in a Sample of Homeless People with Serious Mental Illness*, 188 J. NERVOUS & MENTAL DISEASE 324 (2000)). Consequently, recidivism data may not be a justifiable basis on which supportive housing providers screen out prospective clients with criminal histories out of concern for the safety of other clients.

had a criminal record.[126] That analysis revealed that a *criminal record was not statistically predictive* of program failure.[127] When other characteristics that could potentially affect tenant behavior were taken into account, age was the only statistically significant determinant of housing success, where younger clients were less likely to retain housing.[128] In contrast to other similar evaluations of supportive housing programs, Malone's study was able to draw on detailed data on the *nature* of clients' criminal history, including the time elapsed since last conviction, the number of prior offenses, and the seriousness of past offenses.[129] None of these dimensions were statistically predictive of program success.[130]

These studies provide evidence that, at least within the supportive housing context, *criminal history is not predictive of problematic tenancy*.[131] As such, they raise important questions about the validity of standards of risk estimation, screening practices and admissions policies related to criminal records in the general rental housing context. With respect to the potential broader policy implications of his study for screening and admissions policies in other residential settings, Malone notes that:

> The finding that criminal history does not provide good predictive information about the potential for housing success is additionally important because it at least partially contradicts the expectations of housing operators and others. It certainly runs counter to common beliefs that housing needs to be free of offenders in order to be safe for the other residents.[132]

[126] *Id*. at 224.

[127] *Id*. ("Data were available for 347 participants. Most (51%) had a criminal record, and 72% achieved housing success. The presence of a criminal background did not predict housing failure. Younger age at move-in, presence of a substance abuse problem, and higher numbers of drug crimes and property crimes were separately associated with more housing failure; however, when they were adjusted for each of the other variables, only move-in age remained associated with the outcome.").

[128] *Id*.

[129] *Id*. at 228.

[130] *Id*. at 227–28 ("Criminal history appears to be largely unrelated to the ability of homeless persons with behavioral health disorders to succeed in supportive housing, suggesting that policies and practices that keep homeless people with criminal records out of housing may be unnecessarily restrictive. People with a more extensive criminal history succeeded at rates equivalent to those of others, as did people with more recent criminal activity, people with more serious criminal offenses, and people who began criminal activity at an earlier age. In other words, the criminal history of those who succeeded in housing was nearly indistinguishable from that of those who failed in housing.").

[131] *Id*. at 229. On account of the unique features of supportive housing programs, Malone cautions that his results are not necessarily generalizable to all housing contexts: "Because the study present here involved individuals with specific characteristics (lengthy homelessness and behavioral health disorders) who received a particular intervention (supportive housing), generalizing the results of our study to other situations may not be valid." *Id.*

[132] *Id*. at 228.

The notion that excluding those with criminal histories from housing enhances public safety is also undermined by a larger body of research that has established the strong empirical association between housing insecurity and recidivism. A number of studies have investigated the impact of former prisoners' post-release housing circumstances upon recidivism by utilizing statistical models that control for a number of individual level characteristics thought to potentially affect recidivism.[133] For example, researchers analyzed the case management records of 6,327 parolees in Georgia and found that, controlling for all other relevant factors, housing instability was significantly associated with recidivism (here defined as arrest for a new offense while under parole supervision).[134] Each change of address while on parole was associated with a twenty-five percent increase in the likelihood of re-arrest.[135] Their findings underscore the importance of access to *stable, affordable* housing for the formerly incarcerated.

Two Washington studies examined post-release outcomes as they related to housing stability. One study assessed the impacts of a pilot re-entry housing program in Washington by contrasting the re-entry outcomes of participants with a comparison group composed of non-participants who were released from corrections facilities at the same time.[136] Across every measure of recidivism and reintegration, the stably housed portion of the comparison group fared better than their unstably housed or homeless counterparts.[137] These findings offer strong support for the notion that housing stability significantly reduces recidivism and improves reintegration of the formerly incarcerated. This finding holds even after controlling for various individual-level background characteristics potentially shaping housing circumstances.[138]

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[133] *See, e.g.*, FAITH E. LUTZE ET AL., WASHINGTON STATE'S REENTRY HOUSING PILOT PROGRAM EVALUATION: YEAR 3 FINAL REPORT (2011), *available at* http://www.co.whatcom.wa.us/health/wchac/pdf/rhpp_year3_report_june_2011.pdf; TAMMY MEREDITH ET AL., APPLIED RESEARCH SERVS., INC., ENHANCING PAROLE DECISION-MAKING THROUGH THE AUTOMATION OF RISK ASSESSMENT, (2003); MELISSA SHAH ET AL., WASH. STATE DEP'T OF SOC. & HEALTH SERVS., ACHIEVING SUCCESSFUL COMMUNITY RE-ENTRY UPON RELEASE FROM PRISON (2013), *available at* https://www.dshs.wa.gov/sites/default/files/SESA/rda/documents/research-11-193.pdf.

[134] *See* MEREDITH, *supra* note 133, at 15.

[135] *Id.* ("Finally, there is a 25% increase in the likelihood of arrest each time a parolee changes address. That translates into doubling the odds of arrest by simply moving three times while on parole (having four residences).").

[136] *See* LUTZE ET AL., *supra* note 133.

[137] *Id.* at 15–16. Those dependent or outcome measures included new convictions, revocation of community supervision, readmission to prison, and the "time to failure" or the length of time between an individual's release date and the first instance of recidivism. *See also id.* at 36 ("Although this study was focused on RHPP/HGAP [the two pilot programs under study] performance, it is important to note the reentry experience of those who were released to unstable housing. These offenders tended to perform poorly across all counties on each of the outcome measures.").

[138] *Id.* at 14–18 (including age, gender, incarceration history, criminal conviction history and exposure to rehabilitative programming in prison).

In the second study, Washington researchers investigated the impact of post-release housing circumstances on various dimensions of prisoner reentry including recidivism, employment, earnings, medical care and substance abuse.[139] The researchers followed a sample of approximately 12,000 individuals released from a Washington State Department of Corrections (DOC) facility for one year.[140] Among study participants, those that received housing assistance and eventually secured permanent housing fared the best across multiple measures of reintegration; this group had the lowest rates of recidivism and the highest rates of employment, medical coverage and substance abuse treatment.[141]

Despite the importance of housing stability for successful reentry, a large body of research literature has unfortunately found that the formerly incarcerated experience high rates of homelessness and housing instability relative to the general population.[142] One such study drew on longitudinal survey data to compare the housing circumstances of formerly incarcerated men and of a group of men who share similar demographic characteristics but have never been incarcerated.[143] After controlling for an array of background characteristics (i.e. race, age, education, employment history, behavioral characteristics, etc.) and housing circumstances prior to incarceration, the authors found that the formerly incarcerated men were nearly twice as likely to have been homeless during the study period than their never-incarcerated counterparts.[144]

Of all the studies reviewed on the topic for this article, not one indicated a positive correlation between a criminal record and a future problematic tenancy. Rather, the studies indicated no correlation between the two. Based upon this

[139] *See* SHAH ET AL., *supra* note 133, at 1.

[140] *Id*.

[141] *Id*. at 1 ("Homeless ex-offenders who received housing assistance and transitioned to permanent housing had *lower* rates of criminal recidivism and *higher* rates of employment, Medicaid coverage, and substance abuse treatment, compared to other homeless ex-offenders.").

[142] *See, e.g.*, Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL'Y 139 (2004); BRADLEY, *supra* note 6; Geller & Curtis, *supra* note 6, at 1196; NELSON, *supra* note 6; Roman, *supra* note 6.

[143] *See* Geller & Curtis, *supra* note 6, at 1197.

[144] *Id.* at 1206 ("[F]ormerly incarcerated men face more than twice the odds of homelessness as men who have not been incarcerated."). Another notable finding to emerge from that study is that formerly incarcerated men were not significantly more likely to have been evicted or to have skipped mortgage payments relative to their never-incarcerated study counterparts when relevant covariates are controlled for. *Id.* at 1203 (''Namely, differences in frequent moves and ''living with others without paying rent'' are consistently statistically significant, while differences in skipping a mortgage payment, eviction, and doubling up lose significance as additional covariates are controlled."). Their research is the first to compare the tenant behavior of formerly incarcerated and never-incarcerated individuals in the general rental housing context. As such, these findings provide early but important evidence challenging the assumption that a criminal history is an effective predictor of at least some forms of "bad" tenant behavior that result in eviction.

research, future harm resulting from renting to an applicant with a criminal record is not reasonably foreseeable.

III. BECAUSE CRIMINAL RECORDS DO NOT CREATE A FORESEEABLE RISK OF FUTURE HARM, TORT LIABILITY SHOULD NOT ATTACH TO RENTING TO A PERSON WITH A CRIMINAL RECORD

A tort standard that would not impose landlord liability on the sole basis of renting to an applicant with a criminal record supports societal goals of fair housing, habitable premises, public safety and rehabilitation.

A. Fair Housing

Imposing liability upon landlords for negligent screening also conflicts with the goals, policies, and language of laws that prohibit discrimination in housing. Reducing or eliminating liability on landlords who rent to tenants with a criminal record furthers fair housing goals. A specific goal of the Fair Housing Act is to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics."[145] However, restrictive tenant screening practices with respect to criminal history could undermine that goal and facilitate discriminatory treatment.[146] If a landlord refuses to rent to a person with a criminal history, she could be liable for violating the Fair Housing Act.[147]

The U.S. Department of Housing and Urban Development (HUD) has issued no guidance regarding fair housing and criminal records screening.[148] However, over twenty years ago, the EEOC recognized that "an employer's policy or practice of excluding individuals from employment on the basis of their convic-

[145] *See* Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052, 1056 (E.D. Cal. 1998) (discussing goal of Federal Housing Act, 42 U.S.C. § 3601). *See also* United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974).

[146] *See* Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 212–13 (2009).

[147] *Id.*; *see also* Gamble v. City of Escondido, 104 F.3d 300, 304–05 (9th Cir. 1997) (describing the burden-shifting scheme for disparate treatment claims under the Fair Housing Act).

[148] HUD has issued regulations regarding disparate impact liability that set out a three-step burden-shifting analysis. 24 C.F.R. § 100.500(c) (2013). A recent law review article provides an in-depth discussion of this rule and its implications for future court decisions. *See* Michael G. Allen et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155 (2014). *See also, e.g.*, Inclusive Cmtys. Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014) (applying the disparate impact test set out in the HUD regulations). The U.S. Supreme Court heard oral arguments in this case on January 21, 2015 to determine whether the Fair Housing Act prohibits housing policies that have a disparate impact on protected classes. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., No. 13-1371 (U.S. argued Jan. 21, 2015).

tion records has an adverse impact on [African American and Latino workers] in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population."[149]

Washington State corrections statistics demonstrate that African Americans are disproportionately represented in the corrections system. Washington State's 2013 estimated Census population estimate was 6,971,406.[150] Of that number, 81.2% were White, 11.9% Hispanic or Latino, 1.9% Native American and 4.0% were African American.[151] The Washington State Department of Corrections (DOC) collects data on the race of all offenders admitted to its facilities.[152] Of the 18,059 prisoners as of September 2014, 18.1% were African American, a rate almost five times the rate of African Americans in the general population.[153] For Native Americans, the incarceration rate was more than double their share of the state population at 4.4%.[154]

As a result of this disproportionate representation of protected classes in the criminal justice system, housing policies that eliminate applicants for consideration based upon a criminal record create a discriminatory effect. A tort law standard that reduces negligence liability for renting to an applicant with a criminal record could increase access to housing for historically marginalized groups. Landlords would have less fear of a negligence lawsuit, thereby removing one possible business justification for restrictive background screening policies. The proposed tort law standard supports the important public policy objective of removing unnecessary and impermissible barriers to housing for protected classes.

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[149] *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000 ET SEQ. (1982) (Feb. 4, 1987), *available at* http://www.eeoc.gov/policy/docs/convict1.html. The EEOC issued guidance in 1990 for consideration of arrest records. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC POLICY STATEMENT ON CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UUNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000 ET SEQ. (1982) (Sept. 7, 1990), *available at* http://www.eeoc.gov/policy/docs/arrest_records.html. In 2012, the EEOC updated this guidance. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The 2012 guidance consolidates the 1987 and 1990 guidance, updates the research, and discusses disparate treatment and disparate impact analysis for employer criminal record policies under Title VII with an in-depth analysis and specific examples.

[150] U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS FOR WASHINGTON, *available at* http://quickfacts.census.gov/qfd/states/53000.html (last revised Feb. 5, 2015).

[151] *Id*.

[152] *Fact Card*, DEP'T OF CORRS. (Sept. 30, 2014), *available at* http://www.doc.wa.gov/aboutdoc/docs/msFactCard_002.pdf.

[153] *Id*.

[154] *Id*.

B. Habitable and Safe Premises

Landlords should be liable if they fail to maintain or secure the property resulting in harm to a tenant by another tenant's or third party's criminal act.[155] The few courts that have heard negligent tenant screening claims have not expanded liability to the future criminal acts of tenants who have a criminal record.[156] But, no uniform standard has been established.[157] We posit that a clear tort law standard should be established that reflects the relevant social science and psychological research regarding foreseeability and risk as well as the public policy goals of safety, rehabilitation, and fair housing.

Courts and legislatures have not and should not expand liability for the criminal acts of third parties to the tenant screening context. Rather than using a criminal record to reject an applicant for fear of future harm to other tenants or property, landlords should instead be incentivized to be responsible property managers and owners.[158] They should be encouraged to do what is already required—comply with applicable common law and statutory habitability and security requirements or face liability if their failure to do so results in reasonably foreseeable harm from the criminal acts of a third party.[159]

Prior case law and good public policy require that Washington courts hold a landlord liable for tenant injuries caused by a defective condition on the premises that could foreseeably cause harm to a tenant from third party criminal activity if:

- the condition is dangerous
- the landlord was aware of it or should have been
- the landlord failed to properly repair it; and
- the condition violated the warranty of habitability.[160]

[155] *See* Griffin v. West RS, Inc., 984 P.2d 1070, 1076 (Wash. Ct. App. 1999).

[156] See discussion *supra* Part I.C.

[157] *Id*.

[158] *See* B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 791 (1992).

[159] *See* Degel v. Majestic Mobile Manor, 914 P.2d 728, 731 (Wash. 1996) (en banc) (holding that landlord has affirmative duty to maintain common areas in safe manner).

[160] *See* Pinckney v. Smith, 484 F. Supp. 2d. 1177, 1182 (W.D. Wash. 2007) (citing WASH. REV. CODE ANN. § 59.18.060(1) (2004) for the proposition that a dangerous condition is one that substantially "impairs the health or safety of the tenant"); Lian v. Stalick, 62 P.3d 933, 936 (Wash. Ct. App. 2003). Both cases cite to the RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 17.6 (1977). ("A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation.").

To incur liability, the landlord must have control over the part of the property where the defect occurred.[161]

In cases where the issue is an allegation of inadequate security, courts or the state legislature should define the factors that render criminal conduct reasonably foreseeable. These should include factors that actually relate to foreseeability:

> 1) whether criminal conduct previously occurred on or near the property at issue;
> 2) how recently the prior criminal conduct occurred;
> 3) how often the prior criminal conduct occurred;
> 4) how similar the prior criminal conduct was to the conduct that occurred on the property; and
> 5) what publicity was given to the prior criminal conduct that would indicate that the land owner knew or should have known about the potential for crime.[162]

This tort standard also recognizes that landlord behavior related to premises maintenance, adequate security, and appropriate management are more relevant factors in increasing tenant safety, and that these, rather than a past criminal history, should be the focus of liability. Research on criminal activity on or around rental property highlights the importance of factors unrelated to the potential for criminal behavior among tenants with a criminal record. For example, one study investigated the link between residential rental property ownership characteristics and crime.[163] In that study, rates of crime and disturbances were significantly higher in rental properties where property managers lived off-site, lending credence to anecdotal suspicions that absentee landlords or property managers are less effective when it comes to maintaining safety.[164]

C. Public Safety and Rehabilitation

The Washington legislature has declared that the criminal justice system should protect the public, reduce the risk of offenders reoffending in the community, and encourage the rehabilitation of felons through employment.[165] It has al-

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[161] *See* Faulkner v. Racquetwood Vill. Condo. Ass'n, 23 P.3d 1135, 1137 (Wash. Ct. App. 2001) (finding no duty to protect tenant from harm suffered in an area outside landlord's control).

[162] *See* Stan Perry & Paul Heyburn, *Premises Liability for Criminal Conduct: When is Foreseeability Established?*, THE HOUSTON LAWYER (Oct. 1998) at 21–22 (citing Timberwalk Apts., Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (1998)).

[163] *See* Terance Rephann, *Rental Housing and Crime: The Role of Property Ownership and Management*, 43 ANNALS REGIONAL SCI. 435 (2009).

[164] *Id*.

[165] *See* WASH. REV. CODE ANN. § 9.94A.010 (West 2014); WASH. REV. CODE ANN. § 9.96A.010 (West 2014).

so recognized that housing increases the likelihood of success in the community for previously incarcerated individuals.[166]

The social science studies discussed in the previous section establish a link between reduced recidivism and stable housing.[167] While landlords purport to screen out tenants with a criminal history as a safety precaution,[168] this behavior may actually decrease overall community safety. Courts considering negligent renting claims have recognized the competing interests in landlords protecting tenants and staff and the need for people with conviction histories to find housing. One court turned down a tenant's claim that a landlord was obligated to reasonably screen potential tenants.[169] In rejecting this claim, the court raised concerns about a landlord being expected to predict possible future threats based upupon a criminal record. According to the court, this type of liability would:

> induce landlords to decline housing to those with a criminal record in the absence of evidence of an actual threat to cotenants or individual tenants. That would only export the 'problem' somewhere else. The resulting unstable living conditions or homelessness may increase the chances of recidivism to the detriment of public safety[170]

Similar to courts considering negligent renting liability, courts considering negligent hiring cases recognize the competing interests in employers protecting customers and employees and the need for ex-offenders to find jobs. One New York court noted that people with criminal records are "free to walk the streets, visit the playgrounds, and live and work in a society without being branded or segregated – the opportunity for gainful employment may spell the difference between recidivism and rehabilitation."[171] The Supreme Court of Michigan expressed its understanding of the difficulties people with criminal records face in finding employment: "We share … concern for those persons who, having been convicted of a crime, have served the sentence imposed and so are said to have paid their debt to society and yet find difficulty in obtaining employment."[172] One Florida court addressed the tort liability and criminal records issue head on:

> [T]o say an employer can never hire a person with a criminal record at the risk of being held liable for the employee's tortious

[166] *See* WASH. REV. CODE ANN. § 35.82.340 (West 2014).

[167] *See supra* Part II.

[168] *See* Oyama, *supra* note 146, at 187–88.

[169] *See* Davenport v. D.M. Rental Props., Inc., 718 S.E.2d 188, 191 (N.C. Ct. App. 2011) (citing *Anderson v. 124 Green St., LLC*, 2011 WL 341709, at *5, (Mass. Super. Jan. 18, 2011), *aff'd*, 974 N.E.2d 1167 (2012)).

[170] *Id*.

[171] *See* Haddock v. City of New York, 553 N.E.2d 987, 992 (N.Y. 1990).

[172] *See* Hersh v. Kentfield Builders, Inc., 189 N.W.2d 286, 289 (1971).

> assault, 'flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.'[173]

Establishing a tort law standard that eliminates negligent renting claims based upon a landlord's decision to accept an applicant for a criminal record effectuates the public policy goals of safety and rehabilitation. Such a standard would provide strong public policy support for a legal rule that such behavior is not foreseeable as a matter of law rather than leaving the question of foreseeability in these cases for the fact finder.[174]

CONCLUSION

An applicant's criminal record should be absent from the analysis of whether a future crime was foreseeable by a landlord because the mere presence of a record does not implicate foreseeability.[175] Washington courts should not send this question to the jury as the Georgia appeals court did. Rather, Washington courts should examine the relevant research set out above to find that there is no reasonably foreseeable likelihood that a rental applicant is a future threat based solely on a criminal record. A local or state legislature should also adopt this standard to ensure clarity regarding liability for landlords when making these rental decisions and to further the public policy goals outlined above. A reasonable standard would require landlords to meet their common law and statutory duties to maintain safe and habitable premises while removing barriers to housing for qualified applicants with criminal records.

The assumption that a criminal record is accurately predictive of a future problematic tenancy is not supported by current social science research. Tort law should not rely on assumptions about future threats based on a past criminal record when empirical evidence suggests that the risk is not inherent or predictable. Washington needs a rational uniform tort law standard that protects tenants and incorporates the public policy goals of public safety, rehabilitation and fair housing. The standard we suggest—that an applicant's future criminal behavior is not foreseeable solely based on a past criminal record as a matter of law—meets these criteria.

[173] *See* Garcia v. Duffy, 492 So.2d 435, 441 (Fla. Dist. Ct. App. 1986) (quoting Williams v. Feather Sound, Inc., 386 So.2d 1238, 1241 (Fla. Dist. Ct. App. 1980)).

[174] *See* Schooley v. Pinch's Deli Mkt., Inc., 951 P.2d 749, 754 (Wash. 1998) (noting that foreseeability is generally an issue of fact for the jury).

[175] There is no method that completely and accurately measures recidivism. *See* Robert Weisberg, *Meanings and Measurements of Recidivism*, 87 S. CAL. L. REV. 785 (2014). There are also methods of attempting to predict dangerousness, but there is no agreed-upon method or simple way to make this determination. *See supra* notes 107–113.