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Upside Down - Terrorist, Proprietors, and Civil Responsibility for Crime Prevention in the Post - 9/11 Tort-Reform World

Ellen M. Bublick

UPSIDE DOWN? TERRORISTS, PROPRIETORS, AND CIVIL RESPONSIBILITY FOR CRIME PREVENTION IN THE POST-9/11 TORT-REFORM WORLD

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INTRODUCTION

In the wake of the 9/11 tragedy, one might have been excused for thinking that everything had been turned on its head—vehicles of public transportation became weapons of large-scale destruction, centers of great wealth turned into sites of unending loss. After the turmoil, any number of matters seemed in disarray—even, it turns out, the tort law.

Perhaps the case that most vividly illustrated the seeming incoherence of the post-9/11 tort law was a suit that began with the 1993 World Trade Center bombing, but was not decided until after the 2001 blast. In October 2005, a New York jury was asked to determine the availability of tort recovery to citizens and businesses injured in the first World Trade Center explosion. The jury assigned fault for that destruction to the terrorists who deliberately planted and ignited a bomb in the building's underground parking garage.[1] The jury also assigned fault to the World Trade Center's owner and operator, the Port Authority of New York and New Jersey, for its failure to adopt the more rigorous security measures previously recommended to it by its own security experts.[2] Those disregarded

* Dan B. Dobbs Professor of Law, University of Arizona James E. Rogers College of Law. For helpful comments on earlier drafts, many thanks to Barbara Atwood, Curtis Bridgeman, Dan Dobbs, Jon Hanson, Gregory Keating, Andy Klein, Marc Miller, Robert Rabin, Carol Rose, David Shapiro, Kirsten Smolensky, Brent White, members of the Florida State University College of Law colloquium series, and participants in Loyola Law School's Frontiers of Tort Law symposium. Particular thanks to my extraordinary and tireless research assistants, Timothy Reppucci, Mark Sorokin and Victoria Torrilhon.

1. *In re* World Trade Ctr. Bombing Litig., No. 600000/94 (N.Y. Mar. 2, 2007).

2. *Id.*

measures included closing the building to public parking and screening entering trucks for explosives as a lesser precaution against truck bombs.[3]

Traditionally, at this juncture in the case, the court would have thanked the jury for its service and sent the case forward for determination of appropriate compensatory damages. However, following a recent New York Court of Appeals decision,[4] the jury was given one new task—to apportion percentages of civil responsibility between the parties. The jury proceeded to apportion responsibility for the devastation as follows: terrorists 32 percent, Port Authority of New York and New Jersey 68 percent.[5] In the tort action, the Port Authority was twice as responsible for the devastation as were the terrorists themselves.

Public bewilderment, even outrage, over the jury's verdict was palpable.[6] "Shredding Common Sense," one newspaper wailed.[7] "[O]bviously irrational," cried a second.[8] "[A]n argument for people who want to abolish the jury system," suggested a third.[9] Even the kindest media coverage of the story cast the verdict as a jury mistake.[10] To the common eye, the jurors' conclusion was

3. *In re* World Trade Ctr. Bombing Litig., 776 N.Y.S.2d 713 (Sup. Ct. 2004), *aff'd*, *In re* World Trade Ctr. Bombing Litig. Steering Comm. v. The Port Auth. of N.Y. & N.J., 784 N.Y.S. 2d 869 (App. Div. 2004) (denying in substantial part defendants' motion for summary judgment and outlining plaintiffs' valid claims).

4. *See* Chianese v. Meier, 774 N.E.2d 722 (N.Y. 2002) (holding that the trial court erred in setting aside the jury's apportionment of liability between the defendant building owner and the non-party assailant).

5. Anemona Hartocollis, *Port Authority Found Negligent in 1993 Bombing*, N.Y. TIMES, Oct. 27, 2005, at A6.

6. Vincent Carroll, Editorial, *On Point: Vexing Development*, ROCKY MOUNTAIN NEWS, Nov. 1, 2005, at 30A (calling the verdict "patently absurd and morally vicious"); Editorial, *Casting Blame*, N.Y. SUN, Oct. 27, 2005, at 6 (suggesting that "this ruling could make everyone less safe"); *Lawsuits May Be Factor in Future Policy*, LINCOLN J. STAR, Nov. 1, 2005, at B5 (calling verdicts "outlandish" and "a bizarre travesty"); Editorial, *Misplaced Blame in Bombing*, STAR-LEDGER, Nov. 3, 2005, at 18 (calling the assignment of primary blame to the Port Authority "ludicrous").

7. Ralph R. Reiland, *Shredding Common Sense*, PITTSBURGH TRIB. REV., Dec. 5, 2005.

8. *1993 Hindsight*, N.Y. POST, Oct. 30, 2005 at 28 (arguing that the terrorists "and they alone, deserve the blame for what happened").

9. *CNN American Morning* (CNN television broadcast Oct. 27, 2005) (quoting Jeffrey Toobin, CNN Legal Analyst) (suggesting, however, that the verdict might be explainable).

10. *See* Clyde Haberman, *Sometimes Big Brother Is a Protector*, N.Y. TIMES, Nov. 1, 2005, at B1 (calling the jurors' calculation "mathematical wizardry" and sarcastically claiming pity for the terrorists); Anemona Hartocollis, *Port Authority Fears Costs from Verdict*, N.Y. TIMES, Oct. 28, 2005, at B1 (calling the verdict "a startling footnote to history" and suggesting that jurors, motivated by sympathy for victims, were trying to ensure that someone would pay).

inexplicable. Here was another out-of-control jury stuck in the limelight with an embarrassing public gaffe.[11]

But what if the jurors' verdict was correct, at least within the parameters of New York law? The people empanelled to hear the facts of the case and instructed about the state's legal rules themselves reached the verdict.[12] Perhaps less noted if more significant, the trial and intermediate appellate courts have upheld the ruling.[13] Further appeals may follow. Could the law warrant such a seemingly confused result? Could the public support such a seemingly confused judgment of law?

The answer to these questions is important not only to the *1993 World Trade Center Bombing Litigation* itself[14] but to contemporary tort recoveries more generally. The *1993 World Trade Center Bombing Litigation* verdict, though unique in attracting public attention, is not unique in the conclusion reached by its jurors. In jurisdictions that apply comparative apportionment laws similar to those applied in New York, juries have embraced similar institution-heavy apportionments—holding proprietors and other institutional entities more civilly responsible for harm than the criminal assailants.[15] For instance, in an Arizona case, a jury held that a 9-1-1 operator who misclassified a domestic-violence victim's call as low priority was more responsible for the caller's murder than was the ex-boyfriend who committed the crime.[16] Similarly, in Michigan, when apportioning responsibility for a drunken assault, jurors assigned greater responsibility to the bar that negligently served alcohol to a patron past the point of his obvious intoxication than to

11. Editorial, *A Terror-ble Ruling*, N.Y. POST, Jan. 13, 2008, at 26 (arguing that the court of appeals should "toss out a preposterous 2005 jury finding") [hereinafter *A Terror-ble Ruling*].

12. Hartocollis, *supra* note 5, at A6 (noting that the jurors ruled six to zero on the issue of the Port Authority's negligence).

13. Nash v. Port Auth. of N.Y. & N.J., 856 N.Y.S.2d 583, 598 (App. Div. 2008); *In re* World Trade Ctr. Bombing Litig., No. 600000/94 (N.Y. Mar. 2, 2007).

14. The full title of the civil litigation is "*In re World Trade Center Bombing Litigation*." For clarity, throughout the Article I refer to the litigation as the "*1993 World Trade Center Bombing Litigation*."

15. I use the term "criminal" for ease of reading, although this standard would apply to any intentional tortfeasor, criminal or not. In addition, I use the term "institution-heavy apportionments" to describe apportionments that assign a greater share of responsibility to the negligent defendant than to the intentional-tortfeasor defendant. Although these negligent defendants need not be institutional actors, in the vast majority of the appellate court cases they are.

16. Hutcherson v. City of Phoenix, 961 P.2d 449, 451 (Ariz. 1998).

the drunken patron who committed the crime.[17] In a case of child sexual abuse committed by a church-school teacher, a Kentucky jury found that the diocese that ignored the teacher's past improprieties and potentially uncured pedophilia had more responsibility for his continued perpetuation of child abuse than did the teacher himself.[18] Additional juries have reached similar verdicts.[19] There is reason to suspect that more of the same is on the way. Confused? Upside-down?

Well, yes. But the problem is not (unfortunately) the particular jurors in these cases or the verdicts that they have reached. Instead, in this Article I argue that what is upside down—both in the *1993 World Trade Center Bombing Litigation* and in other cases like it—is recent tort-reform-produced state apportionment law that asks juries to divide civil responsibility between parties that fail to use appropriate precautions to prevent crime and those who perpetrate it.

It is a mistake of logic to suggest that the fault of a negligent defendant like the Port Authority necessarily diminishes as the fault of intentional tortfeasors such as the terrorists increases.[20] Both defendants can behave in a wrongful way at the same time. Moreover, the fact that the terrorist truck bombing occurred is inculpatory of the Port Authority's failure to take reasonable precautions to prevent a terrorist attack, not exculpatory.[21] When parties are liable for failing to take adequate precautions against crime, jurors should not be asked to divide responsibility between parties that enable and those who perpetrate the intentional harms—the situation of the parties involved in the *1993 World Trade Center Bombing Litigation.* Ideally, the verdicts in the *1993 World Trade Center Bombing* case and other cases like it will be harbingers of change—leading the minority of jurisdictions that permit

17. Weiss v. Hodge, 567 N.W.2d 468, 471 (Mich. 1997).

18. Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 288 (Ky. 1998).

19. *See, e.g.*, Ortiz v. N.Y. City Hous. Auth., 22 F. Supp. 2d 15 (E.D.N.Y. 1998); Manuel G. v. Golden State Family Servs., 2006 WL 965792 (Cal. 2006); Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048 (Ind. 2003).

20. Nash v. Port Auth. of N.Y. & N.J., 856 N.Y.S.2d 583, 595 (App. Div. 2008).

21. *Id.*; *see also* WILLIAM LLOYD PROSSER ET AL., PROSSER AND KEETON ON TORTS § 44 (5th ed. 1984) ("Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which [the defendant] has subjected the plaintiff has indeed come to pass.").

apportionment between intentional and negligent torts, including New York, to rethink that approach.

The focus on judicial change stems from the fact that courts created, and therefore can revise, many of the legal doctrines that now permit such apportionment. However, state legislatures are also free to act in this sphere. In neighboring Connecticut, when the public learned of the state supreme court's plan to include intentional torts in the jurisdiction's comparative apportionment system, the people promptly pushed the legislature to revive the old system—in which intentional torts played no part in comparative calculations.[22]

At a minimum, courts that elect to apportion responsibility between intentional and negligent torts should harmonize their legal rules with apportionment doctrines crafted by national authorities like the *Restatement (Third) of Torts: Apportionment of Liability.* In particular, courts should not apportion responsibility in cases in which the negligent party's "very duty" was to take precautions to prevent the intentional harm. This "very duty" rule, recommended by the *Restatement* for each of the five types of state apportionment systems it catalogued, would disallow apportionment when the negligent defendant's very duty was to take reasonable care "to [p]rotect the [p]laintiff from the [s]pecific [r]isk of an [i]ntentional [t]ort."[23] The rule would prevent a proprietor such as the Port Authority from being careless with respect to protection from terrorist attacks and then raising the paradoxical claim that responsibility for its own misconduct should be diminished because the conduct resulted in the very harm that it failed to take steps to prevent.[24] Instead, the proprietor could be called on to pay full compensatory damages for victim harm that arises from its negligence. The "very duty" doctrine has origins in New York law

22. *See* CONN. GEN. STAT. § 52-572h(o) (2008) (generally excluding apportionment "between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute"); Bhinder v. Sun Co., 717 A.2d 202, 242–43 (Conn. 1998) (holding that comparative fault act amended in 1986 to make each person liable only for his proportionate share of damages did not include intentional torts in apportionment calculations, but that intentional torts should be included in the system as a matter of common law).

23. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (2000).

24. PROSSER ET AL., *supra* 21, § 44.

dating back to at least the 1940s and should be maintained.[25] Additional solutions crafted by national authorities such as the National Commissioners on Uniform State Laws can be considered at the legislative level.[26]

However, for courts that apportion defendants' intentional and negligent responsibility and do not follow the ameliorative rules of national authorities like the *Restatement* (or in a small number of jurisdictions, for courts that cannot follow those rules due to specific statutory restrictions), the question becomes one of second-best solutions.[27] In the realm of the second-best, I argue that appellate courts should uphold institution-heavy apportionments—apportionments that allot more than 50 percent of the total responsibility to negligent rather than intentional actors. These jury determinations are not only consistent with state, and indeed multi-state tort law, but they also preserve a vehicle for recognizing the accountability of institutional actors. By preserving these judgments, tort law can concentrate on its own goals of accountability, deterrence, and compensation[28] rather than provide redundant primary focus on the accountability of criminal actors.

While the immediate result—upholding seemingly inverse apportionments in cases like the *1993 World Trade Center Bombing Litigation*—may initially appear incomprehensible to the broader public, I argue that the outcome can be made intelligible under traditional accountability principles. For this to happen, courts must clarify that tort apportionment focuses on apportionment of civil responsibility rather than apportionment of fault. Moreover, to uphold such a finding, the system of civil responsibility must be viewed as only one part of a more comprehensive system of legal

25. Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451, 459 (N.Y. 1980); Abbott v. N.Y. Pub. Library, 32 N.Y.S.2d 963, 966–67 (App. Div. 1942).

26. *See* UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT (2002) (creating an apportionment system that reassigns uncollectible shares).

27. R.G. Lipsey & Kevin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1956). Of course, negligent third-party liability for failure to prevent criminal harms is itself already a second-best solution.

28. *See* Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171 (2008) (outlining strategies that incorporate both consequentialist and deontological goals for tort law).

responsibility, which includes the criminal courts.[29] Apportionment of tort liability is not the same as apportionment of all legal penalties or of all moral blame. When civil and criminal penalties assigned in the *1993 World Trade Center Bombing* cases are viewed as a whole, it is clear that even with a 68 percent civil-responsibility assignment, the Port Authority still was tagged with a far smaller share of the overall responsibility and culpability for the bombing than were the terrorists themselves. To be specific, the terrorists are currently serving more-than-life sentences in maximum security prison and have multimillion-dollar fines and orders of restitution assessed against them.[30] In addition, the terrorists, as intentional tortfeasors, can be tagged with full compensatory damage judgments in New York's civil system, notwithstanding the 32 percent apportionment of responsibility.[31] In contrast, there are no reports that any Port Authority official was jailed or fined, and after fifteen years the Port Authority has yet to pay the civil damages awarded for its lack of care.[32]

In sum, this Article argues that courts should avoid all or at least certain intentional/negligent responsibility comparisons, particularly in situations where the negligent actor's very duty was to take steps to prevent the intentional harm. However, courts' second-best position is to uphold all jury apportionments, even those that assign greater, perhaps even far greater, responsibility to negligent than intentional parties.

To explain this thesis, Part I of this Article provides an overview of the case that brought public attention to the issue of institution-heavy apportionments of responsibility—the *1993 World Trade Center Bombing Litigation.* The section examines the circumstances of the World Trade Center bombing. It also examines the litigation

29. Jules Coleman, *Doing Away With Tort Law*, 41 LOY. L.A. L. REV. 1149 (2008) (discussing Calabresi's argument that tort law "occupies the essential normative and practical space between the criminal law on the one hand and contract law on the other").

30. *See, e.g.*, Benjamin Weiser, *Driver Gets 240 Years in Prison for Bombing of Trade Center*, N.Y. TIMES, Apr. 4, 1998, at B2.

31. N.Y. C.P.L.R. § 1602(5), (7) (McKinney 2008). Of course, the plaintiff can receive only one satisfaction of the injury claim. See 487 Elmwood, Inc. v. Hassett, 486 N.Y.S.2d 113 (App. Div. 1985).

32. *See* David W. Dunlap, *A Disaster That Tragedy Relegated to Second Place*, N.Y. TIMES, Feb. 27, 2008, at B3 (noting that on the fifteenth anniversary of the bombing "some victims of the attack are still fighting in court with the Port Authority").

that emanated from the bombing—not only the civil litigation, but the criminal litigation as well.

Part II briefly reviews two types of laws that are instrumental in determining proprietor payouts in negligent security suits—proprietor liability and comparative apportionment law. The section outlines how these laws have changed, in New York as elsewhere, over the past fifty years. It also describes how changes in these laws have led to the recent phenomenon of juror percentage-based divisions of responsibility in negligent security actions.

Part III looks at a question that the courts and legislature have not yet examined—the effects of including intentional torts in several-liability comparative apportionment systems. Most, if not all, of the effects of including intentional torts in apportionment are not desired even by courts that embrace that doctrine. A number of red-herring arguments of logic, not contemplated policy preferences, have led courts to select these poor policy outcomes. The section suggests that when the effects of including intentional torts in apportionment are examined, it is easier to see that intentional torts should not be included in apportionment or should be limited by ameliorative doctrines of the *Restatement (Third) of Apportionment* such as the "very duty" rule.

However, if states choose to make unlimited intentional-negligent fault comparisons between multiple defendants, Part IV examines how courts can most coherently review jury answers to the impossible question posed to them. After reviewing suggested national standards and examining prior opinions of state courts that have reviewed institution-heavy apportionments, the section ultimately concludes that courts should view apportionment as a method of dividing civil responsibility between defendants. In that vein, even judgments assigning a greater civil-responsibility share to the negligent party can be justified, both within a set of formal legal rules and in accordance with policy considerations, in the courthouse and to a broader public audience (which the jurors themselves represent).

The issue of apportionment in the *1993 World Trade Center Bombing Litigation* is important in its own right. The ultimate disposition of the case by the New York courts will have a significant effect on victim compensation in litigation filed by the

victims of the 1993 bombing. However, the importance of the case extends far beyond the litigants themselves.

Tort litigation stemming from the 1993 World Trade Center bombing highlights the current tension between, on one hand, the public's desire for liability limitation in the post-tort-reform world and, on the other, the public's hope for institutional actors to take reasonable security precautions against foreseeable criminal and even terrorist harm, particularly post-9/11 when those harms seem all the more lethal.[33] When asked to apportion responsibility between the Port Authority and the terrorists—in real effect, between tort liability for the Port Authority and no tort liability for the Port Authority—jurors making civil-responsibility judgments are faced with the difficult task of mediating these dual interests in liability limitation and accountability for care. Judicial support for juries' front-line verdicts will affect whether jurors continue to have the prerogative to call on tort law to play its established role in encouraging care to protect against criminal harms.

I. *IN RE WORLD TRADE CENTER BOMBING LITIGATION*

Well before the September blast that changed the nation's course, another terrorist attack assaulted the prominent New York City landmarks. Shortly after noon on February 26, 1993, terrorists drove a rented Ryder van packed with explosives into the World Trade Center's underground public parking lot.[34] They set off the explosives with a time-delayed fuse and immediately fled the building.[35] The bomb exploded with the force of 1500 pounds of dynamite.[36] The blast created a crater five stories deep in the

33. *See* George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN. ST. L. REV. 175, 177 (2007) (concluding that "tort law will continue to be eroded by attrition"); Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 994 (2003) (discussing a psychometric approach which shows that "the more a risk is dreaded, the greater the support for strict regulation to reduce or eliminate the risk").

34. Anemona Hartocollis, *Blame for 1993 Attack at Center Is Still at Issue*, N.Y. TIMES, Jan. 10, 2008, at B3.

35. *Foreign Terrorists in America: Five Years After the World Trade Center: Hearing Before the S. Subcomm. on Technology, Terrorism and Government Information of the Comm. on the Judiciary*, 105th Cong. 18 (1998) (testimony of Henry J. DePippo).

36. *The World Trade Center Bombing: A Tragic Wake-Up Call: Hearing Before S. Comm. on Investigations, Taxation, and Government Operations*, N.Y. State S., at 9 (N.Y. Aug. 3, 1993) (testimony of Port Authority Director Stanley Brezenoff).

underground portion of the World Trade Center.[37] The bombing killed six people, including a pregnant woman who was having lunch in a cafeteria nearby and a person who was buried in rubble at the bottom of the crater and not found until days later.[38] Four of the victims were killed when a steel beam weighing approximately 3000 pounds was propelled thirty feet inside tower one.[39]

Damage to the World Trade Center buildings was not localized to the bombed area itself. The explosion sent smoke through ventilation and elevator shafts.[40] Two million gallons of water rushed from severed pipes.[41] Electricity, lighting, heat, emergency power, and running water were all shut down.[42] There was no way to communicate with the tens of thousands of tenants and visitors who were forced to evacuate the building.[43] Many panicked.[44] A thousand people were injured.[45] Injuries included smoke inhalation, damage to organs, and crushed limbs.[46] As the U.S. Attorney responsible for prosecutions stemming from the 1993 bombing testified before Congress in 1998, "[a]part from certain battles in the Civil War," prior to that date, the 1993 bombing "was the largest patient-producing incident in United States history."[47]

Businesses inside the building also suffered millions of dollars of damage.[48] Estimates suggested that "dislocation and the loss of business" accounted for the bulk of an estimated $330 million in

37. Richard Bernstein, *Explosion at the Twin Towers; 4 Are Convicted in Bombing at the World Trade Center that Killed 6, Stunned U.S.*, N.Y. TIMES, Mar. 5, 1994, § 1, at 1.

38. *Id.*

39. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 18 (testimony of Henry J. DePippo).

40. *Id.*

41. *Id.*

42. *Id.* at 19.

43. *Id.* at 17, 19 (noting that on any given day 100,000 people traveled through the World Trade Center and that there was no way to communicate with tenants and visitors).

44. Bernstein, *supra* note 37. For testimony concerning evacuation without communications in the dark through 100 floors of smoke-filled stairwells, see *The World Trade Center Bombing: A Tragic Wake-Up Call*, *supra* note 36, at 24–29.

45. *The World Trade Center Bombing: A Tragic Wake-Up Call*, *supra* note 36.

46. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 18 (testimony of Henry J. DePippo).

47. *Id.*

48. Andrew Blum, *Trade Center Verdict Spurs Suits*, NAT'L L.J., Mar. 21, 1994, at A5 (putting the figure at $550 million).

costs to businesses in the very first week.[49] Other sources estimated the first week's economic damage to companies and government agencies at $692 million.[50] Although commodities exchanges in the building reopened that week, firms were unable to move back for a longer period of time.[51]

After the tragedy, police located four of the assailants—Messrs. Salameh, Ayyad, Abouhalima, and Ajaj.[52] The four were arrested and tried in New York federal court.[53] The prosecution presented "mountains of evidence" against the defendants, who said little or nothing in their own defense.[54] The evidence revealed many details of the conspirators' plans, as well as their roles in the bombing. Their participation included securing chemicals and detonators to create the explosive device, renting the van, planting the bomb inside it, sending messages to news media seeking credit for the destruction, and (famously) trying to secure from the car rental company a refund of the deposit placed on the exploded van.[55]

The four conspirators were convicted on a wide range of charges—in fact, on every charge that the government had pursued against them.[56] Those charges included conspiracy, explosive destruction of private property, explosive destruction of government property, interstate transportation of explosives, destruction of motor vehicles, assault upon a federal officer, and using or carrying a destructive device during a violent crime.[57] Two of the four men were also convicted of international travel as part of a commission of a crime.[58] Each of the four was sentenced to 240 years in prison.[59]

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49. *After the Blast*, ECONOMIST, Mar. 6, 1993, at 78.

50. Peter Marks, *The Twin Towers: Opening of Twin Towers Unlikely to Occur Until Next Month*, N.Y. TIMES, Mar. 3, 1993, at A1.

51. *After the Blast*, *supra* note 49, at 78.

52. Bernstein, *supra* note 37, §1, at 1.

53. *Id.*

54. *Id.* §1, at 29; *see also Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 12 (testimony of J. Gilmore Childers) (noting that at trial there were over 1000 exhibits and 200 witnesses).

55. Bernstein, *supra* note 37, §1, at 29; *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 15–16.

56. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 12 (testimony of Henry J. DePippo).

57. Bernstein, *supra* note 37, §1, at 29; *see* United States v. Salameh, 54 F. Supp. 2d 236 (S.D.N.Y. 1999).

58. Bernstein, *supra* note 37, §1, at 29.

On review, the Second Circuit Court of Appeals held that the four should not have been allowed to represent themselves at sentencing.[60] Represented by attorneys on remand, the four were resentenced to terms of more than 100 years.[61] Those greater-than-life-expectancy prison terms were upheld by the appellate court.[62] Fifteen years after the bombing, all four remain in maximum security penitentiaries with posted release dates far in the future.[63] At sentencing, each of the four was fined $250,000 and ordered to pay restitution of $250 million.[64] On appeal, the Second Circuit found that these amounts could not be made immediately payable given the prisoners' lack of assets. However, the amounts would become payable should any of the men receive future payments for the sale of his account of the bomb plot.[65]

A second criminal case was filed against a broader group of defendants who were part of a conspiracy not only to bomb the World Trade Center but also to attack prominent leaders and many New York City landmarks.[66] Those conspirators included Sheik Omar Ahmad Ali Abdel Rahman, a cleric who preached violent jihad to followers who included many of the other convicted terrorists.[67] Of the initial thirteen defendants in the second case, two pleaded guilty (one to the entire indictment), and eleven others were convicted at trial.[68] The year-long case involved "just about every

59. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 11 (timeline of events).

60. *See* United States v. Salameh, 152 F.3d 88 (2d Cir. 1998).

61. Benjamin Weiser, *Trade Center Bombing Terms*, N.Y. TIMES, Aug. 7, 2001, at B1.

62. United States v. Salameh, 261 F.3d 271 (2d Cir. 2001), *cert. denied*, 537 U.S. 847 (2002), *cert. denied sub nom.*, Abouhalima v. United States, 536 U.S. 967 (2002).

63. In March of 2008 the Federal Bureau of Prisons website stated that all four were serving prison terms in the Florence Administrative Maximum Security Penitentiary in Florence, Colorado. *See* Fed. Bureau of Prisons, Inmate Locator, http://www.bop.gov/inmate_locator/index.jsp (last visited Nov. 23, 2008). The earliest release date was set for 2087. News stories have criticized the government for allowing the terrorists to support others by mail. *See* Jim Popkin & Rich Gardella, *Terrorists' Mail Still Not Monitored: Prison System Yet to Crack Down on Incarcerated Terrorists, Report Finds*, Oct. 3, 2006, http://www.msnbc.msn.com/id/15120480/.

64. *Salameh*, 261 F.3d at 275.

65. *Id.*

66. United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) (describing the facts of the conspiracy in detail); Blum, *supra* note 48 (putting the original number of defendants at fifteen).

67. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 23–24 (testimony of Patrick Colgan).

68. *Id.* at 11 (noting that the group was convicted in October of 1995).

law enforcement agency" and almost a full year's worth of testimony.[69] The defendants were convicted on almost every charge against them.[70] Rahman received a sentence of life in prison.[71] Other conspirators were sentenced to serve between 25 years and life in prison.[72] All of the sentences save one were upheld on appeal.[73] After resentencing, the final sentence was also upheld.[74]

A third round of prosecutions was undertaken in 1997 when the U.S. government later located two additional conspirators from the 1993 World Trade Center attack, Ramzi Ahmed Yousef and Eyad Ismail.[75] Immediately after the attacks, the two had fled the United States.[76] Yousef originally traveled to Iraq but was later apprehended in Pakistan.[77] Ismail was apprehended in Jordan.[78] At separate trials in 1997, both Yousef and Ismail were convicted of charges involving the use of explosives to kill people and conspiracy.[79] Yousef was also convicted of counts related to a conspiracy to blow up airliners in Southeast Asia.[80] At sentencing, Yousef received a prison sentence of 240 years, as had the other conspirators.[81] A few months later Ismail received a 240 year sentence as well.[82] The defendants

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69. *Id.* at 22, 24 (testimony of Patrick Colgan).

70. *Rahman*, 189 F.3d at 103.

71. *Id.*

72. *Id.*; *see also Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 11 (noting that sentencing took place on January 17, 1996).

73. *Rahman*, 189 F.3d at 103.

74. United States v. Elgabrowny, 10 F. App'x. 23, 24–26 (2d Cir. 2001) (upholding sentence reduced from fifty-seven years to thirty-three years).

75. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 11 (noting that trials ran from August through November of 1997).

76. Benjamin Weiser, *The Trade Center Verdict: The Overview; "Mastermind" and Driver Found Guilty in 1993 Plot to Blow Up Trade Center*, N.Y. TIMES, Nov. 13, 1997, at A1.

77. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 11.

78. Neil MacFarquhar, *Angry Bomber or Shy Youth: Two Portraits*, N.Y. TIMES, Aug. 6, 1995, at 33.

79. *See* United States v. Yousef, 327 F.3d 56, 160 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

80. *Id.* at 164.

81. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 12 (testimony of J. Gilmore Childers) (noting that Yousef was also sentenced to a 240 year prison term); Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES, Jan. 9, 1998, at A1 (upon hearing the sentence Yousef declared that he was "a terrorist" and "proud of it").

82. News reports also mention that he was assigned to pay $10 million in restitution. Weiser, *supra* note 30, at B2.

were also ordered to pay significant fines and awards of restitution.[83] Ismail was ordered to pay a $250,000 fine and $10 million in restitution.[84] Yousef, considered the "mastermind" of the plot, was ordered to pay a $4.5 million fine and $250 million in restitution.[85] An appellate court upheld the 240 year sentences, as well as the fines and restitutionary payments.[86] In Yousef's case, because of evidence that he had easy access to large sums of money and refused to report his assets, the payment of fines and restitution was made collectible immediately, not subject to later earnings.[87] One additional suspect, Abdul Rahman Yasin remains at large despite United States efforts to capture him.[88] He is listed on the FBI's most wanted terrorist list.[89]

Congruent with the criminal prosecutions related to the attack, hundreds of individual plaintiffs injured in the bombing filed civil suit.[90] Those suits focus on the allegedly negligent security practices of the Port Authority of New York and New Jersey ("the Port Authority"), the buildings' owner and operator.[91] The multiple individual suits were consolidated for trial on the issue of the Port Authority's liability, though not on the issue of damages. *In re World Trade Center Bombing Litigation Steering Committee v. The Port Authority of New York and New Jersey*,[92] the consolidated litigation, encompasses suits from three major constituencies—people injured in the bombing, families of people killed in the blast, and businesses located in the World Trade Center.

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83. *Id.*

84. *Id.*

85. *See Yousef*, 327 F.3d at 164–65.

86. *Id.* at 164–66, 172–73.

87. *Id.* at 165.

88. Tina Kelley, *Suspect in 1993 Bombing Says Trade Center Wasn't First Target*, N.Y. TIMES, June 1, 2002, at A10.

89. *See* Fed. Bureau of Investigation, Most Wanted Terrorists: Abdul Rahman Yasin, http://www.fbi.gov/wanted/terrorists/teryasin.htm (last visited Oct. 27, 2008).

90. Hartocollis, *supra* note 34, at B3 (noting that "hundreds of people and companies" originally filed suit); Anemona Hartocollis, *Judge Wants No Reference to Sept. 11 in Terror Case*, N.Y. TIMES, Oct. 26, 2005, at B1 (noting that the trial which went to the jury "consolidates more than 400 cases"); *A Terror-ble Ruling*, *supra* note 11 (estimating the original pool of plaintiffs at 655).

91. Mark Fass, *Trial Commences Over 1993 World Trade Center Bombing*, 234 N.Y. L.J. 1, 1 (2005); *see In re* World Trade Ctr. Bombing Litig., 776 N.Y.S.2d 713, 716 (Sup. Ct. 2004), *aff'd*, *In re* World Trade Ctr. Bombing Litig. Steering Comm. v. The Port Auth. of N.Y. & N.J., 784 N.Y.S. 2d 869 (App. Div. 2004) (noting that the litigation joins more than 175 individual cases).

92. 784 N.Y.S. 2d 869.

In 2008, fifteen years after the bombing, litigation in the civil case remains unresolved.[93] However, most of the cases brought as a part of the litigation have been settled.[94] Of the forty-seven cases that remain in active litigation, the vast majority, forty-three, are personal injury claims.[95]

Over the years of protracted litigation, the civil suit has encompassed a number of legal issues in the lower courts and on appeal.[96] In essence, the legal action alleges that the Port Authority was negligent for failing to close the Trade Center's four-hundred-car public parking garage in light of the foreseeable risk that terrorists could drive a truck bomb into the building through that route.[97]

Evidence introduced by the plaintiffs in opposition to the Port Authority's motion for summary judgment suggests that the Port Authority was aware of terrorist threats but elected not to take precautions against them due to financial concerns. Specifically, testimony introduced by plaintiffs showed that as early as the 1980s, the Port Authority was aware that the World Trade Center was a highly symbolic target to terrorists, that car bombs were becoming a prominent method of terrorist attack, and that attacks on the United States took place in the New York-New Jersey metropolitan area.[98] Accordingly, the Port Authority created an internal Terrorist Planning and Intelligence Section.[99] The section's 1984 report suggested that the underground parking garage was an easily accessible, potentially vulnerable point of attack.[100] Peter Caram, head of the section at that time, has both testified and written at

93. *See* Dunlap, *supra* note 32.

94. Hartocollis, *supra* note 34.

95. *Id.*

96. The Port Authority launched its defense by asserting that it should be entitled to withhold discovery because documents contained sensitive security data. *See* Blum, *supra* note 48.

97. *Id.* (suggesting that the cases will "fall or rise on notice and foreseeability by the Port Authority of an attack"); *see In re* World Trade Ctr. Bombing Litig., 776 N.Y.S.2d 713, 716 (Sup. Ct. 2004).

98. *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 718.

99. *Id.*

100. *Id.*

length about the warnings he provided to World Trade Center officials.[101]

Later in 1984, Peter Goldmark, executive director of the Port Authority from 1977–1985, met with Scotland Yard officials who were "appalled to hear we had transient [public] parking directly underneath the towers."[102] In light of the concern expressed by Scotland Yard concerning the vulnerability of the World Trade Center's parking garage to terrorist attack, Goldmark convened a special antiterrorist task force later that year.[103] The task force, named the Office of Special Planning ("OSP"), included a variety of different personnel and consulted with the FBI, the CIA, the National Security Agency, the U.S. Secret Service, Department of Transportation, Department of Defense, Department of State, and security officials from several other countries.[104] The OSP listened to experts, visited other large commercial buildings, examined blueprints and photographs of the World Trade Center, and analyzed targets in terms of "criticality, accessibility, vulnerability, recuperability and extended effect that destruction of the specific target would have."[105]

After their months-long investigation, the OSP issued its final report entitled *Counter-Terrorism Perspectives: The World Trade Center*. The 1985 report recognized that the World Trade Center was a "most attractive terrorist target," discussed car bomb incidents, and flagged the public parking garage as a "definite security risk."[106] The report stated that the parking garage provided "unimpeded access for someone bent on putting a car bomb into the World Trade Center parking lot," to affect "[v]irtually all of the important building systems."[107] With exacting prescience, the report concluded:

> A time bomb-laden vehicle could be driven into the WTC and parked in the public parking area. The driver could then exit via elevator into the WTC and proceed with his

101. *See* PETER CARAM, THE 1993 WORLD TRADE CENTER BOMBING: FORESIGHT AND WARNING (2001).

102. *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 719; Hartocollis, *supra* note 5, at A6.

103. *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 718.

104. *Id.* at 719.

105. *Id.* (quoting Defendant's exhibit Q report).

106. *Id.* at 720–21 (quoting Defendant's exhibit Q report).

107. *Id.* at 721 (quoting Plaintiffs' exhibit 13).

> business unnoticed. At a predetermined time the bomb could be exploded in the basement. The amount of explosives used will determine the severity of damage to the area.[108]

Based on the risk that a truck bomb could be driven into the public parking lot, the OSP counseled the World Trade Center to eliminate all public parking in the Center.[109] The task force also noted more modest security measures that might be adopted, such as having manned entrances to the public parking area, restricting pedestrian entry into the area, subjecting vehicles to random inspection, and providing a police patrol with an explosives-detection dog.[110]

The report was issued to several top officials at the World Trade Center in 1985, four months after Goldmark left the Port Authority.[111] His successors decided not to close the public lot, citing the potential loss of revenue and inconvenience to tenants.[112] The Port Authority also decided not to adopt most of the compromise security measures that had been recommended, again based on financial and other considerations.[113] However, in 1986 and 1991, the Port Authority did seek second and third opinions from additional security firms.[114] Evidence cited in the court's opinion suggested that subsequent security opinions flagged similar security issues, including vulnerability of the parking garage to attack.[115] The second security opinion, unlike the first, deemed security measures to address the problem "very costly." It did not perform a cost analysis though, and the only cost it presented to the Port Authority's director was $83,000 for "barriers to deter car bomb attempts," a measure estimated to reduce risk of a terrorist attack by 40 percent.[116] In 1993, just a month before the Trade Center bombing, the FBI

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108. *Id.* (quoting Defendant's exhibit Q report).

109. *Id.*

110. *Id.*; Hartocollis, *supra* note 5, at A1.

111. *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 720; Hartocollis, *supra* note 5, at A1.

112. Hartocollis, *supra* note 5, at A1.

113. *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 722.

114. *Id.*

115. *Id.* (discussing the reports of outside consultants, Science Applications International Corporation and Burns and Roe Securacom).

116. *Id.* (quoting Plaintiffs' exhibit 30).

informed the Port Authority of a "threat from the Mideast to blow up a major office building in New York."[117] Some heightened security measures were implemented but only for a weekend.[118]

After the bombing in February of 1993, the injured parties sought to assign blame, not only to the terrorists, but also to the Port Authority for its failure to follow the many security recommendations it had received in the decade prior to the explosion. The civil suit alleged a number of specific failures by the Port Authority including failure to restrict public access to the parking levels, failure to have an adequate security plan, and failure to have a backup communications system, among other complaints.[119] Some of the business claims were for breach of lease.[120]

The Port Authority moved for summary judgment on two grounds. First, it asserted that it should enjoy governmental immunity or, in the alternative, be found to have no duty to the plaintiffs. Second, it argued that the bombing was not foreseeable as a matter of law, particularly in the absence of prior similar incidents.[121] The trial court rejected both arguments, concluding that "based on the statutes and the case law, the Port Authority was not immune from liability," and that in light of plaintiffs' evidence "there are triable issues of [material] fact with respect to the foreseeability of plaintiffs' damage and injuries."[122]

The court's conclusion on the first issue was largely based on state statutes that waive the Port Authority's sovereign immunity to tort claims.[123] According to the plain language of the statutes, before the statutes' enactment in the 1950s the Port Authority was entirely immune from suit.[124] After the statutes were enacted, it was not.[125] The enacted statute expressly states:

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117. *Id.* at 723 (quoting Plaintiffs' exhibit 15).

118. *Id.*

119. *Id.*

120. *Id.* at 726 (noting the claims of Dean Witter).

121. *Id.*

122. *Id.* at 727.

123. *Id.* at 728 (citing N.J. STAT. ANN. §§ 32:1-158 to -162 (West 1990) and N.Y. UNCONSOL. LAW §§ 7101–7112 (McKinney 2000)).

124. *Id.* at 729.

125. *Id.*

> Although the Port Authority is engaged in the performance of governmental functions, the said two States consent to liability on the part of the Port Authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.[126]

In its performance of proprietary functions—running a commercial building—the court held that the Port Authority owed the same duty to physically maintain the building and provide security for tenants as would have been owed by similar commercial landlords.[127] Only to the extent that plaintiffs claimed inadequate police patrolling of the complex would a portion of the claim be considered a particular governmental function and denied.[128]

On the second issue—foreseeability—the court recounted an expansive record of repeated prior warnings about a potential terrorist attack.[129] The trial court held that "[t]he predicted scenario, eerily accurate, in the Port Authority's security reports, of a vehicle bomb in the garage, and the evidence of bomb threats in the complex, are sufficiently similar in nature to the bombing to raise a triable issue as to foreseeability."[130] The court rejected defendants' attempt to invoke the prior similar incidents test. "The fact that an explosive-laden vehicle had not previously been placed in the WTC garage does not, as the Port Authority appears to be arguing, make this event unforeseeable as a matter of law."[131]

The case then went to a jury, which unanimously concluded, after apparently wrenching testimony from former Port Authority Director Peter Goldmark himself, that the Port Authority was negligent for failing to take the proposed security measures.[132] By a four to two vote, the jury also found that the Port Authority's conduct did not rise to the level of recklessness.[133]

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126. N.J. STAT. ANN. § 32:1-162 (West 1990); N.Y. UNCONSOL. LAW § 7106 (McKinney 2000).

127. *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d at 731–32.

128. *Id.* at 733.

129. *See id.* at 736, 738–39.

130. *Id.* at 736.

131. *Id.* at 737–38.

132. Hartocollis, *supra* note 5.

133. *Id.*

Had the jury's assignment of liability been the end of the matter, as it would have been prior to changes in the law occurring shortly before the verdict, the case might have looked like a large but otherwise garden-variety case of negligent security. The tenant is injured by an act of crime. The landlord did not take reasonable steps to prevent the foreseeable criminal harm. Compensation is awarded.

However, a recent change in the interpretation of New York law required the jury to take a further step—not only to declare the parties who were at fault, but also to apportion percentages of responsibility for the harm in a zero-sum fashion among all potentially responsible actors, including intentional tortfeasors.[134] Thus, if the terrorists were assigned 99 percent of the responsibility, the Port Authority must be assigned the remaining 1 percent, and vice versa.

In compliance with this new practice of apportioning percentages of responsibility, the jury was required to apportion responsibility between the Port Authority which failed to take appropriate precautionary measures and the terrorists who hatched and executed the bombing plot. The jury's assignment of responsibility—68 percent to the Port Authority of New York and New Jersey and 32 percent to the terrorists—was anything but garden variety.

In post-trial motions, the Port Authority appealed a number of issues. In particular, it asked the district judge to overturn the apportionment and conclude that the terrorists had "at least half of the responsibility" or award a remittitur of not more than 20 percent of the responsibility to the Port Authority.[135]

Judge Nicholas Figueroa of the state's trial court specifically affirmed the jury's verdict. The judge determined that "the jury in the instant case, was able to find, based on the facts, that defendant's culpability was greater than the bombers' fault."[136] In particular, the judge relied on evidence that the Port Authority knew in advance of the World Trade Center's vulnerability as well as the danger posed

134. *See* Chianese v. Meier, 774 N.E.2d 722, 726 (N.Y. 2002).

135. Post Trial Brief for Defendant The Port Authority of New York and New Jersey at 24, *In re* World Trade Ctr. Bombing Litig., No. 600000/94 (N.Y. Dec. 5, 2005) (suggesting that 20 percent of the liability would be appropriate).

136. *In re* World Trade Ctr. Bombing Litig., No. 600000/94, at 23.

by terrorists, yet deliberately decided not to act.[137] The judge also relied on the tradition that apportionment, like other discretionary questions resolved by a jury, is a matter entrusted to jury discretion.[138]

The Port Authority appealed both the jury verdict and the post-trial rulings that upheld it to the New York Supreme Court's Appellate Division in Manhattan.[139] This appeal, the sixth in the case, took particular aim at the jury's apportionment of responsibility.[140] The appeal also raised issues about matters of care, governmental immunity, and causation.[141]

The appellate court upheld the jury's verdict against all of the defendant's arguments. With respect to the standard of care, the court disagreed with the Port Authority's contention that it had either no duty or only a minimal duty of care.[142] Rather, given the proprietary function of the Port Authority acting as a commercial landlord, the court held that the ordinary standard of reasonable care under the circumstances applied. Nor was the court willing to say that, as a matter of law, the defendant had met this standard. Under a risk-benefit analysis, the court detailed the Port Authority's ample prior notice of the risks.[143] As the court noted, the bombing "had not merely been foreseeable, but had actually been foreseen."[144] The court also addressed the "potentially catastrophic magnitude" of the truck-bomb and noted that "dire risks" must be managed differently than more routine risks. In contrast with this true probability of a dire risk, the court examined the "inconsequential" cost of precaution.[145] The four hundred public parking spots would simply have been transferred to tenants.[146] Furthermore, evidence of custom

137. *Id.*

138. *Id.*

139. Hartocollis, *supra* note 34, at B3.

140. *Id.*; *see* Brief for Defendant-Appellant The Port Authority of New York and New Jersey, *In re* World Trade Ctr. Bombing Litig., No. 600000/94 & 129074/93, at 13 (N.Y. App. Div. Feb. 26, 2007) [hereinafter Brief for Defendant-Appellant].

141. Brief for Defendant-Appellant, *supra* note 140.

142. Nash v. Port Auth. of N.Y. & N.J., 856 N.Y.S.2d 583, 586–88 (App. Div. 2008).

143. For a fuller discussion of the use of cost benefit analysis for evaluating cases of catastrophic risk, see Richard A. Posner, Catastrophe: Risk and Response 140–48, 264 (2004).

144. *Id.* at 587.

145. *Id.* at 589, 592.

146. *Id.* at 593 n.8.

did not aid the defendant. The Port Authority's lack of precaution was contrasted with expert testimony that even in the mid-1980s and early 1990s, the "industry practice" was "either to eliminate or to place strict controls upon public parking under or immediately adjacent to unusually large, high-profile buildings" such as the Smithsonian Institution, Union Station, and the Bank of Boston.[147] Given the disconsonant level of care that defendant took relative to other large building owners and the uneven risks and utilities of defendant's conduct, the court held that the record would "not compel the legal conclusion that defendant's duty had been met even if the applicable standard of care required only minimal precautions."[148]

In terms of causation, the court noted the "futility" of an attempt to argue lack of causation in traditional terms. Apparently, "defendant's own witness" testified that implementation of "recommendations to heighten security at the public parking garage would have deterred the bombers . . . from committing the February 26, 1993 bombing."[149] Defendant's more novel request to assert that recommended precautions "would not have deterred the bombers from carrying out another 'similar attack,'" perhaps on a different date or at a different location, was denied given the lack of authority to support the legal proposition and the lack of evidence to support the scenario in any event.[150]

Finally, the court upheld the jury's apportionment of responsibility. The court rejected the claim that a negligent tortfeasor could not be assigned "a percentage of fault higher than that of the parties whose intentional conduct concurrently caused the bombing."[151] Instead, the court framed the apportionment issue as a factfinder determination to be examined in the particular context and circumstances of the case.[152] In this case, the court upheld the jury's apportionment allocation because the Port Authority's negligence was not inadvertent but resulted from "deliberate decisions by defendant's top management" and the intentional wrong "was not

147. *Id.* at 591.
148. *Id.* at 592.
149. *Id.* at 593 n.9.
150. *Id.* at 593.
151. *Id.* at 594.
152. *Id.* at 595.

simply concurrent with the negligence, but to an unseemly degree flowed from the negligence and was determined by it"—an analysis that seems strikingly similar to a very duty analysis.[153] In upholding the jury's allocation the court was careful to point out that the apportionment was not an apportionment of "comparative reprehensibility."[154] Nor did it in any way absolve the terrorists of responsibility for their "murderous acts."[155]

II. FROM NO LIABILITY TO LIABILITY (AND BACK AGAIN?): THE EVER-CHANGING LAW OF CARE TO PROTECT AGAINST CRIMINAL ACTS

It did not take long for the public to notice the *World Trade Center* verdict or to sense that something was amiss. Public criticism was swift and ample but ultimately narrow—focusing exclusively on the question of whether the empanelled jurors had arrived at the wrong numeric percentages. The Port Authority itself attacked the judgment as "the product of a jury hijacked by Al Qaeda sympathizers."[156] From the outset, that argument seemed dead on arrival:a New York jury allied with the reviled terrorists who threatened the local population and were jailed for life? But in one form or another, the theme persisted—the problem with this verdict, and with other verdicts like it, was a problem with juries.[157]

To date, public discourse has not yet alighted on the deeper problem underlying the verdict—changes in New York's comparative apportionment law. Throughout all of New York history, the liability of a proprietor like the Port Authority had been decided directly:either there was no liability (the norm for many years) or there was liability. After 2002, jurors were asked for the

153. *Id.* at 596.

154. *Id.* at 597.

155. *Id.* at 598.

156. Anemona Hartocollis, *Port Authority Seeks Voiding of Jury Verdict*, N.Y. TIMES, Dec. 7, 2005, at B2.

157. *A Terror-ble Ruling*, *supra* note 11 ("What happened here is that six misguided jurors—feeling understandable sympathy, perhaps, for the victims—bought into the contorted logic of fee-hungry lawyers who were targeting the agency's deep pockets."); *see also* Stevens v. N.Y. City Transit Auth., 797 N.Y.S.2d 542, 543 (App. Div. 2005) (modifying institution-heavy judgment as "against the weight of the credible evidence").

first time to assign liability for failure to protect against crime and then, to pare back that liability in light of the crime.[158]

In essence, over the last hundred years New York law has moved through three phases: (1) a time when proprietors had no liability to protect against criminal harms; (2) a more robust doctrine of liability for negligent failures of protection; and now (3) an uncertain future. Currently, although the trend towards protection against crime is still formally recognized, the doctrine is of uncertain value because of its intersection with a new set of legal doctrines—several liability and comparative apportionment. Overall then, the history is of expanded third-party liability and indirect contemporary limits.

A. Evolution of a Duty of Care

Throughout the first half of the 20th century, property owners, landlords, and many others generally had no tort liability for failing to take reasonable security measures to protect against crime.[159] This was true in New York as elsewhere.[160] Doctrinally, the no-liability policy was expressed by one of two mechanisms. In the first limitation, courts held that a private party had "no duty" to protect another against criminal attack by a third person.[161] Courts also frequently denied liability under a second doctrine—proximate cause.[162] Through this doctrine, even if a party failed to take appropriate precautions against foreseeable crime, the criminal was considered a superseding cause of the plaintiff's injury, which barred a successful liability action against the negligent party.[163] To be sure,

158. Of course, crime is not identical with the tort category—intentional tort. For ease of discussion, however, the terms are used interchangeably in this Article.

159. *See generally* Miriam J. Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299, 306–12 (1980) (discussing the origins and changes in the doctrine in the context of landlord-tenant cases).

160. *See* Sherman v. Concourse Realty Corp., 365 N.Y.S.2d 239, 243 (App. Div. 1975) (changing the rule in the context of residential landlords, but citing several earlier cases that had barred recovery).

161. Haines, *supra* note 159, at 306.

162. Saugerties Bank v. Del. & Hudson Co., 141 N.E. 904, 904 (N.Y. 1923); Smith v. ABC Realty Co., 336 N.Y.S.2d 104, 105 (App. Div. 1972) (holding that landlord's failure to repair the broken glass in tenant's window as requested was not the proximate cause of an intruder's entering her apartment through the window and raping her).

163. Abbott v. N.Y. Pub. Library, 32 N.Y.S.2d 963, 966 (App. Div. 1942) ("The act of a third person such as [the patron who committed the assault], not an employee or otherwise connected with defendant, committing an intentional tort or crime, which he concededly did, is ordinarily a

this superseding cause limitation was not absolute.[164] Creative exceptions to that rule have been cited as an early foundation for the later development of enabling torts.[165]

The early no-liability rule was justified on a number of bases. Many of these rationales were formalistic. According to Prosser, the rule "may have been due in part, to the idea, which once had some currency, that the law fulfilled its function if it provided *one* legally responsible defendant, and that it was superfluous, uneconomical and confusing to the issue to offer more."[166] In terms of policy, it was said that the landowner was not required to anticipate a crime by some third party.[167] Moreover, the idea of a broader duty to care for crime was criticized based on the uncertainty of that obligation, the cost of security precautions, and the public nature of the policing function.[168]

Yet, despite the general rule of no liability, there were exceptions. Exceptions were made, for example, when criminal attack was foreseeable and a special relationship existed between the defendant and either the attacker or crime victim.[169] An influential article in 1934 argued that as a part of these special relationships, a "duty is imposed upon the occupier of the land to use reasonable care to protect his business visitors not only from his own dangerous

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superseding cause of injury for which defendant would not be liable."); *see also* Schwartz v. Cohen, 119 N.Y.S.2d 124, 126 (Sup. Ct. 1953); Tirado v. Lubarsky, 268 N.Y.S.2d 54, 56 (Civ. Ct. 1966), *aff'd*, 276 N.Y.S.2d 128 (App. Div. 1966).

164. *See* Hines v. Garrett, 108 S.E. 690 (Va. 1921).

165. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 439 (1999).

166. PROSSER ET AL., *supra* note 21, § 42.

167. *Tirado*, 268 N.Y.S.2d at 56 (rejecting claim against landlord for failing to repair door lock from which burglar may have entered and stating that "[u]nder ordinary circumstances no one is chargeable with damages because he has not anticipated a crime by some third party").

168. Goldberg v. Hous. Auth., 186 A.2d 291, 298 (N.J. 1962) (rejecting claim that municipal housing authority had duty to provide police protection).

169. *See id.* at 301 (Jacobs, J., dissenting) (noting that courts have "repeatedly held that where there are special conditions from which the owner or operator of the premises should recognize and foresee an unreasonable risk or likelihood of harm or danger to invitees from criminal or wrongful acts of others, he must take reasonable precautions which may, under the circumstances, fairly and justly entail the employment of special guards or police," and citing many New York state cases in support of this contention); Ferraro v. Bd. of Educ., 212 N.Y.S.2d 615, 627–28 (App. Div. 1961) (emphasizing the special relationship between a school and students); *see also* Haines, *supra* note 159, at 307.

activity but from the conduct of third persons, whether other business visitors or trespassers."[170]

Relatively early on New York recognized a number of special relationships that gave rise to defendants' responsibility to use care to prevent crime. These relationships included care by defendants held to a high standard such as innkeepers, common carriers, and possessors of premises open to the public.[171] Some of New York's early exceptions to the no-liability rule were particularly expansive given the time. For example, in *Abbott v. New York Public Library*,[172] a 1942 case, a New York court held that a public library had a "duty of ordinary care and reasonable supervision so that . . . patrons would not be unreasonably exposed to dangers," which included the danger of being attacked by another patron known to be violent.[173]

Over the second half of the twentieth century courts in New York and elsewhere expanded obligations of care to prevent foreseeable criminal harms.[174] The liberalization occurred in part because courts began to see that doctrinal barriers were not essential bars to recovery. For example, the superseding cause rule was recognized as permitting exception when a library could foresee that a patron who had earlier stabbed one patron would later take a hatchet to another, absent a report by the library to police.[175] Similarly, the superseding cause rule could also be jettisoned when a landlord charged tenants in order to install a buzzer system to address rampant crime on the property but then failed to keep the

170. Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 903 (1934).

171. *See* Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210, 1214 (D.C.N.Y. 1976) (upholding liability of motel owner for negligence resulting in Connie Francis' being criminally assaulted in a motel and upholding a verdict of $2.5 million against the argument that the judgment was excessive); Amoruso v. N.Y. City Transit Auth., 207 N.Y.S.2d 855, 856 (App. Div. 1960) (holding that a common carrier had a "duty to take reasonable precautions for the protection and the safety of its passengers" that encompassed police protection against assault at a subway station that had experienced prior similar incidents of crime); Abbott v. N.Y. Pub. Library, 32 N.Y.S.2d 963, 968 (App. Div. 1942) (permitting recovery where a library had not reported to police a stabbing committed by a patron in its facility and the patron returned on another day and injured another patron with a hatchet).

172. 32 N.Y.S.2d 963.

173. *Id.* at 968.

174. DAN B. DOBBS, THE LAW OF TORTS § 324 (2000); Haines, *supra* note 159, at 300.

175. *See Abbott*, 32 N.Y.S.2d at 967–68.

system in good repair.[176] Although one context involved a premises owner and a public invitee and the other involved a landlord and tenant, the principle was the same. "'If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.'"[177]

In many instances, rationales for a duty of care in one context appeared to apply equally to others. For example, in the premises liability context, New York courts had long held that a landowner had a duty to use reasonable care to prevent trespassers from firing guns from the landowner's property.[178] Although those early shooters were apparently aiming at ducks when they shot the plaintiff, and so were negligent intervening actors, some decades later the court had no trouble expanding that doctrine to encompass both a duty to use care to prevent a drunken assault (in a dram shop action in which proximate cause was not required)[179] and a duty to use care to prevent intentional misconduct.[180] When New York courts recognized a landowner's duty to use reasonable care to protect against crime, it viewed that obligation as a "natural

176. Sherman v. Concourse Realty Corp., 365 N.Y.S.2d 239, 243 (Sup. Ct. 1975) ("The fact that the immediate cause of the tenant's injury was the act of a third party, i.e., a criminal intruder, does not prevent the landlord's negligence from being regarded in contemplation of law as the Proximate cause.").

177. *Id.* at 244 (citing RESTATEMENT (SECOND) OF TORTS: TORTIOUS OR CRIMINAL ACTS THE PROBABILITY OF WHICH MAKES ACTOR'S CONDUCT NEGLIGENT § 449 (1965)); *see also Abbott*, 32 N.Y.S.2d at 966–67.

178. DeRyss v. N.Y. Cent. R.R. Co., 9 N.E.2d 788, 790 (N.Y. 1937) ("Thus if the railroad authorities knew that persons were in the habit of shooting guns from its bridges or signal towers, ordinary caution would have required the company to take measures to stop it; such practice continued after knowledge of its existence and an opportunity to end it would make the company liable.").

179. *See* Bartkowiak v. St. Adalbert's Roman Catholic Church Soc'y, 340 N.Y.S.2d 137, 142 (App. Div. 1973) ("One in control or possession of the premises has the duty to control the conduct of those permitted or invited to enter upon the premises and such person in control is required to exercise it for the protection of others.").

180. *See* Nallan v. Helmsley Spear, Inc., 407 N.E.2d 451, 458 (N.Y. 1980); *see also* Moody v. Busy Corner Retail Meat Store, Inc., 387 N.Y.S.2d 154, 154 (App. Div. 1976) (ordering a jury trial against a store in which the owner knew that the employee had "a gun, without a holster, in his belt or pocket, yet did nothing about it"); Ward v. State, 366 N.Y.S.2d 800, 808 (Ct. Cl. 1975) (asserting that "a landowner has the affirmative duty of protecting those legally on his premises from the negligent and criminal acts of third persons," but denying recovery on other grounds).

corollary" to New York's longstanding duty to keep premises safe in other ways.[181]

This expansion of common law principles from one context to another was not exclusive to the development of New York law but applied to many nationally significant cases in the area.[182] As the D.C. Circuit wrote in one influential case that recognized a duty of reasonable care by residential landlords, there have been many other contexts in which a special relationship grounding a duty has been established and "[i]n all, the theory of liability is essentially the same."[183]

But while expanded liability seemed to relate back to earlier legal obligations with respect to safety and repair in a fairly natural way, it is perhaps no coincidence that the expansion to encompass protection against criminal harms took place, in New York and across the country, when it did—in the 1970s. At the conclusion of the 1960s, crime rates seemed to be exploding at a break-neck pace.[184] In a 1971 opinion which urged the legislature to allow a tenant-majority to require the landlord to install a buzzer communication system, a New York court opined, "the crime statistics remain increasingly frightening."[185] Citing several recent crime statistics, the court wrote that "[f]or the first six months of 1971 there was an increase in New York City of 30.1 percent in homicides, over a like period in 1970."[186] Given that reality, the court asserted that intercommunication systems "are as vitally necessary in [multiple-unit] buildings as hot and cold water, heat, light, power, elevator and telephone service."[187]

Minimizing risks of crime was visibly on state agendas, as was the idea that the police could not be "expected to do it all."[188] It was

181. *See Nallan*, 407 N.E.2d at 458 (citing cases from as early as 1915). Although, New York Housing Codes required the landlord to maintain premises in "good repair," N.Y. MULT. DWELL. LAW §§ 78, 302-a (McKinney 1929), repairs originally were not thought to include those needed for crime prevention. Tirado v. Lubarsky, 268 N.Y.S.2d 54, 56 (Civ. Ct. 1966).

182. *See, e.g.*, Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477, 482 (D.C. Cir. 1970).

183. *Id.* at 483.

184. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 5–6 (2007).

185. People v. Gruenberg, 324 N.Y.S.2d 372, 373 (Crim. Ct. 1971).

186. *Id.*

187. *Id.* at 373; *see also* Brownstein v. Edison, 425 N.Y.S.2d 773, 775 (Sup. Ct. 1980) (holding that building security is an essential issue of habitability).

188. *Kline*, 439 F.2d at 484.

not exactly that private parties were needed to augment failing public security forces but that they needed at least to be responsive to the risks of criminal harm that only they could address. As the New York courts noted, citing District of Columbia rulings, "where the landlord has notice of criminal occurrences 'in the portion of the premises exclusively within his control' which are likely to recur, '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.'"[189] The "inability of an individual tenant to control the security of common hallways, elevators, stairwells, and lobbies," in a commercial building was cited as a factor in expanding liability to commercial landlords as well.[190] As a practical matter, this type of third-party control of "factors that determine whether or to what extent others will be exposed to a danger" is one of two situations in which liability generally has been found. Another is "when the third party, by virtue of position, has superior information regarding a danger."[191] Liability in these contexts is designed to encourage safety precautions and reduce crime.[192]

By the early 1980s, many jurisdictions allowed negligent security actions in a broader range of cases.[193] Today, the rule of reasonable care to protect those on the premises is "usually generalized" to require "reasonable care even to protect against criminal acts."[194] Although jurisdictions vary, property owners are ordinarily expected to take reasonable care to protect against foreseeable crime, along with more mundane hazards.[195] Violence in business parking lots is one typical backdrop for negligent security suits.[196]

189. Sherman v. Concourse Realty Corp., 365 N.Y.S.2d 239, 245 (App. Div. 1975) (citing *Kline*, 439 F.2d at 481).

190. Doe v. Dominion Bank of Wash., N.A., 963 F.2d 1552, 1559 (D.C. Cir. 1992).

191. Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1422 (1999).

192. *Id.* at 1423 (citing language to this effect from many recent state court cases).

193. PROSSER ET AL., *supra* note 21, § 63 (discussing a growing number of courts that had imposed "duties of reasonable protection upon landlords").

194. DOBBS, *supra* note 174, § 324; PROSSER ET AL., *supra* note 21, § 42 (noting that the rule of the last human wrongdoer "is now of purely historical interest").

195. DOBBS, *supra* note 174, § 324.

196. *See, e.g.*, McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 904 (Tenn. 1996).

Even under an expanded system of potential liability for failure to protect against foreseeable crime, liability in any given case is far from certain. There are many current cases in which courts have denied recovery, for example, when a crime was not foreseeable or when reasonable care was taken.[197] However, liability for negligent security leading to criminal harm is still a broadly accepted theory of liability.

And yet, potent potential restrictions on plaintiff recoveries for this liability have emerged, not from direct but from indirect sources. Negligent security cases always involve at least two potential defendants—the party that negligently failed to take appropriate security precautions and the criminal himself. Consequently, the law governing multiple actors has particular significance to liability in this context. It is that law—the law of comparative apportionment—to which the article now turns.

B. Comparative Apportionment

Under traditional rules of joint and several liability for single indivisible harms, the question of proprietor liability for negligence leading to crime was resolved under a relatively simple process. The plaintiff could sue the criminal for the intentional harm and the proprietor for negligence that led to the attack. In the negligence action, the plaintiff would be required to prove all of the traditional elements of negligence against the proprietor but no more than that. Once the negligence claim was proven, the plaintiff was entitled to recover full compensatory damages. A plaintiff who pursued an action against both the proprietor and the criminal was restricted to one satisfaction of damages. In terms of contribution, if both the criminal and the negligent tortfeasor had money, the criminal, as the active tortfeasor, would be required to indemnify the proprietor, as the passive one.

This approach still prevails in most states, either because the state retains joint and several liability for multiple actors who cause single indivisible injuries or because the state's several liability system does not extend to intentional torts.[198] In fact, this approach

197. *See, e.g.*, Tyson v. Danbury Mall Ltd. P'ship, 811 N.Y.S.2d 105, 106 (App. Div. 2006); Petra v. Saci, Inc., 796 N.Y.S.2d 673, 674 (App. Div. 2005).

198. Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 372–76, 384–86 (2003).

was in force in New York at the time that the *1993 World Trade Center Bombing Litigation* was filed.[199] The law was not definitively overruled in New York until the litigation had been pending for almost a full decade.[200]

Had this more traditional approach to apportionment involving negligent and intentional torts still been in force in New York when the *1993 World Trade Center Litigation* was decided, the jury's verdict would have been far different. Plaintiffs still would have had to establish that the Port Authority failed to use reasonable care to protect against a foreseeable terrorist attack and that the Port Authority's negligence was an actual and proximate cause of the plaintiffs' injuries. Once established, however, the jury simply would have been asked to assign compensatory damages. The Port Authority's responsibility would have been assigned directly, rather than in comparison with the responsibility of any other party (although any terrorist assets would be fair game in an indemnity suit brought by the Port Authority). Thus the question of the Port Authority's responsibility relative to that of the terrorists would not have been raised and no percentages would have been assigned.[201] The Port Authority's liability might have made headlines, and even raised controversy, but the tenor of the public debate would likely have lacked the bewildered and furious tones.

What makes the actual verdict in the *1993 World Trade Center Bombing* case so different than the judgment plaintiffs would have obtained under the prior law, is the comparative responsibility calculation that the jury was required to make—assigning percentages of responsibility between the Port Authority and the terrorists. This decidedly new approach has its origin in two current legal trends—the trend of states to abolish joint and several liability as a part of tort reform measures and the more recent trend of courts to expand comparative apportionment systems to intentional torts.

The move to abolish joint and several liability in the 1980s was a legal change that occurred as a part of tort-reform agendas

199. N.Y. C.P.L.R. § 1601 (McKinney 2008).

200. *See* Chianese v. Meier, 774 N.E.2d 722, 725–26 (N.Y. 2002).

201. Of course, there is a ranking of responsibility in the traditional system to the extent the Port Authority could seek full indemnity from the terrorists.

advanced by particular interest groups in state legislatures.[202] A 1986 New York Act stated t that when a personal injury case involved two or more tortfeasors, if a tortfeasor was found to have "fifty percent or less of the total liability assigned to all persons liable," the tortfeasor would be liable only for that percentage of the non-economic loss.[203] A second section of the Act set forth a list of situations in which that liability limitation would not apply.[204]

Unlike legislative moves to reduce the scope of joint and several liability, the move to incorporate intentional torts into comparative apportionment systems has been a more complex process. At present, only a minority of states include intentional torts in percentage apportionment comparisons.[205] That minority did not exist until the last decade, however, and may be growing. For the most part, the trend to include intentional torts in comparative apportionment (previously referred to as comparative fault) has been propelled by courts rather than legislatures, although a few legislatures writing statutes after the year 2000 have expressly addressed the issue.[206]

In terms of practice, when courts include intentional torts within comparative apportionment, juries are required to apportion responsibility among all potentially responsible actors, including known (and in some jurisdictions unknown) criminals.[207] Under this approach, the jury is asked to apportion percentages of responsibility among various parties, including criminals, negligent parties, and crime victims. The jury is informed that the assigned percentages, when added, must equal 100 percent.

Although inclusion of intentional torts in comparative apportionment systems is not a direct negation of a proprietor's duty to use care to prevent foreseeable harm, it is a powerful but indirect way to diminish that responsibility.[208] When intentional torts were

202. Joseph Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 654–55 (1990); Bublick, *supra* note 198, at 365 n.29.

203. N.Y. C.P.L.R. § 1601 (McKinney 2008).

204. *Id.* § 1602.

205. Bublick, *supra* note 198, at 367.

206. *Id.* at 378 n.87 (listing state statutes that expressly include intentional torts).

207. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 (2000).

208. *See, e.g.*, Stevens v. N.Y. City Transit Auth., 797 N.Y.S.2d 542, 543 (App. Div. 2005) (holding that negligent train operator could not be responsible for more than 20 percent of the plaintiff's damages).

not included in apportionment, the negligent party could be called on to pay full compensatory damages to an innocent victim. However, once the jury is asked to apportion fault between the intentional and negligent party, the negligent party may only be called on to pay a fraction of those damages. If the jury assigns the lion's share of the responsibility to the criminal, or the court requires that result, the negligent party, even if independently judged to have significant fault, need pay only a tiny percentage of the damages that its negligence caused.[209] Thus, in effect if not in name, the apportionment system can function as the equivalent of a no-duty or slight-duty rule (unless courts compensate for the liability reductions in individual cases by substantially increasing the number of cases in which they permit recovery against negligent parties).

In this case, the jury was instructed to make assignments of responsibility that totaled 100 percent. The jury did so. The percentages they entered—68 percent Port Authority and 32 percent terrorists—would preserve a more robust duty of the Port Authority to use care to prevent foreseeable criminal acts. In fact, in light of a New York law that preserves joint and several liability for defendants assigned more than 50 percent of the total responsibility,[210] the jury's verdict would allow the plaintiffs to collect not just 68 percent of their compensatory damages from the Port Authority but full compensatory damages—exactly the same position plaintiffs would have been in had New York apportionment law not been extended to include intentional torts. Furthermore, although assigned 32 percent of the liability, the terrorists would still be liable for full compensatory and punitive damages under a special section of the New York statute that applies to intentional tortfeasors.[211]

Appeals in the case will determine whether jurors in New York can still assign liability awards up to the full amount of compensatory damages, or whether the range of compensation jurors can grant victims of negligence leading to criminal harm has shrunk to less than 50 percent of compensatory damages—a substantial trek

209. *See, e.g., id.* at 544 (holding that apportionment of 60 percent of the liability to criminal was too little in light of "the heinous crime" and setting a new trial on apportionment unless the plaintiff would agree to collect only 20 percent of her damages from the third party).

210. N.Y. C.P.L.R. § 1601 (McKinney 2008).

211. *Id.* § 1602(5), (7).

back from the expanded duty of care to prevent criminal harm that had, until recently, prevailed.

III. REJECTING COMPARATIVE CALCULATIONS IN THE CASE OF INTENTIONAL TORTS: THE BETTER REASONED VIEW

Perhaps one of the most striking ironies of the shift to include intentional torts in New York's comparative apportionment system is that it is not clear whether anyone in New York—the courts, the legislature, or the people—actually wanted this system.

A. New York's (Unintended) Shift to Include Intentional Torts in Comparative Apportionment.

The history of New York's comparative apportionment law is instructive. In 1986 the New York legislature enacted a law, known as the "Toxic Torts Bill," that in part limited joint and several liability.[212] However, the law explicitly stated that "[t]he limitations set forth in this article shall . . . not apply to actions requiring proof of intent."[213] When questions arose about whether the statute therefore precluded a negligent tortfeasor from seeking to apportion responsibility with an intentional tortfeasor, Appellate Division judges within the same department were split and announced their "'inability to reconcile their views.'"[214] Ultimately, in 2002, the New York Court of Appeals broke the tie. The Court of Appeals held that the legislative restriction on "'actions requiring proof of intent'" did not preclude apportionment between negligent and intentional tortfeasor defendants.[215] However, the court noted that there was "little legislative history" to suggest the legislature's preference with respect to this question.[216] In fact, having crafted the law in the mid-1980s, when no state had ever compared defendants' negligent and

212. *Id.* § 1601; Siler v. 146 Montague Assocs., 652 N.Y.S.2d 315, 319 (App. Div. 1997).

213. N.Y. C.P.L.R. § 1602.

214. Chianese v. Meier, 774 N.E.2d 722, 725 (N.Y. 2002) (comparing an earlier New York Appellate Court decision in *Chianese v. Meier*, 729 N.Y.S.2d 460 (App. Div. 2001), precluding apportionment between negligent and intentional tortfeasor defendants, to two other appellate court decisions permitting such apportionment). *See* Concepcion v. N.Y. City Health & Hosps. Corp., 729 N.Y.S.2d 478 (App. Div. 2001); *see also* Roseboro v. N.Y. City Transit Auth., 729 N.Y.S.2d 472 (App. Div. 2001).

215. *Chianese*, 774 N.E.2d at 724 (quoting N.Y. Civil Practice Law § 1602 (Consol. 2008).

216. *Id.* at 725–26.

intentional torts by percentages, and virtually no one had raised that possibility, the legislature most likely had not even thought of the issue.[217]

Yet while the New York Court of Appeals is the institution that allowed the inclusion of intentional torts within the state's comparative apportionment system, it is not fair to suggest that the doctrine was a court-embraced plan either. The court did not purport to decide the issue based on its own ideal policy choice. Instead the court viewed its role in the controversy as an effort to "implement the will of the Legislature as we see it."[218] Perhaps reflecting its skepticism about whether it could see that will one way or another, the court noted that "the Legislature has the last word as to what it intended."[219] From its view, the court wrote of the split opinions in the lower court: "we recognize that there is cogency and anomaly in both positions."[220]

In terms of public preference, there is no evidence that there was any testimony about the question of comparing intentional and negligent fault at the time the legislation was passed. This absence of evidence exists despite the Court of Appeals' observation that "the record by this time has surely been scoured."[221]

Analysis of New York's shift to include intentional torts within its comparative apportionment system thus begins with the unusual observation that the proposition seems to have become law without the express policy support of the people, the legislature, or the courts.

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217. Cases apportioning defendants' intentional and negligent fault generally arose in the late 1990s. For some early cases comparing defendants' intentional and negligent torts, see, for example, *Scott v. County of Los Angeles*, 32 Cal. Rptr. 2d 643, 647 (Ct. App. 1994), *Blazovic v. Andrich*, 590 A.2d 222, 223 (N.J. 1991), and *Reichert v. Atler*, 875 P.2d 379, 380 (N.M. 1994). There was some earlier discussion of whether a plaintiff's comparative fault should be a valid defense to a defendant's intentional tort. One of the earliest articles on that subject was Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984). Academic discussion of comparative apportionment between defendants arose somewhat later. *See* William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law*, 37 U. KAN. L. REV. 1005, 1049 (1989).

218. *Chianese*, 774 N.E.2d at 725.

219. *Id.*

220. *Id.*

221. *Id.* at 726.

B. Incorporating Intentional Torts Into Comparative Apportionment: Undesirable Effects and Unsatisfactory Justifications.

Given the lack of stated policy reasons for the New York rule's enactment, this section will instead address: (1) the potential effects of including intentional torts in comparative apportionment; (2) the desirability of those effects; and (3) the misguided justifications commonly used to support the rule.[222] To begin, although apportionment of intentional and negligent torts is often discussed in monolithic terms, apportionment issues involving intentional torts can arise in at least three distinct contexts. Comparisons frequently involve comparing the responsibility of a negligent defendant, like the Port Authority, with that of an intentional tortfeasor defendant, such as the terrorists. However, apportionment of intentional and negligent torts can also encompass comparisons of responsibility between an intentional tortfeasor defendant and a negligent plaintiff—comparing the terrorists' responsibility with the alleged victims' responsibility. Finally, comparisons can involve claims brought by an intentional tortfeasor plaintiff like the terrorists against a negligent defendant, such as the Port Authority. To date, comparison of intentional and negligent torts, when permitted, is most frequently accepted in the first context, occasionally accepted in the second, and rarely accepted in the third.[223]

Across these different contexts there are six *potential* effects of a decision to compare intentional and negligent fault by percentages. The first potential effect is that intentional tortfeasors, like terrorists, might be able to reduce payouts to victims based on the assigned responsibility share of the negligent tortfeasor (in our example, the Port Authority). As such, the terrorists might argue that they should not be called on to pay the percentage of responsibility assigned to the Port Authority.

Second, although not at issue in the *1993 World Trade Center Bombing* case, in many cases victim fault can be raised as a part of comparative apportionment assignments.[224] In the *1993 World Trade*

222. Bublick, *supra* note 198, at 386–420 (examining at greater length state court misconceptions about apportionment as well as its real effects).

223. *Id.* at 367–69.

224. *See* Bublick, *supra* note 191, at 1415.

Center Bombing case, suppose defendants claimed that a person who had been trampled in the crush of people trying to get through the stairwell in the dark, contributed to her own injury by not taking a less-populated route out of the building. If a jury had assigned a percentage of responsibility to that victim, the terrorists might be able to reduce their payouts to the victim based on the percentage of responsibility assigned to her.

A third potential effect of comparisons that include intentional torts is that the terrorists might be able to reduce their share of indemnity and contribution with respect to a negligent defendant, like the Port Authority. Under apportionment, the intentional tortfeasor does not indemnify the negligent party for 100 percent of the judgment. Instead, even if intentional-tortfeasor terrorists had ample resources, they might not be able to be called upon to pay the Port Authority's share of the judgment.

A fourth potential effect of comparisons is that terrorists might be permitted to file suit as plaintiffs against the negligent party. In this case, terrorists could sue the Port Authority for its lack of care.

A fifth potential effect of comparisons is more intangible—comparisons of intentional and negligent actions change apportionment into a system that is "impossible in theory," because the comparisons require jurors to commensurate incommensurable misconduct.[225] Without a meaningful standard with which to compare these incommensurables, jury discretion is increased. Moreover, appellate review becomes strained. The expressive value of jury verdicts becomes opaque if not disorienting to the public—what share of the responsibility belongs to the terrorists and what share belongs to the victim?

Finally, the sixth potential effect of including intentional torts in comparative apportionment is that a negligent actor like the Port Authority might be able to reduce payouts to victims based on the percentage of responsibility apportioned to the intentional tortfeasors—here, the terrorists. With pure several liability, an entity like the Port Authority could reduce its payment for compensatory damages by the 32 percent assigned to the terrorists. With pure several liability in a case in which the jury assigned 90 percent of the

225. Geoffrey C. Hazard, Jr., *Foreward*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB., at xii–xiii (Proposed Final Draft (Revised) 1999).

responsibility to the criminals, the negligent actor might only have to pay 10 percent of the compensatory damages for its negligence, which was an actual cause of the victim's full harm.

At the outset, to identify the six potential effects of including intentional torts within apportionment is not to say that all of these effects will actually be realized in every case in every state. While many states have yet to craft provisions eliminating many of these effects, New York law already eliminates at least a few potential effects of the comparison. For example, New York law specifically retains joint and several liability for people who "act with reckless disregard of the safety of others," in order to prevent parties like the terrorists from reducing their liability to victims based on the Port Authority's fault.[226] Presumably the intentional tort exclusion would apply here as well.[227] In addition, New York currently appears to bar intentional tortfeasors, such as the terrorists, from taking advantage of victim fault assignments (though not from assigning those percentages in the first place).[228] Moreover, New York has a modified version of several liability, so percentage assignments to defendants might not have a direct impact on reduction in payment of damages.[229] The number of potential effects that are translated into actual effects may vary from jurisdiction to jurisdiction.

Although analyzed at greater length elsewhere, it is difficult to imagine that state legislatures have a robust preference for the first five of the six potential effects of including intentional torts in apportionment systems.[230] While there may be marginal circumstances in which a state would prefer apportionment to an all or nothing judgment in the context of the first five potential effects,[231] states that include intentional torts in comparative apportionment

226. N.Y. C.P.L.R. § 1602(5), (7) (Mckinney 2008).

227. *Id.*

228. *See* City of New York v. Corwen, 565 N.Y.S.2d 457, 459 (App. Div. 1990) (holding that comparative negligence was inapplicable to complaint alleging bribery), *overruled on other grounds*; City of New York v. Keene Corp., 756 N.Y.S.2d 536 (App. Div. 2003).

229. N.Y. C.P.L.R. § 1601 (McKinney 2008).

230. *See* Bublick, *supra* note 198, at 386–92.

231. *Id.* at 367–69 (discussing low-culpability intentional tortfeasors such as children); *see also* Alami v. Volkswagen of Am., Inc., 766 N.E.2d 574 (N.Y. 2002) (holding that motorist's legal intoxication at time of accident did not operate on grounds of public policy to bar administrator's crashworthiness claim).

have moved to quash several of these effects either through judicial decisions[232] or subsequent legislation.[233]

Consequently, in terms of desired benefits of a shift to include intentional torts in comparative apportionment, the discussion must focus primarily on the last effect—restricting the liability incurred by negligent actors like the Port Authority. There are two main issues surrounding the third party liability reductions that apportionment effectuates. First, are liability reductions substantively desirable, and second, is apportionment the best mechanism by which to permit those reductions?

It is beyond the scope of this Article to comprehensively address whether liability reductions might be substantively desirable, but a few preliminary thoughts are in order. Whether third parties should be fully liable for failure to protect against crime is a complex question. Asking this question in a broader frame, "[w]hen should we impose liability on parties who, although not the primary authors or beneficiaries of misconduct, might nonetheless be able to prevent it," Professor Reiner Kraackman formulated an influential theory of "gatekeeper" liability.[234] According to the theory, successful prevention of harm through gatekeepers is preferable when the following factors are present: "(1) serious misconduct that practical penalties cannot deter; (2) missing or inadequate private gatekeeping incentives; (3) gatekeepers who can and will prevent misconduct reliably; and (4) gatekeepers whom legal rules can induce to detect misconduct at reasonable cost."[235] Certainly a case for gatekeeper liability can be made in the context of precautions against crime. In addition, it can be persuasively argued that only full liability of third parties will provide optimal deterrence against crime.[236]

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232. *See, e.g.*, Williams v. Thude, 934 P.2d 1349, 1352 (Ariz. 1997) (upholding differential treatment that disfavored willful and wanton plaintiffs).

233. *See* LA. CIV. CODE ANN. art. 2323(c) (2008) ("[I]f a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.").

234. Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON & ORG. 53, 53 (1986).

235. *Id.* at 61.

236. Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 833 (1989) ("Except where one actor's damage does not affect the extent of damage caused by another, only joint and several liability rules produce the efficient result.").

Indeed, after expansion of the legal obligation of private entities to use care to prevent crime in the 1970s and 1980s, crime rates in the 1990s showed "a very substantial and nationwide drop, across all categories of serious crimes, steadily progressing throughout the decade."[237] Aggregate crime in the seven offenses tracked by the FBI declined between 23 percent and 44 percent.[238] Crime reduction in New York City, in particular, led many of these declines.[239] While no causation arrows can be drawn, if changes in public policing get credit for a significant portion of the crime declines,[240] there is no reason that help from private policing measures might not ultimately deserve joint billing.[241] If so, reductions in incentives for private policing may be unwise.

As a local policy preference, the New York legislature has never said that it wanted crime victims to recover less than full compensatory damages from third parties whose negligence led to the harm. Clearly, the jury in the *1993 World Trade Center Bombing* case wanted the Port Authority to pay substantial damages to the victims of its lapses—likely one of the central messages of its verdict.[242] If reducing payouts to crime victims is not somewhere on the New York legislative agenda, including intentional torts in an apportionment system would seem a particularly poor policy choice.

But even if a state seeks a partial-pay solution in accord with contemporary norms of splitting,[243] comparative apportionment between intentional and negligent tortfeasors is a poor mechanism by which to arrive at compensatory-damage reductions. Instead, states

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237. ZIMRING, *supra* note 184, at 3.

238. *Id.* at 7.

239. *Id.* at 13–14, 135–68.

240. *Id.* at 151 ("The only inference that can be drawn [is] that there is strong circumstantial evidence that compound major changes in the quality of police and the tactics of policing had a major impact on crime.").

241. *Cf.* Frank A. Sloan et al., *Liability, Risk Perceptions, and Precautions at Bars*, 43 J.L. & ECON. 473, 497 (2000) (concluding that bar owners' and managers' increased perception of the probability of a tort suit "increased the bar's level of precaution in serving obviously intoxicated adults" and its level of monitoring "to avoid serving alcoholic beverages to minors," and noting that "implementation of dramshop liability lowers motor vehicle fatality rates as well as fatality rates for other alcohol-related causes").

242. *In re* World Trade Center Bombing Litigation, No. 600000/94 (N.Y. Mar. 2, 2007) at 30 (noting that plaintiffs' attorneys could argue for a greater than 51 percent judgment without telling the jury the legal ramifications of that judgment).

243. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868–72 (1996) (noting a change in tort compensation from "all-or-nothing to splitting").

would be far better served to allow reductions in negligent defendant liability directly and with a greater focus on the negligent party's own misconduct, rather than through apportionment and a negative inverse correlation with another party's misdeeds, which may or may not be warranted.[244]

A system that would allow juries to make direct assignments of compensatory damages at less than full compensation would permit partial payouts to victims without the need for juries to engage in troublesome responsibility comparisons. To facilitate consistency, a guidelines system akin to the criminal sentencing guidelines could be enacted.[245] Other direct partial-pay options might be imagined. For example, if the concern about Port Authority liability is a concern for the public fisc, state law might hold the Port Authority liable for half of its liabilities rather than for all or nothing. Statutes that do not require the Port Authority to pay back-interest on the judgment may effectively achieve such a split in a case like the present one in which litigation has already dragged on for fifteen years.[246]

Without salutary effects of including intentional torts in several liability apportionment, it is difficult to see why a number of state courts have selected this option. Moreover, common rationales for doing so turn out to be red herrings. Common but deceptive rationales include: that each party should only be held liable for the harm it "caused," that each party should only be liable for its "fair share" of the fault, or that coherence problems would arise if intentional torts were excluded from comparative apportionment, but not if they were included.[247]

The *1993 World Trade Center Bombing Litigation* is a useful vehicle for dismantling all three of these rationales. First, in the *1993 World Trade Center Bombing* case, both of the defendants' misconduct was an actual cause of the victims' full indivisible harm. But for the terrorists driving an explosives-laden truck into the garage, the victims in this litigation would not have been harmed. Similarly, but for the Port Authority's decision to keep public

244. Bublick, *supra* note 198, at 398–402.

245. *Id.* at 436.

246. *NPR Day to Day*, 2008 WLNR 3774061 (NPR radio broadcast Feb. 26, 2008) (noting plaintiffs lawyer's calculation that "under New York State law, interest runs at nine percent a year, and nine percent times 15 is more than 100 percent," all of which interest is uncollectible).

247. Chianese v. Meier, 774 N.E.2d 722, 726 (N.Y. 2002).

parking open in spite of expert advice to the contrary, the victims in this litigation would not have been injured. Indeed, had the jury found that either the terrorists or the Port Authority were not an actual cause of the plaintiffs' full harm, that party would not have been liable at all. Accordingly, the apportionment stage of the case would never have been reached. In this case, as in most negligent security cases, the negligent defendants' and the criminal defendants' conduct were both necessary but not sufficient causes of the victims' full indivisible harm.[248]

Equally unwarranted is the argument that under comparative fault, each party is liable only for its "fair share" of the fault. Fairness is not capable of being ascertained as an essential percentage allocation of relative fault; it is instead a normative question. What has been seen as a fair share for a negligent defendant to pay for carelessness leading to a crime has varied over time. With the no-duty rule of the early and mid-1900s, what was thought to be a fair share for the defendant to pay was nothing.[249] In the 1970s and 1980s, with the expanded view of premises owners' duty of reasonable care along with joint and several liability, full compensatory damages were thought to be a fair share for the defendants to pay.[250] More recently, New York courts have thought that some sort of partial recovery based on apportionment would be fair.[251] These partial recoveries might be calculated in any number of ways. Other types of solutions may later be developed. But there is no one true "fair share" for the defendant's payment.

One need look no further than an argument that the assignment of 32 percent responsibility to the terrorist means that the terrorist's "fair share" of the judgment would be to pay only 32 percent of victim damages. Even if the terrorists had been found to have one percent of the relative responsibility, a fair share for the terrorists to pay could be 100 percent of compensatory damages and then some (for punitive damages as well).

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248. Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295 (2008) (discussing causation under the necessary element of a sufficient set ("NESS") test).

249. Smith v. ABC Realty Co., 336 N.Y.S.2d 104, 105 (Sup. Ct. 1972).

250. Nallan v. Helmsley Spear, Inc., 407 N.E.2d 451, 460 (N.Y. 1980).

251. Roseboro v. N.Y. City Transit Auth., 729 N.Y.S.2d 472, 474 (App. Div. 2001).

A jury can calculate what it thinks would be fair damages for the defendant to pay to the plaintiff in light of the defendant's negligence. However, this fair amount for one defendant to pay may or may not have a direct relationship with other defendants' relative fault.

Criminal sentencing provides a useful example. In the criminal context, the court did not tell jurors in the bombing cases against the nineteen terrorist defendants that the jurors needed to decide each defendant's percentage of responsibility for the overall harm from the bombing with respect to the others. Neither did it assign shares of relative defendant fault or responsibility and multiply those percentages by a total number of years of prison time appropriate to a bombing of this magnitude—100, 500, 1000, 10,000. The jurors and judges were not told that if they gave one defendant a 240-year prison term they would only have 760 years of prison terms left to apportion among the other eighteen defendants. Instead, each criminal sentence was assigned independently based on what seemed fair in that case—not in any necessary relationship to the other defendants' sentences.[252] In fact, prison sentences of defendants who had very different roles in the bombing were identical. That a defendant called the "mastermind" of the operation had greater participation and culpability than another defendant considered "the driver" had precisely no effect on the prison term of either.[253] This was true even though relative defendant comparisons in the criminal context would seem more appropriate than comparisons in the tort context given the similar nature of the defendants' wrongdoing and the similar purposes of imposing criminal sanctions on them.

Taking the example of the criminal law, courts should allow jurors to assign responsibility based on the individual's own fault, not that party's fault relative to a codefendant. This direct assignment of responsibility has been a mainstay of tort law, no less

252. Tort scenarios might seem distinguishable on the theory that compensatory damages are a single fixed sum, but there is considerable flexibility in compensatory damage awards. *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. REV. 391 (2005) (noting malleability of various components of damages, which often are considered categorically distinct, such that imposition of caps on noneconomic damages had no effect on overall compensatory damages). Compensatory damage awards for an inherently unquantifiable loss like a death or injury may well vary based on the defendant called upon to pay them.

253. *See* United States v. Yousef, 327 F.3d 56, 164 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

than that of criminal law. "[A] defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior does not become 'partial' or 'minimal' simply because other defendants' tortious behavior was much worse, individually or in the aggregate."[254] This same idea was aptly stated by New York's intermediate court. "Neither the magnitude of a defendant's negligence, nor its moral blameworthiness, nor the closeness of its causal relationship to the harm necessarily diminishes to subordinate significance in attribution of fault by reason of the circumstance that the harm was concurrently attributable to intentional conduct, even when the intentional conduct is particularly heinous. To the contrary, as this case so vividly illustrates, the blameworthiness of negligence may actually be increased by the heinousness of the wrongdoing it directly and foreseeably facilitates."[255]

Finally, coherence problems remain whether intentional torts are included or excluded from a comparative apportionment system because several liability is based on the false premise that responsibility is a neatly divisible zero-sum amount.[256] By way of example, imagine a case in which a landowner negligently fails to repair the building's front door. The door, which is badly warped, cannot be easily shut and often remains open. Tenants have notified the landlord that they want the door repaired in light of two concerns. First, the open door has allowed access to trespassers, including some particularly menacing trespassers. Second, the open door has allowed snow to accumulate in the entryway, making the floor slippery.

Now imagine three situations in which injury occurs. In the first scenario, as anticipated by the tenants, snow accumulates inside the open doorway, and the plaintiff trips on it and breaks her ankle. In the second scenario, a delivery person placing a package outside carelessly knocks a heap of snow inside the doorway and decides not to clean it up given his rush. The plaintiff trips and suffers a broken ankle. In the third scenario, a criminal who entered through the open

254. Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEMPHIS ST. U. L. REV. 45, 59 (1992).

255. Nash v. Port Auth. of N.Y. & N.J., 856 N.Y.S.2d 583, 595 (App. Div. 2008.

256. Bublick, *supra* note 198, at 398–402 (describing at length coherence problems in a several liability system).

door is waiting inside the doorway and chases the plaintiff who trips, resulting again in an ankle break.

In each of the three cases above, the landowner has committed the same negligent act—failing to repair the doorway—and that act has resulted in same harm to the plaintiff—tripping and breaking an ankle. However, in the first case, there is no other defendant involved in the case and therefore no apportionment issue so the defendant will be responsible for full compensatory damages. In the second case, the landlord's responsibility will be apportioned against that of the delivery person—another negligent actor. If the jury finds that the responsibility of the two is roughly equal, the landlord will pay 50 percent of the compensatory damage judgment (or more if joint and several liability kicks in at 50 percent). However, in the third case, the landlord's responsibility will be apportioned with that of a more nefarious actor—the criminal. If the jury finds that the responsibility of the intentional actor is greater than the responsibility of the landowner, perhaps far greater, the landlord need only pay a small share of the same judgment—say 20 percent. Accordingly, even though the landlord has committed the same negligent act and caused the same harm to the plaintiff, the landlord has a lesser percentage of liability for exposing the plaintiff to risks of criminal rather than negligent or non-negligent harm—a different form of incoherence.

Accepting that coherence problems persist in any apportionment system that has a zero-sum apportionment mechanism with or without intentional torts, and rejecting misleading arguments that apportionment requires defendants to pay for only their fair share of the causation or fault, does not mean that courts must either include or exclude intentional torts in apportionment. It simply means that when deciding whether and to what extent intentional torts should be factored into the comparative equation, courts cannot hide behind formalistic reasoning. Instead, they must look at the desirability of the previously addressed effects of the apportionment of intentional torts. When those effects are examined, courts should decline to add intentional torts to apportionment calculations.

C. Limiting the Impact of Apportionment with IntentionalTorts: Adopting a Very Duty Rule or Reapportioning Uncollectible Shares

Even when courts have expanded comparative apportionment systems to include intentional torts, apportionment in some types of cases, such as the *1993 World Trade Center Bombing Litigation*, can and should be avoided. On this point, all major national legal authorities agree.

The American Law Institute's *Restatement (Third) of Torts: Apportionment of Liability* has provided the most in-depth consideration of the issue of intentional-negligent tortfeasor responsibility comparisons in the negligent security context. Despite controversy about the complexity of its work, the *Restatement* took great pains to divide its apportionment rules into five different tracks of liability to mirror the many different state systems enacted by legislatures throughout the country. While different rules pertain to each of these different tracks, a few rules applyacross all five tracks. Specifically, across all of these tracks, the *Restatement* recommended retention of joint and several liability for the category of cases in which a person "is liable to another based on a failure to protect the other from the specific risk of an intentional tort."[257] Professor Dobbs, in his leading treatise, *The Law of Torts*, echoes his agreement with this view when he counsels that perhaps "intentional torts should be weighed on the comparative negligence scale in some case patterns but not others."[258] In particular, he notes that weighing is inappropriate in cases in which the defendant negligently risks another's intentional harm.[259] Also in accord is another major national authority—the Uniform Apportionment of Tort Responsibility Act authored by the National Commissioners on Uniform State Laws. The Uniform Apportionment of Tort Responsibility Act includes a provision that states: "If a party is adjudged liable for failing to prevent another party from intentionally causing personal injury to, or harm to the property of, the claimant, the court shall enter judgment jointly and severally against the parties for their combined shares of responsibility."[260]

257. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 14 (2000).

258. DOBBS, *supra* note 174, §§ 206.

259. *Id.* at § 206.

260. UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 6(2) (2002).

The rule articulated by these many contemporary authorities stems from teachings that have been accepted for many generations. Although written in 1984, before apportionment of intentional and negligent torts was at issue, the Prosser and Keeton treatise took a similar position with respect to the very duty rule, which was then important to the doctrine of proximate cause. "Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which the defendant has subjected the plaintiff has indeed come to pass."[261] Since at least the 1940s, New York also recognized this rule.[262] As the court wrote in a premises liability case of that time:

> [t]he happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability, cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk, from which it was the purpose of the duty to protect him, resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.[263]

The logic of this rule is as true today as it was many years ago:apportioning responsibility between one who enables and one who perpetrates a risk of intentional harm risks nullifying or diminishing the original duty. This is particularly true if courts require intentional tortfeasors to be assigned more than 50 percent of the total responsibility, correspondingly reducing the negligent party's responsibility by more than half.

In this case, New York's intermediate court recognized the significance of the fact that the intentional tort, "to an unseemly degree flowed from the negligence and was determined by it."[264] Although not using the very duty terminology or negating the intentional-negligent fault comparison directly, the court's focus on defendant negligence that occasions the intentional tort looks like a variant of the traditional "very duty" reasoning.

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261. PROSSER ET AL., *supra* note 21, § 44.

262. Abbott v. N.Y. Pub. Library, 32 N.Y.S.2d 963, 966 (App. Div. 1942).

263. *Id.* (citing RESTATEMENT (FIRST) OF THE LAW OF TORTS § 449 cmt. a (1934)).

264. Nash v. Port Auth. of N.Y. & N.J., 856 N.Y.S.2d 583, 596 (App. Div. 2008).

IV. UPHOLDING INSTITUTION-HEAVY JUDGMENTS: THE BEST OF A BAD WORLD

If a state like New York adopts comparative apportionment and includes intentional torts in the comparison without exception, courts have no choice but to address the issue of how comparisons of intentional and negligent torts can be made.[265] The former director of the American Law Institute acknowledged that comparisons "between an actor charged with negligence and an actor charged with intentional misconduct" are "impossible in theory," but nevertheless asserted that they were "feasible in practice."[266] However, the difficulty of a doctrine that is "impossible in theory" is not that it cannot be put into practice, but that it cannot be put into a theoretically sound and consistent practice. Enter the realm of the second best.

A few sources of authority have already examined judicial review of intentional/negligent responsibility comparisons. The most noted of these are the *Restatement (Third) of Apportionment*,[267] the Uniform Apportionment of Responsibility Act, and the many state courts that have reviewed inverse judgments.

As discussed in Part III, the *Restatement* views comparisons of criminal misconduct with negligent failure to protect against that conduct as unwise. Accordingly, the *Restatement* does not address appropriate apportionment standards in this context. In other contexts, the *Restatement* suggests examining two key factors in order to assign shares of responsibility. The first factor involves "the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct."[268] The second factor is "the strength of the causal connection between the person's risk creating conduct and the harm."[269]

With respect to the first factor, both defendants in the *1993 World Trade Center Bombing Litigation* were aware of and to some

265. Of course, there has always been an implicit apportionment of responsibility even without formal apportionment systems.

266. Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY at xii–xiii (Proposed Final Draft (Revised) 1999).

267. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 (2000).

268. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 (2000).

269. *Id.*

extent indifferent to the risks. The terrorists knew that injuries were likely and actively sought that result.[270] For example, the terrorists added metal powders and other chemicals to enhance the bomb's destructive impact.[271] In addition, they set the bomb to explode in the middle of a busy workday.[272] Evidence suggests that they hoped not only for the risks and injuries they caused but also for the building itself to come down.[273]

Testimony also suggests that the Port Authority was aware of the risks, not only of a truck bomb detonating in the parking garage, but also of the broader devastation that a truck bomb would cause to critical infrastructure systems. Perhaps Port Authority indifference is also reflected in its willingness to accept major risk of physical harm in return for fairly inconsequential benefits. Although the appellate records reveal little data about the risks and benefits that factored into the Port Authority's decision, preserving 400 public parking spaces for a building with 20,000 employees and approximately 80,000 visitors or commuters each day seems like a relatively modest good, particularly when other revenue-generating uses of the space were feasible.[274]

Although both parties were aware of, and to some extent indifferent to risks, their actions were not equally reprehensible. With respect to the first *Restatement* factor, intended harm is generally more culpable than negligence. While the greater culpability of intended harm is often thought of as a truism, the reality is more complex. At times, intended harm may be less culpable than negligent harm.[275] For example, intended harm to

270. *Foreign Terrorists in America: Five Years After the World Trade Center*, *supra* note 35, at 17–18.

271. *Id.* at 12 (testimony of Henry J. DePippo).

272. *Id.* (noting that the bomb went off at 12:18 p.m.).

273. *Id.* at 2 (opening statement of Hon. Jon Kyl) (noting that "the death toll in New York could have been much higher" and that "Ramzi Yousef, the central figure behind the bombing, said he meant to collapse one of the World Trade Center's towers on top of the other, hoping to kill 250,000 people inside and in the immediate area, but the explosion did not go according to plan").

274. *Id.* at 17 (testimony of Henry J. DePippo); *In re* World Trade Ctr. Bombing Litig., 776 N.Y.S.2d 713 (Sup. Ct. 2004), *aff'd In re* World Trade Ctr. Bombing Litig. Steering Comm. v. The Port Auth. of N.Y. & N.J., 784 N.Y.S. 2d 869 (App. Div. 2004); Brief for Defendant-Appellant The Port Authority of New York and New Jersey, *In re* World Trade Ctr. Bombing Litig., Nos. 600000/94 & 129074/93, (N.Y. App. Div. Feb. 26, 2007).

275. Bublick, *supra* note 198, at 417–18; Kenneth W. Simons, *A Restatement (Third) of Intentional Torts*, 48 ARIZ. L. REV. 1061, 1088–90 (2006); Simons, *supra* note 28.

property might be less culpable than negligent harm to human life. Similarly, when the intended harm is small, perhaps stepping on a toe, but the negligence involves a careless risk of dire consequences,say nuclear annihilation, negligence may be more culpable than an intentional tort. In addition, an intentional tort by a low-culpability actor, like a young child, may be less culpable than a tort committed by a negligent actor in full possession of decision-making capacity. Or high culpability acts by the negligent actor, perhaps rising to the level of recklessness, might make for a different comparison.[276]

But all of these situations in which intended harm actually may be less culpable than negligent harm are irrelevant to this case. Both the terrorists and the Port Authority risked harm to persons as well as property. Both risked massive damage. Both were decision-makers who were fully morally accountable for their own choices. And the jury expressly found that the Port Authority was not reckless. In light of these factors, the intended bombing would be more culpable than the negligent failure to guard against it.[277] Accordingly, the trial court's suggestion that the Port Authority's "culpability" was greater than the terrorists' fault seems to be the wrong justification for upholding the allocation.[278]

Looking at the second *Restatement* factor—causation—it is difficult to envision a framework for analysis because apportionment has not previously been based on causation. However, scholars have suggested some factors that could be used to compare causal contributions. In this case, both the terrorists and the Port Authority were actual causes of the plaintiffs' full harm under the "necessary elements of a sufficient set" test.[279] Moreover, to the extent that these factors might still be taken into account in tort law, the terrorists' causal connection to the bombing was both more direct and more active.[280] However, a different factor—"indispensability" of

276. Bublick, *supra* note 198, at 368–69.

277. There is one caveat here. As discussed more fully with respect to causation, it might be said that the Port Authority risked more harm by opening up critical systems to potentially catastrophic harm. Although the terrorists desired massive damage, their placement of the bomb did not risk as much harm as might have been realized.

278. *See In re* World Trade Ctr. Bombing Litig., No. 600000/94, (N.Y. Mar. 2, 2007).

279. Wright, *supra* note 248, at 1304.

280. As the NEW YORK POST put it, "Terrorists planned the attack, built the bomb, rented the truck, drove it to the building—and exploded it." *A Terror-ble Ruling,* supra note 11.

causes—might argue in favor of a greater responsibility share for the Port Authority.[281]

The Port Authority argued that its failure to close the garage was not an actual cause of the injuries because even if public parking had been closed, the terrorists would have found another way to cause harm (see, e.g., 9/11). This type of causal argument typically is not accepted in tort law on the point of causation.[282] If it were permitted to weigh into the apportionment calculus, it might still not persuade. Whatever can be said of Osama Bin Laden's operation in 2001, evidence about the 1993 bombers suggested that the terrorists were not up to the challenge of surmounting many, or perhaps any, obstacles at that time.

But such an argument for the centrality of the particular terrorists to the harm might be offset by the argument which equally could be raised on behalf of plaintiffs—that if this terrorist group had not bombed the World Trade Center, with public parking open to all comers, another terrorist group might have planted a bomb just as well, perhaps with more devastating impact. According to the World Trade Center's architect, if the terrorists' van had been left in a slightly different location, the World Trade Center would in fact have toppled during the first attack.[283] This, in the architect's words, could have been "a catastrophe that killed 40,000 or more."[284] If, when comparing causation, a court looks at "more and less important causes" and considers the "indispensability" of causes, the particular terrorists might be considered the more dispensable cause because there were more plentiful substitutes for them and their conduct.[285]

In addition, if comparative causation involves, as some have suggested, looking at the relationship between causes such that a first cause which led to a second was assigned more weight, this factor also would favor greater liability for the Port Authority.[286] In at least

281. Robert N. Strassfeld, *Causal Comparisons*, 60 FORDHAM L. REV. 913, 939 (1992).

282. Wright, *supra* note 248, at __.

283. Peg Tyre, *An Icon Destroyed*, NEWSWEEK, Sept. 11, 2001 ("On February 26, 1993, the World Trade Center merely shook but did not collapse. But it was a close call. Later, the WTC's architect would tell jurors that if the van had been left closer to the poured concrete foundations, they would have succeeded. The tower would have fallen.").

284. *The World Trade Center Bombing: A Tragic Wake-Up Call*, *supra* note 36.

285. Strassfeld, *supra* note 281, at 939.

286. *Id.* at 926; *see also* Reichert v. Atler, 875 P.2d 379, 382 (N.M. 1994) (instructing the jury that the degree of care required to protect increases as the risk of danger increases, so that the

one state supreme court opinion, the focus on the greater causative role of the party who afforded the opportunity for crime was a key reason for upholding the verdict.[287]

The Uniform Tort Apportionment of Responsibility Act recommends apportionment factors consistent with those enumerated by the *Restatement*. According to that model act, "[i]n determining percentages of responsibility, the trier of fact shall consider: (1) the nature of the conduct of each party . . . determined to be responsible; and (2) the extent of the causal relation between the conduct and the damages claimed."[288] Although the Act is intended to replace the earlier Uniform Comparative Fault Act, the phrase "nature of the conduct" is not specifically defined. To the extent that the phrase is defined in accordance with the previous act, the actors' "superior or inferior capacities" might also be weighed in the equation, as is currently done in some jurisdictions that apportion intentional and negligent harms.[289]

If the care delivered is weighed against the care to be expected, that factor might also militate in favor of a greater percentage of responsibility apportioned to the Port Authority.[290] In a case that apportioned responsibility for student sexual assault between a school board and an elementary school principal who perpetrated the assaults, the New Jersey Supreme Court held that the jury "should be instructed on the heightened duty of school boards to ensure students' safety."[291] A similar account of expectations of the parties was taken in a case in which police failed to respond to an emergency call.[292]

Because there is no set formula for calculating the significance of any of these different factors, putting them together yields no obvious set of percentages, unlike that which might result from a straight comparison of culpability. When electing to include

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proportionate fault of the negligent tortfeasor is not necessarily reduced by the wrongful conduct of the intentional tortfeasor).

287. Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048, 1055 (Ind. 2003).

288. UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT §4(b) (2002).

289. *See* UNIF. COMPARATIVE FAULT ACT §2(b) (Commisioner's comment on allocating percentages of fault); *see also* Vidrine v. Denton, 951 So. 2d 274, 284 (La. 2006) (applying Uniform Comparative Fault Act factors including parties' capabilities).

290. *See* Hutcherson v. City of Phoenix, 961 P.2d 449, 453 (Ariz. 1998).

291. Frugis v. Bracigliano, 827 A.2d 1040, 1059 (N.J. 2003).

292. *Hutcherson*, 961 P.2d at 455.

intentional torts in comparative apportionment systems, courts professed confidence in juries' ability to make intentional/negligent responsibility comparisons. Perhaps deference to juries will carry the day now that jurors are being asked to make these amorphous and difficult comparisons on a routine basis.

State appellate court judgments that review institution-heavy apportionments of responsibility suggest that this high degree of jury deference is indeed applicable to apportionment choices.[293] A number of state supreme courts and appellate courts have now had the opportunity to review cases that apportion greater shares of responsibility to negligent rather than intentional parties.[294] These decisions generally do not apply a rule of thumb that the intentional tortfeasor must be assigned a larger share of the overall responsibility. To the contrary, courts have upheld the institution-heavy apportionments in many if not most of the cases.[295]

However, approval of institution-heavy apportionments by appellate courts is not universal. Several cases reverse these apportionments when the criminal was assigned a trivial percentage of the harm (under 5 percent),[296] or when the court viewed the apportionment solely as a normative statement about the relative culpability of the parties.[297]

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293. Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048, 1055 (Ind. 2003).

294. *See, e.g.*, *Hutcherson*, 961 P.2d at 451; *Paragon*, 799 N.E.2d at 1055.

295. *See, e.g.*, Manuel G. v. Golden State Family Servs., No. F047681, 2006 WL 965792 (Cal. 2006) (upholding jury verdict that assigned 90 percent of responsibility to county and foster family agency who knew of foster child's violent tendencies, and 10 percent responsibility to thirteen year-old foster child who assaulted other boy in foster care); Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 287 (Ky. 1998) (upholding apportionment of responsibility of 75 percent to church that retained teacher despite concerns about pedophilia and 25 percent to teacher who sexually abused students); Weiss v. Hodge, 567 N.W.2d 468, 477 (Mich. 1997) (upholding 80 percent responsibility apportionment to dram shop and 20 percent to drunk patron who committed assault).

296. Ortega v. Pajaro Valley Unified Sch. Dist., 75 Cal. Rptr. 2d 777, 797–98 (Ct. App. 1998) (reversing 100 percent apportionment against school that continually reinstated teacher accused of molesting children); Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 647 (Ct. App. 1994) (holding that jury's apportionment of 99 percent of fault to county for negligent supervision of child physically abused by foster parent was against the weight of the evidence).

297. Stevens v. N.Y. City Transit Auth., 797 N.Y.S.2d 542, 543 (App. Div. 2005) (holding that apportionment of 60 percent of the liability to criminal was too little in light of "the heinous crime" as "[a]ny negligence by the train operator [who was alleged to have been speeding while entering the station] cannot approach the culpability of the perpetrator"); Roseboro v. N.Y. City Transit Auth., 782 N.Y.S.2d 23, 25 (App. Div. 2004) (holding blameworthy conduct of sleeping clerk who failed to summon help "cannot approach the degree of culpability of the decedent's attackers").

Judicial rationales for upholding or reversing institution-heavy apportionments have been spare. Perhaps the most significant debate between and within courts about these verdicts is the relative importance of structural versus individual factors. Arizona's *Hutcherson v. City of Phoenix*[298] case and the Indiana appellate court's decision in *Paragon Family Restaurant v. Bartolini*[299] (later reversed on appeal to the Indiana Supreme Court) provide useful counterpoints. In *Hutcherson*, a jury assigned 75 percent of the responsibility for two murders to a 9-1-1 operator who negligently misclassified a domestic violence call as low priority. The misclassification resulted in a substantial police delay during which the two victims were killed.[300] Only 25 percent responsibility was assigned to the ex-boyfriend who deliberately murdered his former girlfriend and her new boyfriend.[301] Disputing defendant's claim that the jury verdict was "illogical" and "so unreasonable and outrageous as to shock the conscience,"[302] the Arizona Supreme Court endorsed the lower court's distinction between "culpability" and "responsibility for foresight and avoidance."[303] Using the lens not of wrongfulness but of ability to effectively engage in crime prevention, the court accepted the jury's apportionment.

In contrast, an Indiana appellate court placed greater weight on individual factors. In *Paragon*, an Indiana jury assigned 80 percent of the responsibility for a drunken assault to the tavern that served alcohol to underage drinkers.[304] Only 20 percent of the responsibility was assigned to the drunken customers who started the fight.[305] The appellate court looked at the matter as a question about the appropriate weight to be given to "spontaneous, unforeseeable and, independent criminal acts" on the one hand, and the pubs' "frequent[]" service of alcohol to minors on the other.[306] The appellate court thought that the spontaneous criminal acts merited

298. 961 P.2d 449.

299. 769 N.E. 2d 609 (Ind. Ct. App. 2002), *rev'd*, 799 N.E.2d 1048.

300. *Hutcherson*, 961 P.2d at 451.

301. *Id.*

302. *Id.* at 453, 455.

303. *Id.* at 453.

304. *Paragon Family Rest.*, 769 N.E.2d at 621–22.

305. *Id.* at 621.

306. *Id.*

more responsibility and the repeat service of alcohol to minors less.[307] The Indiana Supreme Court, over a dissent, disagreed.[308]

At issue in these cases is the importance of assigning responsibility to structural versus more individualized factors related to safety. Structural factors are those factors that shape the environment within which individuals make choices.[309] Other areas of safety regulation focus regulatory efforts on these factors because they are thought to provide a greater measure of safety. An example would be the "Hierarchy-of-Controls Policy" passed under the Occupational Safety and Health Act. The policy requires engineering controls before resort to individual safety measures.[310] Under such a policy, in the context of reducing environmental contaminants, an employer must reduce airborne environmental contaminants as far as feasible through use of fewer toxic materials or better ventilation before resorting to individual compliance safeguards such as asking employees to wear respirators.[311] Shaping the external environment to provide safe conditions makes safety "automatic" rather than dependant on constant individual attention.

Tort law, though different from direct safety regulations, shares this interest in structural safety protections. For example, in the negligent security context it has been persuasively argued that in the case of a substantial risk in which individuals have "limited means of providing safety" for themselves, a defendant who can provide protection should have an expanded obligation to do so.[312] This is not an exception to principles of personal accountability, but a reflection of them.[313]

Preservation of structural safety precautions is an issue in court affirmances in many of the institution-heavy verdicts. In the *Hutcherson* case, for instance, police response to domestic violence

307. *Id.* at 621–22.

308. Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048, 1057 (Ind. 2003).

309. *See* Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 1013–16 (2003).

310. Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261, 1267 (11th Cir. 1999).

311. *Id.*

312. Dan B. Dobbs, *Accountability and Comparative Fault*, 47 LA. L. REV. 939, 970 (1987).

313. *Id.*; *see also* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Culture*, 152 U. PA. L. REV. 129, 333–35 (2003) (providing a fascinating hypothetical about the personal responsibility of not only the participants in the Milgram experiment but also the researcher and his University).

victims is a systemic issue that affects the outcomes of multiple cases. Similarly, a tavern's policy of serving alcohol to underage minors impacts safety to a greater extent than does a particular minor's decision to drink. The "lack of oversight or any effective managerial controls" was the structural concern that led a New York court to uphold a 66.6 percent apportionment of liability to the State of New York when the state mistakenly released an inmate from prison who, while out, raped two women and murdered one.[314] Of course, in these cases both of the defendants have responsibility for their wrongful conduct. But from a policy perspective, the law has particular reason to preserve responsibility in cases of systemic harm.

Recognizing the concern that important liability rules placed on structural actors might get obliterated in comparative calculations, the New Jersey Supreme Court has established special jury instructions. These instructions inform jurors of the important policy function served by negligence liability in situations such as dram shop acts and supervision of school children.[315]

From a policy perspective, the institution-heavy apportionments are quite easy to justify in terms of deterrence, particularly in New York where they yield a similar outcome as would adoption of the very duty rule recommended by the *Restatement (Third) of Torts*. The verdicts would do no more than afford discretion to the jury to assign a range of damages from no award to full compensatory damages. This ability to continue entering a range of potential damage awards against negligent tortfeasors would respond to the concern that without a very duty rule, proprietor liability will be obliterated because "the great culpability of an intentional tortfeasor may lead a factfinder to assign the bulk of the responsibility for the harm to the intentional tortfeasor.[316]

In terms of the tort policy of compensation, premises liability allows losses to be spread over a wider group of people (through private or social insurance stemming from the negligence action), rather than falling solely and heavily on individual crime victims.

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314. Steel v. State of N.Y., 800 N.Y.S.2d 357 (Ct. Cl. 2005).

315. Frugis v. Bracigliano, 827 A.2d 1040, 1058–60 (N.J. 2003); Steele v. Kerrigan, 689 A.2d 685 (N.J. 1997); Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS. L. REV. 1141, 1144 (1988).

316. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 cmt (b).

What impact settlements and potential judgments might have on the public fisc is a subject of active public controversy. The Port Authority does not collect taxes, but does collect fees, which it could increase in light of settlements and judgments.[317] Fee increases depend both on the magnitude of required Port Authority payouts and the availability of insurance coverage for Port Authority losses, as well as factors regarding the elasticity of demand for Port Authority services. News reports suggest that in 1993 the buildings were insured by property and liability insurance policies totaling $1 billion dollars.[318] Whether that coverage would be enough to cover the Port Authority's liability or whether the Port Authority might be required to dip into the $4.5 billion a year it collects in revenue is uncertain.[319] However, with only tens of cases remaining on appeal, it would seem that these losses could be spread across some form of private or public insurance without significant event.

There are also fairness reasons to allow institution-heavy apportionments. The victims are not calling on just anyone to pay the judgment (the type of victim compensation funds that prevailed after the second World Trade Center bombing did not extend to these victims). Instead, the victims' claims to repair stem from a wrong done to them. The Port Authority, made a choice to impose what the jury found to be undue risk of foreseeable harm upon the victims. To the extent that wrongfulness depends on whether the group put at risk is also the group benefited by the risk,[320] this case provides something of a mixed picture. The Port Authority's risk taking imperiled everyone in the building. Some, like those who parked in the open parking garage or had customers who did, may have benefited from the risk taking. Certainly others did not.[321] In addition, imposing risk of harm for financial gain may compound the

317. Pradnaya Joshi, *Long Road to Payouts from PA*, N.Y. SUN, Oct. 28, 2005.

318. Marks, *supra* note 50, at A1 ("The Port Authority of New York and New Jersey has about $1 billion in property and liability insurance on the World Trade Center, the Comptroller said.").

319. Joshi, *supra* note 317.

320. *See* Simons, *supra* note 28, at 1210.

321. Coleman, *supra* note 29; Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957 (2007).

wrongdoing.[322] The jury's expression of indignation toward the Port Authority through its verdict is consistent with a finding that the jury felt the Port Authority had wronged the plaintiffs.[323] In light of the wrong done by it to the plaintiffs, the defendant has a duty to repair.[324]

While the plaintiffs have a right to repair from the Port Authority, institution-heavy apportionments might seem unfair given the nature of the wrongs perpetrated by the parties. However, the strongest way in which institution-heavy apportionments can be squared with traditional notions of accountability is to view different forms of responsibility, including tort actions, as a whole.[325] Criminal punishment and civil liability are both parts of one picture of repair for wrongdoing. In the civil action, with assignment of Port Authority responsibility at 68 percent, both the terrorists and the Port Authority could be fully answerable to the victims for compensatory damages. In the criminal courts, the terrorists also have had many additional penalties levied against them, most significantly, full-life prison terms.

Even when a tort jury has assigned a dramatically higher share of civil liability to the negligent party, the heavier weight of criminal penalties ensures that corresponding condemnation has been assigned to the intentional tortfeasor. One normative statement is made by observing which defendant is locked in jail and which defendant is being called upon to pay damages. As such, tort apportionments need not be viewed as a normative statement about relative culpability of the parties. As New York's intermediate court wrote in the *1993 World Trade Center Bombing* case:

> Were the dispositive consideration in passing upon the jury's allocation of responsibility simply one of comparative reprehensibility, we would not hesitate to vacate the allocation as against the weight of the evidence; there is no question that the bombers' conduct was utterly

322. Plaintiffs' attorneys sought to show that the Port Authority could have taken precautions but kept the garage open for financial reasons. One attorney told the jury: "Money. That was the motivating factor behind the Port Authority's decision." Fass, *supra* note 91, at 1.

323. Coleman, *supra* note 29, at 1154 (suggesting that indignation or resentment is the appropriate response to a person who has committed a wrong).

324. *Id.* at 1155.

325. *Id.* at 1158.

> wanton and that defendant's negligence, albeit great and facilitative of enormous harm, was not deserving of equal odium.[326]

If tort law were required to make a normative statement about the parties' relative culpability, many problems would arise. What percentage of the total responsibility could the negligent party be assigned under a system that compares reprehensibility? Would the negligent actor's responsibility have to be limited to 50 percent or less? But even 50 percent of the total responsibility would seem problematic. Is it plausible to say that the terrorists have about the same amount of responsibility as the Port Authority does? And yet, holding liability down to a minor share of the total in order to create an appropriate expressive statement would not likely preserve the tort policies of criminal-harm prevention that operate in so many of the negligence doctrines.

There are reasons, and ultimately persuasive ones, to uphold inverse apportionments. However, there are also drawbacks to their affirmance. First, if the legislature did mean to significantly reduce negligent-tortfeasor liability to crime victims, upholding inverse judgments may thwart the legislature's will. This concern seems weak with respect to New York law given the dearth of evidence that the legislature formulated any intent with respect to apportionment of intentional and negligent torts at the time the legislation was enacted. As the Court of Appeals aptly noted, however, the legislature can have the last word on its intent if it so desires.

Another drawback to liability is that it may lead to over-precaution, which is a form of waste. The purely financial costs of precaution are staggering. For example, "Los Angeles International Airport has to spend an extra $100,000 per day for additional security when the alert level goes from yellow to orange."[327] If the risk of liability encourages private entities to take costly but ineffective security measures, financial resources will be misspent. Moreover, the case for precaution in the face of terrorism may be different than the case for precaution that responds to other more typical and prevalent forms of crime.

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326. Nash v. Port Auth. of N.Y. & N.J., 856 N.Y.S.2d 583, 597 (App. Div. 2008).

327. DANIEL BYMAN, THE FIVE FRONT WAR: THE BETTER WAY TO FIGHT GLOBAL JIHAD 134 (2008).

Yet, precautions may deter crime, which can be costly in itself. And, even when additional precautions do not deter harm they may not be wasteful to extent that they purchase something else of social value such as comfort or reduced fear. This is true for precautions against terrorism as well as crime. In part, the costs of terrorism stem from public reactions to the threat. "After 9/11, Americans flew less and took fewer vacations, which led to massive job losses in the aviation and tourism industries."[328] If increased precaution encourages the public to engage in valuable economic activity like flying on planes, those precautions, even if ineffective in reducing harm, may promote economic welfare and lessen terrorists' power to stifle the economy through the creation of fear and disruption.

Another concern with allowing a full range of juror judgments—from no liability to full damages and every percentage in between—is that the wide range of permissible verdicts may undermine the consistency and predictability of the system, and therefore its legitimacy.[329] Moreover, even if institution-heavy apportionments reach the same practical result as a very duty rule, their expressive statement about responsibility may be so publicly unacceptable as to further erode public support for the tort system.

Here, a partial solution might be to think about how institution-weighted verdicts can be explained to the public. Perhaps the best option is to redirect the apportionment discussion to the real question in the litigation—not comparative fault but allocation of civil responsibility. In the criminal realm, the terrorists are living out their days in prison, and the former Port Authority decision-makers have never been charged with even the smallest of crimes. The fault of the parties is not equivalent, nor is the overall legal penalty similar. Thus, even if 99 percent of the civil responsibility were apportioned to the Port Authority, the overall responsibility for the event, including criminal and civil fines, could still be disproportionately assigned to the criminals.[330]

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328. *Id.* at 152.

329. John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455 (2008). (arguing that inconsistencies in Foreign Claims Act payments made by the Army would undermine legitimacy of the program).

330. As a theoretical matter, apportionments of 100 percent responsibility to the negligent actor could be upheld because the jury may only be implying that civil responsibility is not needed for the intentional actor given the availability of other penalties. If that precludes civil

Hyperbole about apportionment letting the criminals off the hook is simply false.[331] In New York, for example, criminals, as intentional tortfeasors, are already jointly liable for the full amount of their damages, even if assigned a responsibility share of a single percent.[332]

But, why would responsibility in the civil context not track responsibility in the criminal context? The answer lies in the purpose of the civil law, which does not focus on punishment as the criminal law does, but focuses greater attention on deterrence—crime prevention. Here, we might say that in the realm of violent crimes, civil responsibility is more likely to prevent violence when focused on the nonviolent actors.

Take for example the difference between two recent news stories—the escape and attack of a tiger at the San Francisco Zoo, and terrorist killings of the beloved former prime minister of Pakistan. In the first case, we would not think to assign responsibility to the tiger—the direct cause of the harm—because the tiger is not a moral agent. We would, however, assign responsibility to the terrorist in the second scenario. But at a certain point, the fact that the terrorist has full agency becomes almost irrelevant to the issue of ensuring present safety. To be sure, if caught, the attacking tiger and the terrorist will likely be confined or worse. But, assigning civil responsibility to either seems entirely beside the point. In both cases, the issue of safety is focused on what the zookeeper and the authorities can do to provide a reasonably safe environment given the existing threats.[333]

CONCLUSION

There is much at stake in judicial review of institution-heavy apportionment verdicts. At issue is whether, in cases of crime, tort liability will continue to meaningfully influence a broader range of actors and actions than those addressed by the criminal law, or

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liability for the intentional tortfeasor, courts should examine whether criminal penalties are truly adequate to punish before accepting the apportionment.

331. *A Terror-ble Ruling*, *supra* note 11 (arguing that blaming the Port Authority absolves the terrorist of responsibility).

332. N.Y. C.P.L.R. 1602(5), (7) (McKinney 2008).

333. Dareh Gregorian, *Fight Over WTC Suit*, N.Y. POST, Jan. 10, 2008, at 24 (noting that the Plaintiffs' attorney argued to the appellate court, "[w]e expect terrorists to act like terrorists and the Port Authority should have expected it").

whether tort law will be reined in to provide redundant focus on that set of actors and actions that are already subject to criminal sanctions.

The apportionment question posed to New York juries under a part of the state's model jury instructions tells the jury—"you will decide what is a fair division of responsibility for each defendant"[334]—a broad question and also the right one. If the question is fairness, to which party is it fair to allocate greater civil responsibility? Perhaps the jury is allowed to, and is actually right to, apportion greater responsibility to the party who will potentially be influenced by that liability.

When the public looks at the jury's verdict in the *1993 World Trade Center Bombing* case, the verdict appears upside down. But look again. Post 9/11, that seemingly inverted verdict may be the only way juries can retain security. Post tort reform, it is actually the world of tort law that is upside down.

What is aright, what may give hope even, is that despite legal changes that could easily render the apportionment system unfair, juries like the one in the *1993 World Trade Center Bombing Litigation* are still actively focused on justice.

334. N.Y. PATTERN JURY INSTRUCTIONS CIVIL § 2:275 (West 2007).