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Cover Page Footnote
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*Frederic White***

INTRODUCTION

Over the past fifty years, America has steadily deinstitutionalized[1] its mentally handicapped population, often with mixed re-

* William A. Henry III is credited with the first use of the term "outing" to connote exposing a person's sexual orientation against that person's wishes. William A. Henry III, *Forcing Gays Out of the Closet*, TIME, Jan. 29, 1990, at 67. Generally, I characterize the practice of outing as revealing any private fact without consent. Thus, in this article I use the term outing to describe the public revelation of one's mental handicap or disability without one's consent. For a fuller discussion of the concept, at least as it relates to sexual orientation, see Susan J. Becker, *The Immorality of Publicly Outing Private People*, 73 ORE. L. REV. 159 (1994).

"Madman" is obviously not a term of endearment. Insane persons, or those who have mental disabilities, have almost always been publicly described in a pejorative fashion. For example, "madman" has been defined as "a man who is or acts insane," WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 715 (1990), and as "one who is insane; a lunatic," VOL. IX, THE OXFORD ENGLISH DICTIONARY 176 (2d ed. 1989). A "madhouse" has been described as "a place of uproar and confusion," WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 715, and as "[a] house set apart for the reception and detention of the insane; a lunatic asylum," VOL. IX, THE OXFORD ENGLISH DICTIONARY 176 (2d ed. 1989). My purpose in using the term "madman" is to illustrate the general and continuing public perception that mentally challenged people are not "normal" and are, therefore, unworthy of trust. Although there has been a trend toward the use of the term "mentally challenged," I have chosen to use the term "mentally handicapped" because it reflects current use in the law and in related literature.

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1. John Maurice Grimes, a physician, was probably the first person to coin the phrase, "deinstitutionalization," in his work, INSTITUTIONAL CARE OF MENTAL PATIENTS IN THE UNITED STATES 113 (Arno 1980) (1934). Grimes' study came out of a panel he headed at the behest of the American Medical Association ("AMA") when it decided to develop an official policy concerning institutional care of the insane. ANN BRADEN JOHNSON, OUT OF BEDLAM 18-20 (1990). There are numerous works and reports that discuss the deinstitutionalization movement. They include: Richard Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. J.L. & SOC. PROBS. 193 (1980); Deborah A. Schmedemann, Note, *Zoning for*

sults.[2] The primary goal of this process was to place these long-forgotten people back into the so-called mainstream of American life,[3] allowing them access to the same kinds of advantages—schools, jobs, housing—that most of us take for granted. This road has not always been easy.[4] In particular, providing safe and accessible housing for the mentally handicapped is an important step toward establishing meaningful self-sufficiency for these individuals. However, to ensure that the needs of all tenants are fulfilled, several potential conflicts between the mentally handicapped tenant and other tenants must be resolved.

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the Mentally Ill, A Legislative Mandate, 16 HARV. J. ON LEGIS. 853 (1979); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization,* 28 HOUS. L. REV. 63 (1991). More than fifty years ago, attempts at deinstitutionalization were chronicled in works like A. DEUTSCH, THE MENTALLY ILL IN AMERICA (1949).

2. One author's take on the issue of deinstitutionalization:

> Another critical dimension was the functional responsibility that came with the deinstitutionalization movement. The need for food, housing, medical care, recreation, income, vocation, which had been provided for by the hospital, continued as needs in the community. For many of these patients, life outside of the institution was characterized by a state of prolonged or chronic dependency. Prolonged difficulties in functioning also meant repeated struggles in securing or holding onto the resources to meet basic needs. The community mental health centers, which were expected to develop the treatment follow-up and alternatives to hospitalization, were in no position to respond to the full range of basic needs of these seriously disturbed people. Hence, the multiple needs of this dependent, deinstitutionalized population fell to other institutions of the community and the community at large.

PHYLLIS L. SOLOMON, ET AL., COMMUNITY SERVICES TO DISCHARGED PSYCHIATRIC PATIENTS, 12 (1984); *see also* ANDREW T. SCULL, DECARCERATION, COMMUNITY TREATMENT AND THE DEVIANT: A RADICAL VIEW (1977) (arguing that deinstitutionalization reduced the level of services available to the mentally ill); SHELDON GELMAN, MEDICATING SCHIZOPHRENIA (1999) (arguing that the psychiatric profession has systematically understated the side effects and overstated the benefits of anti-schizophrenia medication).

3. RAEL JEAN ISAAC & VIRGINIA C. ARMAT, MADNESS IN THE STREETS 67-85 (1990).

4. Isaac and Armat have found that public mental hospitals are eager to discharge patients and often show little interest in where patients go.

> The New York State Office of Mental Health's own survey for 1979-80 found that 23% of mental patients were released to "unknown" living arrangements . . . . Merion Kane, an articulate Washington, D.C. resident, reports that her son was twice discharged from St. Elizabeth's Hospital with a trash bag containing his belongings, a token and the address of a shelter. It remains a common practice for hospitals to release patients directly to shelters.

Id. at 7-8. (citations omitted).

Picture this: Tenant, who is mentally handicapped within the meaning of the Fair Housing Amendments Act,[5] completes an application to live in a rental unit in an apartment owned by Landlord. Tenant reveals to Landlord, or Landlord is otherwise informed—perhaps by Tenant's social worker—that Tenant's handicap requires Tenant to take regular doses of medication to prevent violent outbursts. Or, alternatively, Landlord becomes aware that Tenant, although mentally handicapped, has no real potential for violence so long as Tenant attends regular counseling sessions. If, however, Tenant fails to take medication, or go to counseling, the likely result is that Tenant will engage in violent and potentially dangerous conduct.

At Tenant's request, Landlord does not disclose the nature of Tenant's handicap to other tenants. A few weeks after moving in, Tenant fails to take his medication, to go to regular counseling, or both, and without provocation, attacks another tenant, seriously injuring that tenant. Thereafter, the injured tenant sues Landlord for damages on the basis that Landlord's prior knowledge of Tenant's possible propensities toward violent behavior made Tenant's act foreseeable and thus Landlord had a duty to warn and protect the other tenants from Tenant's act. From the injured tenant's perspective, Landlord should be held liable for the new Tenant's actions and be required to compensate the injured tenant for any injuries incurred because of Tenant's acts.

A situation like this places Landlord in a quandary. Landlord's failure to inform the other tenants about Tenant's condition may render Landlord liable for the violent act perpetrated by the handicapped tenant if there had indeed been a breach of some duty to warn other tenants of potential violent activity. On the other hand, if Landlord had disclosed Tenant's condition to the other tenants, Landlord would have risked attempts by the other tenants to vacate their units or warn off other potential tenants from the premises, resulting in economic harm to Landlord's business. Disclosure of Tenant's "secret" also would have exposed Landlord to potential legal action from Tenant, who, as a handicapped person, could sue Landlord for discriminatory practices under the Fair Housing

5. The Fair Housing Amendments Act of 1988, Pub. L. No. 100-430 (1988) amended the Fair Housing Act of 1968, 42 U.S.C. 3601-3631 (1994), also known as Title VIII of the Civil Rights Act of 1968. Throughout this paper I will sometimes refer to this legislation as the FHAA or, simply, the Act. *See generally* Part II *infra.*

Amendments Act, or bring a cause of action based on a breach of Tenant's privacy rights.[6]

This article will explore the serious potential for a clash between two sets of values: (1) the stated values of the Act, that persons handicapped within its terms should not be denied access to decent housing on that account, and that mentally handicapped tenants, especially those who *may* have, but do not necessarily possess, a propensity for violence, have privacy rights; and (2) the landlord's responsibilities with respect to the safety needs of other tenants.

To answer these questions, I will address a number of policies, including those embodied in federal and state statutes relating to the rights of mentally handicapped persons. In particular, I will analyze policies underlying the Fair Housing Amendments Act that seek to enable mentally handicapped persons to select decent housing and require landlords to "reasonably accommodate"[7] their needs. I will explore analogous cases involving reasonable accommodation for handicapped persons under the Americans with Disabilities Act.[8] Furthermore, I will examine whether handicapped

6. This scenario is loosely based on the real life dilemma that confronted Roseann Beckert, a Cleveland, Ohio resident who applied to be put on the waiting list for rental housing at Our Lady of Angels Apartments ("OLA"), a non-profit corporation providing housing and related activities to the elderly and physically handicapped pursuant to § 202 of the National Housing Act of 1959. Although she did not initially disclose her handicap to OLA, when Ms. Beckert completed a preliminary application for residence status, she did indicate that her handicap was a "mental-schizo" condition for which she took two medications.

OLA denied Ms. Beckert's application because she was neither elderly nor physically handicapped and therefore ineligible for residence in the OLA facility. In reality, Ms. Beckert's lawyers took the position that her application was denied because of OLA's fear that Ms. Beckert, if she failed to medicate, might pose a danger to other OLA residents.

Beckert filed suit against OLA, alleging that she had been discriminated against in violation of the Fair Housing Amendment Act's prohibitions against handicapped discrimination. Beckert v. Our Lady of Angels Apartments, Inc., 192 F.3d 601, 603 (6th Cir. 1999). The U.S. District Court for the Northern District of Ohio granted OLA summary judgment. *Id.* On appeal, the Sixth Circuit Court of Appeals upheld the district court, declaring that § 202 of the National Housing Act of 1959 allowed residence sponsors to serve some, but not all, qualified groups of handicapped persons, and that the 1959 Act was neither superceded nor effectively repealed by the FHAA. *Id.* at 607. Notwithstanding the Beckert result, it still remains to be seen what will happen in a similar situation when the provisions of the FHAA and not the 1959 Act govern the housing provider.

7. The Fair Housing Act states that it is unlawful with respect to a handicapped person to refuse "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use or enjoy a dwelling . . . ." 42 U.S.C. § 3604(f)(3)(B).

8. 42 U.S.C. § 12112 (1994). While certain aspects of the issue I will discuss involve analogies to situations involving the physician's duty to warn as well as the

tenants have a right to privacy with respect to their handicap and whether that right is breached if the landlord informs other tenants of their condition.

In the context of this potential conflict, the traditional view of property law, which does not hold landlords liable for the criminal acts of third parties, must be re-examined in light of the introduction of a new population into housing that had up to now generally been denied them. Because the circumstances are particularly problematic in situations where the landlord's traditional lack of liability for the criminal acts of third parties conflicts with his actual knowledge of a tenant's propensity for violence when not medicated or counseled, I will examine cases involving the landlord's actual knowledge of criminal activity.

This article will conclude that a landlord's disclosure of a mentally handicapped tenant's disability, including a propensity toward violence under certain circumstances, to other tenants is unlawful because such disclosure violates the disabled person's right to evenhanded treatment under general property law principles, infringes upon the disabled person's privacy rights, and is an implicit violation of policies embodied in the Fair Housing Amendments Act.

I. THE LANDLORD'S LIABILITY FOR THE CRIMINAL ACTS OF THIRD PARTIES

A. Traditional Liability Rules

Pursuant to long-standing common law rules, landlords have no liability for tenant injuries caused by the violent or criminal acts of third parties.[9] Such thinking primarily has been grounded in the time-honored view of the relationship between the landlord and tenant, predicated on the lease. Traditionally, upon the execution of the lease, the landlord walked away, leaving the tenant to fend for himself. That is not the case in modern times.

Contemporary leases have evolved from what began essentially as a conveyance of real property, usually a farm, for a specified

current wave of sexual predator reporting laws, these subjects are beyond the scope of this article.

9. Marvin M. Moore, *The Landlord's Liability to His Tenants for Injuries Criminally Inflicted by Third Persons,* 17 AKRON L. REV. 395 (1984); Goldberg v. Hous. Auth., 186 A.2d 291 (1962) (holding that the housing authority had no duty to provide police protection at the housing project with upwards of 6000 residents and twelve buildings on nineteen acres, and thus was not liable for injuries suffered by the plaintiff who was beaten and robbed at 1:30 p.m. in a service elevator while delivering milk to a tenant).

period of time.[10] In this context, the landlord was not required to provide property in good repair or to maintain it, and the lessee could accept or reject the property in its then current condition.[11] In such circumstances, it was not considered to be particularly onerous for a tenant to take responsibility for his personal security or anything else involving the leased premises.[12] In effect, landlords and tenants were to be treated as strangers[13]—generally a relationship requiring no duty of protection.[14] This point of view held sway in this country well into the 1960s.

B. Evolution of the Landlord's Liability

Primarily spearheaded by an idealistic and strong-willed group of Legal Services attorneys, and promoted by some of its own innovative judges,[15] the District of Columbia Court of Appeals led the way toward a new conception of landlord-tenant relationships, at least with respect to residential leases. A trio of District of Colum-

10. JOHN E. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY, 195-198 (2d ed. 1975); CORNELEUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 71-76 (2d ed. 1987).

11. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 510-511 (1982).

12. Moore, *supra* note 9, at 395; Caroline Hudson, *Recent Development, Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity,* 33 VAND. L. REV. 1493, 1495-1496 (1980). The traditional view of the landlord-tenant relationship is illustrated by Mary Ann Glendon:

> In the classical scheme, the landlord's principal obligations related to possession and the tenant's to rent. Thus, the landlord was obliged to give the tenant at least good title and a clear right to possession at the commencement of the term. During the term, the tenant had the right to expect that his possession would not be materially disturbed by the landlord, anyone acting under the landlord's authority, or anyone with a title paramount to that of the landlord. This right, inherent in the tenant's estate, came to be expressed as the implied covenant for quiet enjoyment. The landlord had no obligation to deliver the premises in any particular physical condition or state of repair, and *a fortiori,* no duty to maintain or repair them during the term. The lessee was expected to examine the premises and decide for himself whether they were fit for his purposes. After the lease was entered, as after a sale, the risk of loss or deterioration belonged to the lessee. Thus, even if the premises were destroyed or rendered unfit for the tenant's purposes during the lease term, the tenant's obligations to pay rent in principle continued unaffected.

Glendon, *supra* note 11, at 510-511.

13. 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, 685 (1992).

14. *Id.*; *see also* W. PAGE KEETON, ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 375 (5th ed. 1984).

15. Glendon, *supra* note 11, at 521-522.

bia Court of Appeals cases, decided in the 1960s and 1970s, are credited with tipping the balance of power in the landlord-tenant relationship toward tenants.

First, in *Whetzel v. Jess Fisher Management Co.*,[16] the court afforded the tenant the opportunity to recover damages for injuries caused by a falling ceiling, primarily based on the landlord's violation of a housing code.[17] Later, in *Edwards v. Habib*,[18] an eviction action, the tenant successfully defended against the landlord's action for possession by effectively proving retaliatory eviction.[19]

Finally, with the development of the implied warranty of habitability in *Javins v. First National Realty Corp.*,[20] the landlord-tenant relationship gradually switched from complete landlord domination to a relationship with at least some semblance of parity. In *Javins,* the court did away with a trio of common law rules: (1) the landlord's lack of duties with respect to the physical condition of the premises; (2) the independence of the tenant's obligation to pay rent from the landlord's obligations with respect to the premises; and (3) the constructive eviction requirement of complete vacation of the premises.[21]

As a result of cases like these, landlord tort liability for tenant injuries was no longer unattainable. Now, "in almost every jurisdiction, courts impose on landlords a duty of care relating to the condition of leased residential premises. Moreover, the scope of this duty has been expanded from its initial focus on the physical condition of the premises to its current concern with overall residential safety."[22]

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16. 282 F.2d 943 (D.C. Cir. 1960).

17. *Id.*

18. 397 F.2d 687 (D.C. Cir. 1969).

19. *Id.* at 700. With respect to the retaliatory eviction issue, the court stated:

> The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, place to live. Effective implementation and enforcement of the codes obviously depend in part on private initiative in the reporting of violations. Though there is no official procedure for the filing of such complaints, the bureaucratic structure of the Department of Licenses and Inspections establishes such a procedure, and for fiscal year 1966 nearly a third of the cases handled by the Department arose from private complaints. To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington.

Id.

20. 428 F.2d 1071 (D.C. Cir. 1970). *Javins* is generally credited with the development of this doctrine.

21. Glendon, *supra* note 11, at 5.

22. Glesner, *supra* note 13, at 685.

Ramsay v. Morrissette[23] and *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[24] generally are credited with leading the way for the imposition of landlord liability for the criminal acts of third parties. *Ramsay* involved a suit brought by a tenant against her landlord after an intruder forced his way into her apartment and assaulted her.[25] The *Ramsay* court held that there were circumstances in which the landlord did have a duty to protect tenants or their property from the criminal acts of third parties.[26] Although thin on analysis,[27] the court's holding in *Ramsay* paved the way for *Kline*, which still is regarded as the primary case involving the imposition of landlord liability for the criminal acts of third parties.[28]

Kline began as an action against an apartment corporation for damages for injuries sustained after a tenant was criminally assaulted in the common hallway of an apartment house.[29] The *Kline* court recognized the general rule that a private person has no duty to protect another from the criminal acts of third parties.[30] Nevertheless, the *Kline* court imposed landlord liability for the criminal assault upon the tenant: the usual rules did not apply in situations involving contemporary urban apartment living.[31]

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23. 252 A.2d 509 (D.C. 1968).

24. 439 F.2d 477 (D.C. Cir. 1970).

25. *Ramsay*, 252 A.2d at 511.

26. *Id.* at 512-513. In reversing the landlord's trial motion for summary judgment, the *Ramsay* court cited *Kendall v. Gore Properties*, 236 F.2d 673 (1973). *Kendall* involved a mentally deranged person, the landlord's employee, who strangled to death the tenant of an apartment the employee was painting. *Id.* at 675. Landlord negligence was based on the landlord's failure to do a background check on the employee. *Id.* at 681-84.

27. Other than quoting *Kendall*, there is very little in the *Ramsay* case that sheds light on why the trial court's decision was reversed. Essentially, it appears that the appeals court was reluctant to rule on the merits because of defects in procedure. *Ramsay*, 252 A.2d at 511-12.

28. Glesner, *supra* note 13, at 689.

29. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 478-79 (D.C. Cir. 1970).

30. *Id.* at 481 (cataloguing reasons for the rule).

31. *Id.* at 487.

> [T]he rationale of this very broad general rule falters when it is applied to the conditions of modern day urban apartment living, particularly in the circumstances of this case. The rationale of the general rule exonerating a third party from any duty to protect another from a criminal attack has no applicability to the landlord-tenant relationship in multiple dwelling houses. The landlord is no insurer of his tenant's safety, but he certainly is no bystander. And where, as here, the 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

Most of the cases decided post-*Kline* concern landlords who had prior knowledge of similar conduct occurring on the premises.[32] Numerous courts have tended to invoke landlord liability when evidence of prior criminal activities on the leased premises has been demonstrated.

Prior knowledge necessarily implies some element of *foreseeability.* Thus, a landlord's ultimate responsibility for tenant injuries depends upon the landlord's prior knowledge of criminal activities and whether the landlord has sufficient knowledge to foresee such activities and take preventive action. In many cases, a landlord's liability relates to the landlord's ability to keep the *common physical premises* under the landlord's control by making them reasonably safe and keeping them in good repair.

Thus, in *Bryant v. Brannen*,[33] a case involving a tenant who sued his landlord after the tenant was shot by the landlord's building manager, the Michigan Court of Appeals ultimately reversed the trial court's determination of landlord liability on the basis that the incident essentially took place in the tenant's own apartment, not in a common area of the building, and that the manager was not acting within the scope of his employment.[34] The court emphasized that the landlord, like any other business owner, could not control the incidence of crime in the general community.[35] It is important to note that *Bryant* involved an isolated incident between a tenant and a building manager who knew each other.[36] Many courts have begun to take a different view when the facts indicate generalized criminal activity on or near the leased premises.[37]

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steps which are within his power to minimize the predictable risk to his tenants.

Id.

32. *E.g*, Smith v. Gen. Apartment Co., 213 S.E.2d 74, 75-77 (Ga. Ct. App. 1975) (reversing the trial court's summary judgment for a landlord in a tenant rape case, and citing *Ramsay* on the issue of the landlord's alleged prior knowledge of similar incidents).

33. 446 N.W.2d 847 (Mich. Ct. App. 1989).

34. *Id.* at 852-53. *Bryant* continued to indicate, however, that landlords remain liable to the extent foreseeable criminal acts are facilitated by their failure to keep the common areas reasonably safe or in good repair. *Id.* at 851.

35. *Id.* at 851.

36. *Id.* at 849.

37. *E.g.*, Tenney v. Atl. Assocs., 594 N.W.2d 11 (Iowa 1999) (finding that a landlord who had notice of a past burglary had a duty to take reasonable measures to protect tenants from foreseeable criminal conduct and was thus liable in damages for a resident's rape by an intruder).

Prior knowledge and foreseeability, however, do not always lead directly to liability. Some courts still hold that it is fundamentally unfair to impose a duty of protection on the landlord. For example, in *Bartley v. Sweetser,*[38] a tenant who had been raped asserted that the landlord breached a duty to provide reasonable security from foreseeable criminal acts of third parties.[39] The court held that absent a statute or lease agreement provision, the duty did not exist and that there were still sound reasons for not disturbing the long-standing common law rule. These rationales included:

a. Judicial reluctance to tamper with the common law concept of the landlord-tenant relationship;
b. The notion that the act of a third party in committing an intentional tort or crime is a superceding cause of harm to another;
c. The often difficult problem of determining the foreseeability of criminal acts;
d. The vagueness of the standard the landlord must meet;
e. The economic consequences of the imposition of the duty; and
f. The conflict with the public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector.[40]

Although Justice Newbern, concurring with the majority in *Bartley,* intimated that in a proper case the court would consider holding the landlord liable for a criminal act committed by a third party,[41] most modern cases involving attacks by third parties on tenants result in no liability for landlords. These decisions are based primarily on the lack of foreseeability, particularly in the absence of similar incidents on the premises, or the landlord's knowledge of them.[42]

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38. Bartley v. Sweetser, 890 S.W.2d 250 (Ark. 1994).

39. *Id.* at 250.

40. *Id.* at 251-252 (citing ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD TENANT § 4.14 (1980)); *see also Bryant,* 446 N.W.2d at 847. In *Bryant* the court remained convinced that a landlord should remain liable to tenants for injuries to the extent that foreseeable criminal acts of third parties are facilitated by the landlord's failure to keep the physical premises under the landlord's control reasonably safe and in good repair. *Id.* at 850-52. Nevertheless, the court found no liability against the landlord when the landlord's building manager shot the tenant on the premises. *Id.* at 855.

41. *Bartley,* 890 S.W.2d at 252.

42. *E.g.,* Sharon P. v. Arman, 91 Cal. Rptr. 2d 35 (Cal. 1999) (finding no landlord liability for an unforeseeable attack in a parking garage); Soto v. 2101 Realty Co., 699 N.Y.S.2d 107 (N.Y. App. Div. 1999) (finding landlord not liable for an assault in his building's lobby where he had insufficient notice of any prior criminal activity); Post

C. Landlord Liability for Knowledge of a Tenant's Mental Condition

It seems a fairly simple proposition to impose landlord liability for criminal tenant-on-tenant attacks when the landlord has previous knowledge, constructive or actual, of previous criminal *conduct.* It is a more difficult proposition in situations where the landlord knows of a tenant's *condition* but lacks notice of any previous aberrant conduct. *Samson v. Saginaw Professional Building, Inc.,*[43] a Michigan case, is illustrative of the problem.

Samson involved an attack in a commercial building by a mental patient undergoing psychiatric treatment at the state mental health clinic that leased spaced in the building.[44] The victim, an employee of another tenant in the building, was robbed and stabbed in a building elevator by the mental health clinic outpatient.[45] The victim and her husband sued the landlord; the jury verdict for the victim and her husband was eventually upheld by the Supreme Court of Michigan, primarily on the basis that the landlord had not acted reasonably in the circumstances.[46]

While he sympathized with the fate of the victim, Justice Levin wrote a vigorous dissent in *Samson,* focusing primarily on the rights of mentally handicapped persons.[47] Justice Levin pointed out that the vast majority of mental patients, once on "convalescent leave," are not considered dangerous.[48] He further took issue with the majority's approach to the mentally ill in general, stating:

Properties, Inc. v. Doe, 495 S.E.2d 573 (Ga. Ct. App. 1997) (finding landlord not negligent in the rape of a tenant inside her apartment). On the other hand, at least one landlord settled for $1.5 million after mediation in a case involving the beating, choking, and rape of a tenant. *Landlord Pays $1.5 Million to Settle Tenant's Rape Case,* LANDLORD LAW REP., May 2000, at 1.

43. 224 N.W.2d 843 (Mich. 1975).

44. *Id.* at 845.

45. *Id.*

46. *Id.* at 850.

> The fact that such an event might occur in the future was foreseeable to this defendant. It had even been brought to its attention by other tenants in the building. The magnitude of the risk, that of a criminally insane person running amok within an office building filled with tenants and invitees, was substantial to say the least. To hold that, possessed of these facts and no other, this defendant should have inquired further into the reasonableness of its inaction, i.e., the probability of such an event occurring in the future, and that its failure to make such an inquiry may be deemed negligence on its part, does not shock the conscience of this Court.

Id. at 849-850.

47. *Id.* at 851-56.

48. *Id.* at 853.

> This Court imposes on the owner of a building who rents space to a mental health clinic a duty to provide "some security measures."
>
> This suggests an archaic, unfounded fear of all persons who have been in mental institutions. Most persons afflicted with mental illness need not be confined indefinitely. With treatment, they can return to the community. Medical knowledge and human understanding have advanced beyond the time when the mentally ill were considered burdens to be cared for, but for whom cure was impossible. In requiring landlords to treat with suspicion persons who formerly suffered mental illness even after mental health officials have certified them ready to resume life in the community, this Court undermines this salutary and humanitarian advance and perpetuates the isolation of the mentally ill.
>
> While we may take judicial notice of isolated incidents of violence committed by persons released from mental hospitals, we also note that persons without such a history commit violent acts and that countless former mental patients have successfully reentered society.[49]

Justice Levin's dissent in *Samson* clearly indicates that he would have opposed a landlord's disclosure of a tenant's mental handicap to other tenants. For Justice Levin, the issue is not so much the invasion of privacy rights, but rather, a concern with basic fairness to a group of persons, members of which would have no greater propensity for violence than those of any other group.[50] If Justice Levin's position is reasonable, then a landlord who discloses a tenant's mental handicap to others is violating the disabled tenant's basic right to evenhanded treatment. When combined with possible privacy rights violations, an even stronger case is made for nondisclosure.[51]

Justice Levin's position was echoed twelve years later in *Gill v. New York City Housing Authority*.[52] In *Gill,* a tenant of a Housing Authority project was stabbed by a mentally unbalanced tenant.[53] The injured tenant sued the Housing Authority, primarily on the basis that the authority had failed to check into the assailant's mental condition prior to allowing him to become a tenant in the housing project.[54] In a holding that could be viewed as beneficial

49. *Id.*
50. *Id.* at 853-54.
51. For a discussion of privacy rights, see Part III *infra.*
52. 519 N.Y.S.2d 364 (1987).
53. *Id.* at 366.
54. *Id.*

to the rights of the mentally handicapped, but possibly detrimental to the rights of injured tenants, the court held: (1) the housing authority was under no duty to investigate the assailant's mental condition; (2) the authority had no duty to perform a detailed check into the assailant's mental condition, treatment, or medication; (3) the authority was not responsible for all acts of violence which occurred on the premises; and (4) the assailant's attack was unforeseeable.[55]

Most notable about *Gill* is Justice Murphy's discussion of mentally ill tenants and the landlord's duty to them as well as to other tenants. First, the justice noted that a person discharged from a psychiatric institution with appropriate after-care provisions is presumptively not a danger to himself or to others.[56] Second, Justice Murphy indicated that the type of background check urged by the plaintiff would have been "grossly violative" of the civil rights of the assailant and his family.[57] Last, and most important, Justice Murphy discussed the larger ramifications of affirming the trial court's decision in favor of the victim:

> The practical consequences of an affirmance in this case would be devastating. The Housing Authority would be forced to conduct legally offensive and completely unwarranted "follow-ups" of all of those tenants within its projects known to have a psychiatric condition possibly, but it must be noted, not foreseeably, injurious to another tenant. Once the "follow-up" had been conducted, the Housing Authority would then be obligated to look into its crystal ball to assess the likelihood of harm and then, where indicated, to take protective measures for which it has no expertise or authority. These would include dispensing medication, monitoring treatment, posting warnings (i.e., "Beware of your neighbor"), or evicting tenants. Given the options, eviction, which is described in the Housing Authority Management Manual as a "last resort," would become almost commonplace. Those with psychiatric disorders would be dispossessed from their low income accommodations to live in the streets. The equally unacceptable alternative would be for the Housing Authority to expose itself to staggering liability.[58]

55. *Id.* at 365; *see also* Wright v. New York City Housing Auth., 624 N.Y.S.2d 144 (1995) (holding that a landlord is under no duty to safeguard a tenant against an attack by another tenant).

56. *Gill*, 519 N.Y.S.2d at 369.

57. *Id.* at 368-69.

58. *Id.* at 372.

Although it is unlikely that the magnitude of the issues confronted by a public housing authority in a case like *Gill* would challenge most private residential landlords with respect to mentally handicapped tenants, the concerns voiced by Justice Murphy over the onerous task of monitoring one's mentally handicapped tenants is just as real.

II. Fair Housing and Reasonable Accommodations for Handicapped Persons

A. Deinstitutionalization of Mentally Handicapped Persons

Housing rights for mentally handicapped persons cannot readily be discussed outside the context of the shift in such persons' status from a class of largely institutionalized persons to a class of residence seekers. Today, the primary public policy approach toward the mentally handicapped involves a presumption in favor of deinstitutionalization. This change came about less easily and less rationally than might appear. According to one commentator:

> The idea that deinstitutionalization was a piece of deliberate social planning seems so rational and so obvious as to go without saying, to people both in and out of the mental health field. It's not true. Deinstitutionalization, which did not even have a name when it happened, was the product of only dimly related forces: the "can-do" postwar American mood, which was one of optimism, faith in the future, and enthusiasm for scientific breakthroughs; the latest in the long line of shocking exposés of heinous conditions in state mental hospitals, which appeared in the late 1940's and the early 1950's; the organized activity of the states, which had recognized that the costs to them of lifetime care for the chronically mentally ill were prohibitive; and the profession of psychiatry, which was caught up in a longstanding conflict about the chronic mental illnesses and how best to deal with them. What we now call deinstitutionalization did take place—but it was not planned; it simply happened.[59]

59. Johnson, *supra* note 1, at 24-25. Ms. Johnson's book chronicles the social-political history of deinstitutionalization. Essentially, she concludes that deinstitutionalization is a good idea that has been stymied by a bureaucracy that stresses programmatic needs to the detriment of the needs of *individual* patients. In one of her observations, she states:

> The point that deinstitutionalization makes so clearly but that is missed by so many is that it is possible to be seriously and chronically mentally ill outside a total institution and survive; it is even possible, under certain circumstances, to do very well indeed. But just as different patients adjust differently to life in a hospital, so they have been adjusting differently to life outside. Yet mental health professionals, instead of noting these differences

Mentally handicapped persons began to be released from traditional residential institutions in large numbers during the 1960s.[60] The basic rationale for this process took root at the Council of State Governments' conference on the chronically mentally ill held in Michigan in 1954,[61] and culminated in the Mental Health Study Act of 1955,[62] which itself established the Joint Commission on Mental Illness and Health.[63] The Joint Commission "recommended huge outlays of federal funds to abolish the state hospital system as then constituted in favor of community-based treatment facilities."[64]

Of course, the best-laid plans are often found wanting. Braden Johnson, the author of *Out of Bedlam*, chronicles her own experience in this regard:

> The drive to discharge chronic patients from the back wards was well known to practitioners all during the 1970s, whether documented or not. Inpatient social workers in many state facilities were given quotas of discharges to plan. At the state hospital where I worked for most of the 1970s, it was an article of faith among outpatient and day hospital workers that our own inpatient unit would only keep patients a maximum of twenty-one days, no matter what. After one colleague left our hospital to become a team leader of an inpatient unit at another state facility, he told me that he quickly learned that when all else failed, staff were expected to discharge patients to an address that turned out to be a vacant lot in a remote part of the city.

> and taking them into account for future planning, shift anxiously and look for someone or something to blame for what might look like a mistake. Stupidly, we allowed ourselves to think we had done the work by emptying out the back wards and dreaming up new entitlements like SSI, forgetting for a moment that the same mentally ill people who went into those back wards were the ones who were going to come out, complete with the hallmark symptoms of the condition itself *plus* the regrettable mannerisms and behaviors of the caged animal.

Id. at 256.

60. *Id.* at 24-28; *see also* Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 926-927 (1994) (discussing the affect of the FHAA on discrimination in housing for people with disabilities and concluding that states must amend state fair housing laws to conform with the FHAA to better integrate the mentally ill into communities); Peter W. Salsich Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 416 (1986) (discussing the place of zoning laws in the discussion of the location of housing for deinstitutionalized mental patients).

61. JOHNSON, *supra* note 1, at 25-28.

62. 42 U.S.C. § 242b (1994).

63. JOHNSON, *supra* note 1, at 31.

64. *Id.*

> One of the greatest advantages of this procedure was that the vacant lot was part of another state facility's "catchment area," or area of accountability, so that discharged patients could be expected to wind up on someone else's back ward when, inevitably, they needed to be rehospitalized.[65]

Nevertheless, many mentally handicapped persons were fortunate enough to escape the bounds of the state mental hospital. They, along with their allies, sought many of the characteristics of normal life—including the goal of decent, unsupervised housing.

B. Fair Housing Legislation

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act[66] ("1968 Act"), was established in the aftermath of the assassination of Dr. Martin Luther King Jr., and the general urban unrest of the 1960s.[67] The 1968 Act targeted discrimination in the sale or rental of private housing, primarily outlawing discrimination on the basis of race, color, national origin, or religion.[68] The act was amended in 1974 to bar housing discrimination on the basis of sex.[69] Concern over the ineffective administrative mechanism for resolving statutory claims provided for in the 1968 Act led to pressure to amend it.[70] Thus, the Fair Housing Amendments Act ("FHAA")[71] was enacted to provide for so-called full judicatory resolution of housing discrimination complaints at the agency level.[72]

The Fair Housing Act also was amended in 1988 to add two new "protected classes" to those persons who would be afforded protection against illegal discrimination in housing under federal law.[73] Congressional debate reveals that the goals of the amendment were to provide a response to continued housing discrimination against disabled people, and to remedy a perceived lack of effective enforcement mechanisms of the original act.[74]

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65. *Id.* at 75.
66. 42 U.S.C. § 3604 (1994).
67. 134 CONG. REC. 19,888 (1988).
68. 42 U.S.C. § 3604(c).
69. Pub. L. No. 93-383, § 808(b)(1), 88 Stat. 729 (1974).
70. 134 CONG. REC. 19,888.
71. 42 U.S.C. §§ 3601-3631 (1994).
72. 134 CONG. REC. 19,892.
73. Pub. L. No. 100-430, §§ 6(a)-(b)(2), e, 15, 102 Stat. 1620, 1622, 1623, 1636 (1988). The two new protected classes were handicapped and familial status.
74. 134 CONG. REC. 19,889-97.

C. Fair Housing and Reasonable Accommodation

The FHAA protects handicapped persons from housing discrimination.[75] The Act defines as handicapped any person who has "a physical or mental impairment that substantially limits one or more of such person's major life activities," has "a record of having such impairment," or is "regarded as having such an impairment."[76] Under the FHAA, landlords have an "affirmative duty to reasonably accommodate a person's handicap unless the landlord can show that the accommodation would impose an undue hardship."[77]

Most reasonable accommodation cases brought under the FHAA do not involve mentally handicapped persons, but rather focus on issues involving *physical* disabilities. Most of these cases have concerned themselves with such matters as fees for health care aides, parking spaces, pets, and wheelchair or scooter ramps. There are at least four cases, however, that illustrate how the courts have wrestled with issues involving the mentally handicapped tenant.

Roe v. Sugar River Mills Associates[78] involved a suit against a federally subsidized housing complex by a tenant who alleged handicap discrimination in violation of the FHAA. Several tenants had complained to the management that a tenant, James Roe, had either threatened them with physical violence or used obscene, offensive, or threatening language.[79] As a result of his behavior, Mr. Roe was convicted of disorderly conduct.[80] When the landlords threatened to evict him, Mr. Roe countered in federal court with the argument that he was mentally handicapped within the meaning of the FHAA, and that the landlords had failed to make "reasonable accommodations" necessary to afford him an equal

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75. Under the Act, it is unlawful:

> (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . . . (2) [and t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap.

42 U.S.C. § 3604(f).

76. 42 U.S.C. § 3602(h) (1994); *see also* 24 C.F.R. Sec. 100.201(a)(2) (1999) (discussing what is discriminatory conduct under the Act).

77. Nicollet Towers, Inc. v. Georgiff, 1995 WL 46252 (Minn. Ct. App., Feb. 7, 1995); United States v. California Mobile Home Park Mgmt. Co., 29 F.3d. 1413, 1416-17 (9th Cir. 1994).

78. 820 F. Supp. 636 (D. N.H. 1993).

79. *Id.* at 637-38.

80. *Id.* at 638.

opportunity to use and enjoy his apartment.[81] The defendant landlords moved for summary judgment on two grounds: (1) that Mr. Roe was not "handicapped"; and (2) that even if handicapped, he represented a "direct threat to health and safety of other individuals" living in the complex.[82]

In denying the motion for summary judgment, the court examined the language and legislative history of the Fair Housing Amendments Act:

> It is somewhat unclear precisely how the language of 3604(f)(9) of the Act applies here. Defendants argue that if plaintiff is, as they say, a threat to the safety of others, then the provisions of the Act simply do not apply. Therefore, they need not make any effort to "accommodate" plaintiff's handicap in an effort to minimize the threat he poses nor need they continue to offer housing to him, without regard to any causal relationship between his handicap and the threat he poses. Plaintiff interprets the Act's exemption somewhat differently. Plaintiff argues that only if he constitutes a threat to the safety of others after defendants have made reasonable efforts to accommodate his handicap may defendants refuse to offer him continued housing.
>
> The Court is persuaded that plaintiff's position is both better reasoned and more consistent with the express provisions and goals of the Act.[83]

Although summary judgment was denied in *Sugar River Mills Associates,* the court made it clear that the landlords still had the right to dispute the tenant's alleged handicap.[84] If the tenant was found to be handicapped under the statute, the landlords had to demonstrate that no reasonable accommodation would eliminate or acceptably minimize the risk he posed to other residents of the apartment complex before they could evict the tenant.[85]

Another case, *Roe v. Housing Authority of the City of Boulder*,[86] involved behavior similar to that demonstrated in the *Sugar River Mills Associates* case. After being served with a "30 Day Notice of Intent to Terminate Tenancy," Mr. Roe filed a lawsuit claiming vio-

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81. *Id.*

82. *Id.*; 42 U.S.C.§ 3604(f)(9) (1994).

83. *Sugar River Mills Assocs.*, 820 F. Supp. at 639.

84. *Id.* at 640.

85. *E.g, id.;* Stout v. Kokomo Manor Apartments, 677 N.E. 2d 1060 (Ind. Ct. App. 1997) (holding that the Fair Housing Act does not require a landlord to rent to a tenant whose behavior is a direct threat to the health or safety of others, characterizing a thirteen-year-old boy's act of child molestation against another apartment resident as such a threat, and thus rejecting his claim of disability as a delinquent child).

86. 909 F. Supp. 814 (D. Colo. 1995).

lations of the FHAA.[87] In denying the landlords' summary judgment motion, District Judge Babcock relied heavily on *Sugar River Mills Associates*, explaining that "assuming Roe is handicapped or disabled, before he may lawfully be evicted BHA [the landlord] must demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize any risk Roe poses to other residents at Northport."[88]

Although both *Sugar River Mills Associates* and *Boulder* strongly indicate that landlords cannot summarily evict handicapped tenants without attempting reasonable accommodation, they suggest that when a mental handicap cannot be reasonably accommodated, the courts are more likely to allow the tenancy to be terminated by the landlord.

In *Housing Authority of Lake Charles v. Pappion*,[89] the appellate court denied the tenant's appeal of a decision allowing eviction. Even though the tenant argued that the incidents complained of—loud noises, threats against other residents, and other bizarre behavior[90]—only occurred when he failed to take his medication, the court determined that "there is no guarantee that defendant will take his medication regularly in the future."[91] Ultimately, the court concluded:

> [W]e find that defendant's handicap could reasonably be viewed as posing a substantial risk that defendant will be unable to meet the reasonable standards of conduct required of tenants of Chateau du Lac by plaintiff, such that plaintiff is not obligated to alter, dilute, or bend those standards in order to allow defendant continued tenancy at Chateau du Lac, and that plaintiff was within its rights in terminating defendant's lease. The trial court did not err in ordering that the lease be terminated and that defendant vacate the premises.[92]

The *Pappion* court did not doubt the authenticity of the handicap: paranoid schizophrenia.[93] It decided against the tenant because it did not believe that the tenant could control the handicap and that the tenant's engagement in violent acts demonstrated his

87. *Id.* at 817. Mr. Roe also charged the landlord with violations of the Americans with Disabilities Act as well as the Rehabilitation Act of 1973. *Id.* at 817.

88. *Id.* at 822-823.

89. 540 So. 2d 567 (La. Ct. App. 1989).

90. At least one resident indicated that Mr. Pappion occasionally "howled like a wolf." *Id.* at 569.

91. *Id.* at 570.

92. *Id.*

93. *Id.* at 568-69.

lack of control.[94] In contrast, a mentally handicapped tenant who conveys that he has a general *potential* for violence is not on the same footing as the *Pappion* plaintiff.

III. THE HANDICAPPED TENANT'S RIGHT TO PRIVACY

A. Foundation of the Right to Privacy

Heralded as "the most famous of all law review articles"[95] by United States Supreme Court Justice Marshall, Samuel D. Warren and Louis D. Brandeis' law review article entitled *The Right to Privacy*[96] is generally credited as the forerunner of the constitutional right to privacy that was ultimately recognized by the Supreme Court in *Griswold v. Connecticut*.[97] The Warren-Brandeis article was mainly concerned with the so-called excesses of the Boston press.[98] Their criticisms notwithstanding, Warren and Brandeis eventually concluded that the law should not go so far as to prohibit what they termed "obnoxious publications."[99] Further, they realized that complete censorship of the press was neither possible nor wise.[100] Nevertheless, the article ultimately urged that certain

94. *Id.* at 570.

95. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 80 (1971) (Marshall, J., dissenting). Prosser wrote that the article was "the outstanding example of the influence of legal periodicals upon the American law." William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

96. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis, then two Harvard Law School professors, essentially derived the right to privacy from "the right to one's person . . . to be let alone," a phrase originally coined by Judge Thomas M. Cooley. THOMAS M. COOLEY, COOLEY ON TORTS 29 (Fred B. Rothman & Co. 1993) (1880). At least one scholar argues that the Brandeis-Warren article evolved not so much because of high-minded ideals, but rather because of Samuel Warren's displeasure with Boston press coverage, particularly that by the *Saturday Evening Gazette*, of his family's activities. LEWIS J. PAPER, BRANDEIS 33-36 (1983).

97. 381 U.S. 479 (1965) (holding that a Connecticut statute forbidding the dissemination of information about contraceptives violated the marital right to privacy).

98. PAPER, *supra* note 96, at 33-36. In their article, Warren and Brandeis wrote that:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren & Brandeis, *supra* note 96, at 196.

99. *Id.* at 215.

100. *Id.* at 214-219.

invasions of privacy rights should be protected, by allowing civil actions for damages or by injunctive relief.[101]

The so-called right to privacy did not immediately take hold. Brandeis, however, never lost sight of the concept and returned to it in 1928 in his dissenting opinion in *Olmstead v. United States.*[102] In *Olmstead,* Brandeis characterized the right of the individual to be let alone as "the most comprehensive of rights and the right most valued by civilized men."[103] Unfortunately, much of Brandeis' language in *Olmstead* was cast in the same vein as his 1890 article. It discussed a right to privacy but only in the most general terms.[104] Ultimately, perhaps fueled by the Brandeis dissent in *Olmstead*, the courts came to recognize the rights of individuals to sue and recover for damages where their privacy interests were invaded by: (1) intrusion into one's seclusion, solitude, or private affairs; (2) public disclosure of embarrassing private facts; (3) publicity placing one in a false light in the public eye; or (4) appropriation of one's name or likeness.[105]

Eleven years after *Griswold*, the Supreme Court developed a more precise definition of the right to privacy in the case of *Whalen v. Roe*,[106] which delineated two distinct privacy interests. First, the Court recognized that an individual has an interest in avoiding the public disclosure of personal information, or *confidentiality.*[107] Second, the Court recognized that an individual has an interest in independently making certain important decisions that will significantly affect his or her life, or *autonomy.*[108] In the framework of this article, the interest in confidentiality is the more important of the two for the mentally handicapped tenant.

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101. *Id.* at 219. At least one Brandeis biographer, Lewis J. Paper, noted that the article's factual and substantive bases might have had some weaknesses: "The article had certain shortcomings. Although they vehemently protested the excesses of a scandalous press, Sam and Louis offered virtually no evidence to support their claim; and later scholars found in fact that the press of that day, and particularly the Boston press, was quite respectable." PAPER, *supra* note 96, at 34. Notwithstanding that comment, Paper acknowledged that "[n]one of these defects seemed to matter much to readers. The reaction to the article was nothing short of incredible. Lawyers read it, magazines reviewed it, and courts relied on it—all to the seeming end of creating a new right to privacy." *Id.*

102. 277 U.S. 438 (1928) (holding that the Fourth Amendment does not prohibit wiretaps).

103. *Olmstead*, 277 U.S. at 478.

104. *Supra* notes 96 and 101 and accompanying text.

105. Prosser, *supra* note 95, at 389.

106. 429 U.S. 589 (1977).

107. *Id.* at 599-600.

108. *Id.*

Safeguarding the concept of privacy continues to confound us. Recent articles on privacy issues have concerned themselves with such varied issues as health information,[109] property,[110] marriage,[111] and the Internet.[112] Further, controversies over the right to privacy are not limited to handicapped persons.[113] Nevertheless, for the handicapped tenant with fewer resources to begin with, issues of personal privacy are particularly striking.

B. Privacy and Mentally Handicapped Tenants

In the context of landlord-tenant relationships involving the mentally handicapped person, the primary issue involving privacy rights is not the constitutional right to privacy recognized in *Griswold,* but rather the individual rights at risk when private facts are publicly disclosed—in this case, when a landlord dispenses information concerning the *possibility* of a fellow tenant's violent behavior to other tenants. Prosser characterizes the interest harmed by this so-called public disclosure of private facts as reputation—in essence, an extension of defamation.[114]

Most cases concerning public disclosure of public facts relate to media exposure.[115] According to Prosser, to be actionable, the dis-

109. Catherine Louisa Glenn, Note, *Protecting Health Information Privacy: The Case for Self-Regulation of Electronically Held Medical Records*, 53 VAND. L. REV. 1605 (2000) (arguing that we should consider a system of self regulation of the privacy of medical records because "a functioning marketplace and the threat of restrictive governmental intervention could spur the creation of satisfactory modes of protecting medical records privacy").

110. Redhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359 (2000) (exploring the connections between privacy and property in the context of the human body).

111. Andrew B. Schroeder, Note, *Keeping People Out of the Bedroom: Justice John Marshall Harlan,* Poe v. Ullman*, and the Limits of Conservative Privacy*, 88 VA. L. REV. 1045 (2000) (arguing that privacy as a constitutional doctrine was based on a conservative tradition on the Supreme Court).

112. Dorothy Glancy, *At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 357 (2000) (stating that in the future, "there will be privacy laws intersecting with the Internet in more ways that even sophisticated Internet users may imagine").

113. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implication of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000); Maureen Maginnis, *The Privacy of Personal Information: The DPPA and the Right to Privacy*, 51 S.C. L. REV. 807 (2000).

114. Prosser, *supra* note 95, at 398.

115. Melvin v. Reid, 112 Cal. App. 285 (1931) (finding that a movie depicting a reformed prostitute's life and using her name violated her right of privacy); Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N.D. Cal. 1939) (finding a violation of the privacy rights of a plaintiff who claimed mental anguish after a radio program dramatized a robbery in which the plaintiff was a victim); Trammell v. Citizens News Co.,

closure of private facts must meet certain criteria, some apparently difficult to quantify. Such disclosure must be "public," not private.[116] Furthermore, the facts disclosed must be private facts, not public facts,[117] and they must be "offensive and objectionable to a reasonable man of ordinary sensibilities."[118] *The Restatement (Second) of Torts*, in addition to Prosser's three requirements, argues that the public must not have a legitimate interest in having the information disclosed.[119] Finally, one commentator, Alfred Hill, suggests that the controlling basis for disclosure is the "shocking character" of the disclosure.[120] Apparently, Prosser, the *Restatement*, and Hill all agree that the public disclosures must be those that would be "offensive and objectionable to a reasonable man of ordinary sensibilities."[121]

Prosser requires some form of "publicity" before the public disclosure of private facts becomes actionable. The question here is whether a landlord, communicating information verbally to other tenants about a handicapped tenant, is engaging in "publicity." Most of the cases involving publicity revolve around newspapers and magazines,[122] public notices,[123] or public places.[124] A landlord's informing other tenants about one tenant's mental handicap would probably not fit into these categories. Furthermore, in *Gregory v. Bryan-Hunt Co.*,[125] the court indicated that communicating private information to a small group is not actionable.[126]

148 S.W.2d 708 (Ky. 1941) (finding an invasion of privacy where a newspaper published notice of plaintiff's debts).

116. Prosser, *supra* note 95, at 393.

117. *Id.* at 394.

118. *Id.* at 396 (citations omitted).

119. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977); *see also* Virgil v. Time, Inc., 527 F.2d 1122, 1126 (9th Cir. 1975) (finding that plaintiff's expertise in body surfing was a matter of legitimate public interest).

120. Alfred Hill, *Defamation and Privacy Under the First Amendment,* 76 COLUM. L. REV. 1205, 1258-62 (1976).

121. Prosser, *supra* note 95, at 396; *see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 119, at § 652D cmt. d.

122. *E.g.* Sidis v. F-R. Publ'g Corp., 113 F.2d 806 (2d Cir. 1940), *aff'g* 34 F. Supp. 19 (S.D.N.Y. 1938) (finding that a magazine did not violate plaintiff's right to privacy by printing a short biography and cartoon of him).

123. *E.g.*, Brents v. Morgan, 299 S.W. 967 (Ky. Ct. App. 1927) (holding that a public notice would violate plaintiff's right of privacy if defendant posted the notice "for the purpose of exposing the plaintiff to public contempt, ridicule, aversion, or disgrace" and the plaintiff suffered from "mental pain, humiliation, or mortification").

124. *E.g.* Bennett v. Norban, 151 A.2d 476 (Pa. 1959) (finding a cause of action for slander where a storeowner publicly embarrassed a woman outside his store on an unfounded suspicion of shoplifting).

125. 174 S.W.2d 510 (Ky. Ct. App. 1943).

126. *Id.* at 513.

The *Gregory* case involved a lawsuit over the oral accusation of theft.[127] The *Gregory* court recognized a right to privacy, but held that such a right would not be recognized in a case where "other known and established remedies are available."[128] *Bowden v. Spiegel, Inc.*, a case that is more analogous to a handicapped tenant's situation, involved a suit over the communication of false information about an alleged unpaid bill within earshot of the plaintiff's neighbors.[129] The plaintiff sued in tort, alleging that the words spoken had caused physical harm.[130] The plaintiff also sued for invasion of privacy.[131] The appellate court overruled the trial court's decision to grant a demurrer to the defendant, holding that the defendant was liable in tort for "mere spoken words" if those words had the effect of inducing physical harm.[132] Because it found independent grounds for relief, the *Bowden* court did not decide the plaintiff's privacy claim.[133] Nevertheless, in dicta the court strongly indicated, the Brandeis privacy article notwithstanding, that spoken words, even without "special damages" could form the basis for an actionable right to privacy claim.[134] Prosser's position, that there is "little doubt that a writing is not required,"[135] squares well with the *Bowden* dicta.

There are no cases involving a landlord's liability for providing information about one tenant to other tenants. In addition, the *Bowden* facts are not directly analogous to the situation where a landlord provides information about his tenant's mental handicap to other tenants without the handicapped tenant's consent. Nevertheless, *Bowden*'s dicta suggests that a case can be made that such action is an invasion of privacy. Furthermore, even if to prevail there must be some breach of a contract, a trust, or a confidential relationship,[136] a tenant providing a landlord with private information about his handicap and requesting silence about the matter

127. *Id.* at 511.
128. *Id.* at 512.
129. 216 P. 2d 571 (Cal. Dist. Ct. App. 1950).
130. *Id.* at 572.
131. *Id.* at 573.
132. *Id.*
133. *Id.*
134. *Id.*; Warren & Brandeis, *supra* note 96, at 217.
135. Prosser, *supra* note 95, at 394.
136. Prosser, *supra* note 95, at 393-94; Berry v. Moench, 331 P.2d 814, 816-17 (Utah 1958) (recognizing that while, ordinarily, truth is a defense to an action for libel or slander, the confidential relationship existing between a doctor and patient makes it obligatory for the doctor not to reveal information obtained in confidence in connection with the diagnosis or treatment of the patient).

would be involved in a "confidential relationship" with the landlord.

The public versus private facts concern of Warren and Brandeis would be of scant utility in the context of mentally handicapped tenants. Other than, perhaps, the unlikely circumstance that a mentally handicapped tenant's propensity toward violence had been acted out in a public place, and, thus, was subject to general public knowledge, there would be little question that such information would be considered "private facts." Nor would these matters, medical in nature, generally be considered concerns worthy of public record.

In addition, according to Prosser, the matter disclosed must be offensive and objectionable to a reasonable person of ordinary sensibilities.[137] While it is doubtful that there is much, if any, empirical research on this matter, it is likely that having one's mental deficiencies revealed to third parties without one's consent, and, indeed, in direct violation of one's requests to the contrary, would be considered offensive.

In essence, whether one agrees with the Prosser three-point requirement for actionable public disclosures of private facts, the *Restatement's* additional requirement, or Alfred Hill's baseline requisite that the information be "shocking," it appears that if a landlord provides information of this nature to other tenants, his action is arguably public disclosure of private facts. This is so unless the landlord's duty to warn and the public's (the other tenants') right to be secure in their homes outweighs this right. Since we already know that landlords have no general duty to warn or protect their tenants,[138] it is unlikely that a tenant's handicapped status should form the basis for requiring a duty.

C. Privacy and the Americans with Disabilities Act

The issue of the handicapped tenant's privacy rights can be analyzed by examining how federal law operates in other areas that raise privacy concerns. The regulation of potential or actual violent behavior in the workplace is a useful starting point.

Perhaps nowhere have issues surrounding human behavior, particularly inappropriate or violent behavior, become more important than in the workplace. A 1992 study by the Centers for Disease Control revealed that murder is the third largest cause of

137. *Id.* at 396.
138. *Supra* Part I.

on-the-job death, and the largest cause of on-the-job death for women.[139]

> Approximately 750 people were murdered at work in 1992, and experts estimate that more than 110,000 acts of workplace violence occur annually. With more and more violent episodes occurring in the workplace, employers are becoming increasingly concerned about the legal issues involved in the employment of mentally or emotionally unstable employees.[140]

There is no reason to think these data are any less true today. How has the American workplace dealt with the issue of workplace violence, especially as it relates to potentially violent, mentally handicapped persons? Does the employer have a duty to warn the worker, or are the rights of the individual employee, including privacy rights, to be held paramount? An analysis of cases involving workplace violence decided under the Americans with Disabilities Act ("ADA")[141] may prove instructive.

It has been written that "[t]he social stigma accompanying a disability often exceeds the physical or mental limitations actually imposed by the handicap."[142] In an attempt to address this problem, Congress enacted the ADA in 1990.[143] Similar in its approach to the FHAA, Title I of the ADA prohibits employers from discriminating against individuals on the basis of disability.[144]

Under the ADA the scope of information that employers may seek and disclose about their employees' medical condition is limited.[145] In addition, under the ADA employers can require a medical examination of a prospective employee only after an offer of employment has been made.[146] However, the ADA permits employers to condition a final offer of employment upon the results of the medical examination, with the condition that any information

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139. Janet E. Goldberg, *Employees with Mental and Emotional Problems—Workplace Security and Implications of State Discrimination Law, The American with Disabilities Act, The Rehabilitation Act, Workers' Compensation, and Related Issues,* 24 STETSON L. REV. 201, 201 (1994) (citations omitted).

140. *Id.*

141. 42 U.S.C. § 12112 (1994).

142. Jessica Zeldin, Note, *Disabling Employers: Problems with the ADA's Confidentiality Requirement in Unionized Workplaces*, 73 WASH. U. L. Q. 737 (1995) [hereinafter *Disabling Employers*].

143. 42 U.S.C. §§ 12101-12213 (1994).

144. 42 U.S.C. § 12112(a).

145. 42 U.S.C. § 12112(d); *see also* Cossette v. Minn. Power & Light, 188 F.3d 964, 969 (8th Cir. 1999) (holding that where some cognizable injury of fact occurs, the ADA protects an employee from an employer's unauthorized disclosure of medical information, regardless of whether or not the employee is disabled).

146. 42 U.S.C. § 12112(d)(3).

obtained as a result of the examination be "treated as a confidential medical record."[147] It appears that if the "confidential medical record" indicates that the employee has a propensity to violence, the employer is required to keep this information confidential.

Federal housing discrimination law parallels federal employment discrimination law. In both cases, landlords and employers alike must exercise caution when they make decisions regarding the mentally handicapped. Thus, just as does the FHAA,[148] both the ADA and the 1973 Vocational Rehabilitation Act ("Rehabilitation Act")[149] prohibit employers from discriminating against "qualified" employees or job applicants on the basis of "disability." While employers have employed a number of strategies for dealing with the so-called violent applicant or employee,[150] it is difficult to eliminate the applicant or employee who seems to indicate a general *potential* for violence. It seems that something has to *happen* before that person can be terminated or controlled.

If a person presents a significant danger to himself or to others, an employer can refuse to hire that person, or, if that person is an employee, an employer can take adverse employment action against the person who displays dangerous propensities.[151] Nevertheless, such a person must pose a "significant risk of substantial harm."[152] According to the Equal Employment Opportunity Commission ("EEOC"), before an employer can "disqualify" a person from being treated as disabled, not only must a significant risk of substantial harm be shown, but also the employer must identify the specific risk of harm; demonstrate that it is current, not speculative

147. *Id.* This subsection also carves out three exceptions under which employers do not have to maintain the confidentiality of the employees' medical information. 42 U.S.C. § 12112(d)(3)(B). One exception allows first aid and safety personnel to be told if the disability might require emergency treatment. 42 U.S.C. § 12112(d)(3)(B)(ii). In the context of the FHAA, it is an open question whether, for example, a resident manager might have to be told about a mentally handicapped tenant's potential for violence or need for medication.

148. 24 C.F.R. § 100.202(c) (1999) makes it generally unlawful to inquire whether an applicant for housing has a handicap.

149. Vocational Rehabilitation Act, 29 U.S.C. § 794 (1994).

150. Some strategies include: using psychological tests and criminal background investigations; developing policies and procedures that establish "early warning systems" and appropriate responses to threats and acts of violence; adopting programs and systems which better address some of the conditions cited as likely to lead to an increased risk of workplace violence; and invoking legal procedure, e.g., anti-stalking laws. Goldberg, *supra* note 139, at 202.

151. 42 U.S.C. § 12113(b); *see also* 29 C.F.R. § 1630.15(b)(2) (1999) (containing the Equal Employment Opportunity Commission's interpretation that this provision includes persons who are a direct threat to their own safety).

152. Goldberg, *supra* note 139, at 208.

or remote; assess the risk on the basis of objective medical or other factual evidence regarding the individual; and consider whether the risk the individual poses can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.[153]

Thus, the cases that allow an employee to become "disqualified" invariably revolve around real, direct, and specific behavior that is deemed inappropriate. Three cases are illustrative.

In *Payton v. Runyon*,[154] the United States Postal Service's motion for summary judgment was granted against a former employee who brought an action against the Postal Service charging that his termination violated the Rehabilitation Act and the First Amendment. According to the court, the former employee's documented death threats against his supervisor were a sufficient nondiscriminatory reason for allowing his termination to stand.[155] The existence of his alleged multiple disabilities, including mental illness, was not enough to keep him from being disqualified from holding the status of a mentally disabled person under the Rehabilitation Act.[156]

The ADA was used as the basis for attempt by an employee of the New York City Housing Authority to obtain a preliminary injunction against being placed on administrative leave by his employer because of his unfitness for work. In denying the motion, the court held, in *Jones v. New York City Housing Authority*,[157] that the plaintiff could not establish a prima facie case of discrimination under the ADA.[158] In addition, the court held that the plaintiff "had acted in a threatening manner, was insubordinate, and presented a 'direct threat to the health or safety of other individuals.'"[159]

Similarly, in *Wilson v. Phillips Petroleum Co.*,[160] the plaintiff's post-termination claim brought under the ADA failed and the defendant's motion for summary judgment was granted. The plaintiff, whose job was "safety sensitive," had been diagnosed with bipolar disorder for which she had been hospitalized on at least seven occasions. During several manic periods at work, she informed her supervisor that God had told her of a bomb placed in

153. Goldberg, *supra* note 139, at 208.
154. 990 F. Supp. 622 (S.D. Ind. 1997).
155. *Id.* at 629.
156. *Id.* at 628-29.
157. 104 F. 3d 350, No. 96-72031996, 1996 WL 537915 (2d Cir. Sept. 24, 1996).
158. *Id.* at *4.
159. *Id.*
160. No. 2:97-CV-439-J, 1998 WL 874835 (N.D. Tex. Dec. 8, 1998).

the oil refinery, and that voices were telling her that she must find this bomb.[161] The court denied the plaintiff's request for reasonable accommodations.[162]

Payton, Wilson, Jones, and similar cases[163] are all concerned with real life incidents, not speculation about what an employee *might* do. Nothing in those cases indicated that employers had any duty to warn other employees of the potential for violence. Employees were only required to make reasonable accommodations for known disabilities, or to take action, including reasonable accommodation, after an incident or series of incidents. Thus, it seems clear that a mentally handicapped tenant should likewise be protected from the landlord's dissemination of personal information about the mentally handicapped tenant to other tenants.

EEOC policy clearly mandates confidentiality in the context of mentally disabled employees. Thus, in an enforcement guidance publication explaining how employers must act under the ADA,[164] the EEOC establishes a set of hypothetical questions and answers. With respect to confidentiality and privacy, Questions 15 and 16 are illustrative:

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161. *Id.* at *1.

162. *Id.* at *3. The court stated:

> It is essential in the performance of their duties for Defendant's employees to be prepared for and capable of dealing with safety emergencies whenever they arise. It is undisputed that Plaintiff cannot perform the essential functions of her job during her manic periods. While plaintiff claims that she can detect a manic period and leave work, there is still a strong possibility that she will, at times, be at work during a manic period such as in August 1995. To allow Plaintiff to return to work in the safety sensitive environment of the refinery or in the field during times when she is unable to perform would be unreasonable. Further, Plaintiff does not believe Defendant could do anything to help or do her job during a manic period. Plaintiff is not qualified to work as a pump engine mechanic in Defendant's refinery and allowing her to leave work upon self-detection of a manic period is not a reasonable accommodation . . . .
>
> Plaintiff's request for light duty assignments to be given during her manic periods is also unreasonable. Defendant is not required to create light duty jobs to accommodate disabled employees. Also, the same problem exists as in the prior paragraph in that Plaintiff may be in her regular position while she is unable to perform that position before detecting and reporting her manic period. Further, light duty within the refinery would still carry safety duties which Plaintiff could not perform.

Id.

163. *E.g.*, Green v. Smith II Ga. World Cong. Ctr. Auth., 987 F. Supp. 1481 (N.D. Ga. 1997) (denying protection to terminated employee with bipolar disorder who experienced manic episodes, including becoming delusional and hearing voices).

164. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC NOTICE 915.002EEOC, ENFORCEMENT GUIDANCE, THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997).

15. Do ADA confidentiality requirements apply to information about a psychiatric disability disclosed to an employer?
Yes. Employees must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric history, *confidential* under the ADA. This includes medical information that an individual voluntarily tells his/her employer . . . .
16. How can an employer respond when employees ask questions about a coworker who has a disability?
If employees ask questions about a coworker who has a disability, the employer *must not disclose any medical information in response.* Apart from the limited exceptions listed in Question 15, the ADA confidentiality provisions prohibit such disclosure.[165]

These guidelines make it clear that worker privacy is paramount under the ADA. Since the goals of both the ADA and the FHAA are substantially similar, that is, the prevention of discrimination against the mentally handicapped in both employment and housing, it is axiomatic that the guidance the EEOC provides with respect to privacy and confidentiality under the ADA is easily transferable to housing issues. The right to privacy clearly recognized in the ADA should find a similar home pursuant to the implicit policies recognized in the FHAA. Any other interpretation would severely limit the ability of mentally handicapped persons to create normal lives for themselves.[166]

CONCLUSION

A landlord should not have the right to disclose the mental status of his tenants to other tenants even when a mentally ill tenant may have a potential for violence. The primary thrust of all fair housing legislation is to assist the integration of heretofore ostracized groups of persons into normal community living. To accomplish this purpose, all persons seeking to purchase or to rent housing must be treated alike to the extent feasible. While the FHAA did not provide an explicit blanket exemption from vicarious liability for landlords as a result of injuries caused by handicapped tenants, it did not intend to hinder their property

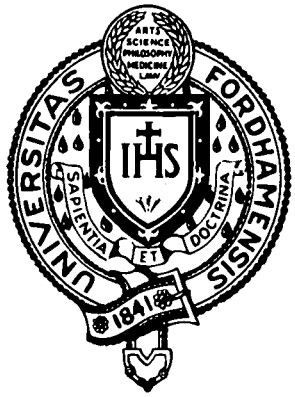
165. *Id.* at 16-17 (emphasis added).

166. *Disabling Employers*, *supra* note 142, at 748-757 (discussing the potential clashes between the ADA non-disclosure policies and the full disclosure issues that arise under the terms of the National Labor Relations Act).

management operations by forcing them to incur liability for injuries caused by mentally handicapped tenants.

The right to be left alone essentially applies to us all. The privacy rights of mentally handicapped persons who might resort to violence in limited circumstances should not be deemed equal to those of persons who pose a direct threat. ADA regulations explicitly realize this distinction by forbidding an employer in the workplace from revealing psychiatric and other medical information about workers to their co-workers. The FHAA should be interpreted in a similar fashion.

Consideration of the major goal of the FHAA—integration of all persons into normal community living—combined with the common law privacy rights of all individuals, strongly suggests that a landlord has a duty not to reveal the medical history of mentally handicapped tenants to other tenants. Not only would such revelations violate the sprit of the FHAA, but also they would trample on the mentally handicapped tenant's right to privacy.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