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WHAT'S LAW GOT TO DO WITH IT?  
DESIGNING COMPENSATION SCHEMES IN  
THE SHADOW OF THE TORT SYSTEM

Anthony J. Sebok*

INTRODUCTION: THE PATH-DEPENDENCY OF COMPENSATION DECISION-MAKING

It is a banal truism of life that where one starts off in a journey determines, to a great extent, where one ends up. This banal observation can be formalized under the rubric of “path-dependency.” Those who study dispute resolution probably can model the degree to which the initial positions taken by parties control the ultimate outcome of negotiation, regardless of whether the dispute concerns settlement of a lawsuit, a divorce proceeding, or a piece of legislation.

It is with this in mind that we should think about the September 11th Victim Compensation Fund of 2001 (the Fund). When the law was enacted on September 22, 2001, it had not received a great deal of comment, for the obvious reason that the nation was facing an unimaginable loss and an uncertain future. The precise history of the law still needs to be written, but it seems uncontroversial to assert that the law was the result of the following dynamic: First, within days after the attacks on four airplanes, the World Trade Center, and the Pentagon, American Airlines and United Airlines requested federal aid, including protection against lawsuits arising from the attack. Second, some Democrats in Congress objected that victims of the attack should not lose their right to sue and receive nothing in return. Third, the sponsors of the bill and the White House agreed to create the September 11th Victim Compensation Fund of 2001. Later that year Congress extended the Fund to limit suits against the City of New York, the Port Authority of New York and New Jersey, the other airports, Boeing (who made the airplanes used in the attack), and the jet fuel manufacturers (who sold the fuel to the airlines).1

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The Fund, which was created by the Air Transportation Safety and System Stabilization Act (Stabilization Act), seems to promise that, in exchange for waiving the right to sue the airlines, any victim of the attack would receive from the U.S. government all of their provable economic and noneconomic losses. Much of the coverage of this trade-off has emphasized the different objections that victims and their families have raised about the deal imposed by Congress. There is currently ongoing litigation concerning the Special Master’s interpretation of the alleged promise for “full compensation.” It is also possible that a victim may choose to sue any one of the defendants whose liability is now capped under the Fund and then challenge the cap as unconstitutional in order to reach the private defendants’ shielded assets in the event of a successful tort claim. Plaintiffs may also wish to challenge the Fund’s jurisdictional rule, which requires all suits arising from the attack on September 11th to be brought in the United States District Court for the Southern District of New York.

To put it mildly, many people are concerned that Congress has wronged the victims of the attack by eliminating the full value of their right to sue and offering too little in return.

There has not been, to my mind, very much discussion about the other half of the choice made by Congress in the two weeks following the attacks on September 11th. The tenor of the major criticisms of the Fund—that it either gives too little money or that it impermissibly interferes with the right to sue for damages in tort—presumes that, but for congressional action, the victims of the attack had a claim in tort against the parties protected by the law. The arguments made by those who think that the Special Master should measure future economic loss exactly the same way a court in New York (or Texas, or California) would measure it, or that Congress should not have demanded that collateral sources be deducted from the “full compensa-


3. The estates of high-income victims of the attack are challenging the interpretation of the Fund’s rules by the Special Master in federal court. See Colaio v. Feinberg, 262 F. Supp. 2d 273 (S.D.N.Y. 2003) (Special Master has not created a cap on compensation under the Fund), affirmed in Schneider v. Feinberg, 345 F.3d 135 (2d Cir. 2003).

4. The airlines’ and other private defendants’ liability are capped at their liability insurance at the time of the attack or by the Stabilization Act itself. See Stacy Shapiro, Compensation To Begin for WTC Attack Survivor, Bus. Ins., Aug. 6, 2002, at 21 (insurance for the four planes about $5 billion); Christopher Marquis, Measure Sets Liability Caps for New York and Landlord, N.Y. TIMES, Nov. 17, 2001, at B7 (Congress limited the Port Authority of New Jersey and New York’s liability to $650 million and the liability of the operator of the World Trade Center to $1 billion.).

5. See Air Transportation Safety and System Stabilization Act § 408(b)(3).
tion" promised by the Fund, assume a hypothetical post-verdict tort award as the standard against which to measure what Congress has taken away from the victims. I shall refer to this baseline against which the victims' loss is measured as the "tort baseline."6

The tort baseline is shared by critics and supporters of the Fund alike. The Fund, by offering an almost complete menu of tort damages, provides the impression that the victims of September 11th are receiving a quid pro quo exchange based on the tort baseline. A common and powerful defense of the Special Master's interpretation of the use of presumptive schedules for the calculation of final compensation under the Fund is that if the schedules produce undercompensation, the victims should view the difference between what they receive and what they would have been entitled to ask for under the tort baseline as a discount that takes into account the very real fact that, in litigation, even perfect cases do not produce perfect compensation (given that lawyers take up to forty percent; there are litigation expenses; and the inevitable risk of unforeseen error in factual judgment by the factfinder).

The debate over the Fund—where we are now—is, therefore, a result of the assumptions that lay behind the Fund's creation—where we started off. In this Article, I will test the plausibility of the tort baseline and explore why it has become such a fixed point in the debate over the adequacy and normative attractiveness of the Fund. To do this I will examine what the law actually says about the potential liability of the defendants protected by the Fund. If, on September 11, 2001, the state of tort law was such that the victims of the attack had a reasonable chance of suing and recovering in tort, it makes sense to regard the tort baseline as the proper metric against which to measure that which Congress took away from the victims in order to judge the Fund.

6. A slightly different variation of the tort baseline is more modest. Some have argued that the damage caps and jurisdictional rules in the Fund effectively take away the victims' "day in court" (lawsuits the victims would not necessarily win). This version of the tort baseline is not merely a more modest estimate of the victims' chance of proving breach and causation (the stronger version of the baseline should factor in these legal concerns as well), it recognizes that having a "day in court" is a good in itself either because it promotes autonomy for victims' families, or because it promotes other public good. See, e.g., Owen Fiss, Against Settlement, 93 YALE L.J. 1073 (1984). This version of the baseline assumes that, at the very least, the plaintiffs would have survived a motion to dismiss and would have had an opportunity to prove their prima facie case. I am not extending my analysis to cover the loss specifically denoted by this more modest measure of the baseline. This is because, as we will see below, it was obvious from the inception of the Fund that someone (insurers and property owners) would sue most of the defendants protected by the Fund, and so the private and public goods of a trial (e.g., the pursuit of truth) would not be impaired by the Fund, even if experienced by the victims vicariously.
II. THE TORT BASELINE ON SEPTEMBER 11, 2001

A. Why Jurisdiction Matters

A complete survey of all the possible tort claims that could have arisen out of the hijacking of the four airplanes might be impossible, and certainly for purposes of this Article, unnecessarily voluminous. There is currently litigation pending against thirteen airlines, seven airport security firms, three airport authorities, Boeing, the operators of the World Trade Center, and the Port Authority of New Jersey and New York. The number of plaintiffs in such suits is very large and sure to grow larger to potentially include the following: representatives of the deceased passengers on the four planes, representatives of those deceased as a result of the attacks on the ground, those injured in the ground attacks, as well as an array of parties suing for property damage and consequential economic loss.

For the sake of efficiency, I will focus on Congress’s stated concern when it passed the original Fund: the exposure of the airlines to crushing liability. The prospective plaintiff class could not have been known in detail in the weeks following the attack, but it could have been described in principle. The airlines would have had potential liability to the following four plaintiff classes: (1) the 266 passengers and crew on the four planes, (2) the thousands of persons on the ground killed or injured by the attack, (3) the property owners who suffered property damage as a result of the attack, and (4) the businesses that suffered pure economic loss as a result of the attack.

Reviewing this list of possible causes of action, the first important lesson it teaches is that initial judgments about the jurisdiction in which the claims against the airlines would be heard constrain measurement of the tort baseline (path-dependency in action). For example, while many sophisticated tort scholars might scoff at the fourth

8. See, e.g., Property Plaintiffs’ First Amended Master Liability Complaint, In re Sept. 11 Litig., 21 MC 97 (AKH) (S.D.N.Y. Dec. 11, 2002) (Suit brought by various insurers on behalf of subrogees Silverstein Properties, Inc. and other property owners, including Citigroup, Inc. and Consolidated Edison. Tenant plaintiffs include Karoon Capital Management, Wall Street Reality Capital, Barclay Dwyer Co. Inc., Tower Computer Services, Inc., Mayore Estates LLC, and 80 Lafayette Associates, LLC). All the litigation concerning domestic defendants has been consolidated into a single action under this docket number. Other actions against foreign defendants for aiding and abetting the terrorists have been filed separately.
9. Judge Alvin K. Hellerstein, for purposes of analyzing the question of duty as presented by the defendants in the motions to dismiss, divided the defendants into the following three groups: the Aviation Defendants (the airlines and airport security companies), the WTC Defendants (the Port Authority of New York and New Jersey, and the World Trade Center Properties, LLC), and Boeing. See In re Sept. 11 Litig., 2003 U.S. Dist. LEXIS 15522, at *10.
cause of action—pure economic loss—arising in such a case, it is obvious that it is much easier to say with confidence that there is no cause of action for pure economic loss under the facts of the September 11th attack (facts known within hours of the event) in New York as opposed to, for example, New Jersey.¹⁰

Jurisdiction also plays a very important role in thinking about the tort baseline in causes of action (1) through (3). As of September 22, 2001, the facts upon which one could analyze the airlines' tort liability were extremely limited. As of that date, no one knew how the hijackers took over the planes, if failures in airport security facilitated the takeover, how the crew behaved during the takeover, and what the full consequences of the takeovers were in terms of personal and economic injury.¹¹

On the other hand, as of September 22, 2001, anyone trying to provide a rough sense to Congress of whether to use the tort baseline or not would have discovered, on reflection, that they actually knew quite a lot, relative to what they needed to know. For example, it is often the case that air disaster cases are litigated and concluded without detailed information about the cause of the accident.¹² Furthermore, to the extent that suits arising out of the attack were to focus on security lapses on the ground, one could have taken up the question of duty using just the most general set of facts and a careful reading of the law.¹³ Duty is supposed to be decided as a matter of law and, for that reason, is usually considered on a motion to dismiss before significant discovery has begun. Duty is often viewed as part of the general principles of American tort law,¹⁴ but there are still variations among the states, and it turns out that if one had looked at the landscape of duty doctrines across America, one would have realized that suits brought under New York law would have a difficult time surviving a motion to dismiss. Should Congress have assumed that the tort baseline would have been New York law? The vagaries of civil procedure are hard to predict, especially with air disasters. As an initial matter,

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¹¹. Total insured loss caused by the attack is estimated at $40 billion, of which 25% of that is estimated to be payment for business interruption. Total gross loss is estimated at $50 billion. See September 11 Loss Estimates, CLAIMS MAG., Apr. 2002, at 9.

¹². The doctrine of res ipsa loquitur has been permitted to play a powerful role in air disaster litigation for the obvious reason that often significant evidence is unobtainable due to the lack of eyewitnesses and the impact of crashes.

¹³. One might even have been able to make a few strong predictions about the strength of the various claims given the general rule of proximate cause, but I will not pursue this point.

it was well understood in Congress that perhaps ninety percent of the personal injuries and ninety-nine percent of the property damage occurred as a result of an airplane striking two buildings in New York. Therefore, I will proceed on the assumption that it would not have been unreasonable to measure the tort baseline using New York law.

B. Duty in New York

Unlike some other states, New York has always been somewhat restrictive when it comes to duty. The famous statement of Chief Judge Benjamin N. Cardozo in Palsgraf v. Long Island R.R. Co., \textsuperscript{15} "the risk reasonably to be perceived defines the duty to be obeyed," \textsuperscript{16} is vague enough to accommodate a variety of interpretations, but in the hands of subsequent New York courts, it has taken a very specific cast. On the one hand, New York, like most jurisdictions, has viewed duty as a nonissue in cases of direct injury causing personal injury. Thus, in Cordas v. Peerless Transportation Co., \textsuperscript{17} no one even questioned whether the defendant cab driver who leapt from his moving car to escape a thief owed a duty to the bystander struck by the runaway vehicle—the driver obviously owed a duty to the bystander. \textsuperscript{18} On the other hand, New York has been much less willing to find duty in cases where the defendant's conduct enables foreseeable injury. \textsuperscript{19}

Depending on which side of the divide described above one places the events of September 11th, one's view of the tort baseline changes dramatically. As the current plaintiffs in In re September 11 Litigation \textsuperscript{20} have argued in their response to the airline defendants' motion to dismiss, "there is no novel issue of law" involved in their lawsuit. \textsuperscript{21} They point out that as early as 1822 a balloonist was held liable in New York for ground damage arising from an inadvertent landing. \textsuperscript{22} The plaintiffs have a point, as far as it goes: To the extent that airplanes are like automobiles, New York, like almost all other states,\textsuperscript{23}

\textsuperscript{15} 248 N.E.2d 99, 100 (N.Y. 1928).
\textsuperscript{16} Id. at 100.
\textsuperscript{17} 27 N.Y.S.2d 198 (N.Y. City Court 1941).
\textsuperscript{18} Id. The issue in the case was whether, under the emergency doctrine, the defendant breached his duty. Id.
\textsuperscript{19} In this context I will be discussing duty in relation to a class of torts identified by Robert Rabin as "enabling torts." See Robert L. Rabin, Enabling Torts, 49 DePaul L. Rev. 435 (1999).
\textsuperscript{21} Plaintiffs' Memorandum of Law in Opposition to Rule 12(b)(6) Motions to Dismiss by Aviation Defendants, Airport Operators, Non-Carrier Airlines, and Boeing, In re Sept. 11 Litig., 21 MC 97 (AKH), at 16 (S.D.N.Y. filed Mar. 7, 2003).
\textsuperscript{22} See Guille v. Swan, 19 Johns. 381 (N.Y. Sup. Ct. 1822).
\textsuperscript{23} There are still a handful of states that treat ground damage caused by airplanes under strict liability.
treats personal and property damage under a rule that suggests that the scope of duty is coextensive with the scope of actual causation.24

There is another way of viewing the events of September 11th. Instead of focusing on the risk posed by the defendants' operation of their airplanes, one might focus on the risk posed by the defendants' loss of control over their airplanes. The suits currently filed against the airlines allege a failure to prevent the hijackers from seizing the airplanes and flying them into the ground, not a failure to land carefully, and there is no reason to assume that Congress could not have predicted that this would be the sort of claim made in any lawsuit arising out of the events of September 11th.

New York has permitted enabling torts, although grudgingly. In New York, the Court of Appeals initially indicated that it would extend liability when a car owner negligently left the keys in the ignition of an unlocked car, and a thief stole the car and ran over a third-party pedestrian.25 Subsequently, however, the Court of Appeals refused to allow recovery, concluding that the car owner's negligence could not be a proximate cause of the plaintiff's injury.26 Because they found no proximate cause, the courts of New York never reached the question of duty.27

There are three principles that seem to guide New York in its consideration of whether a duty exists to prevent the enablement of another's intentional wrongdoing.

1. Defendant's Relationship

The Restatement (Second) of Torts section 315, entitled "Duty to Control Conduct of Third Persons: General Principles" grounds the duty to prevent the enablement of another's wrongdoing on the existence of a "special relationship" between either the defendant and the

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26. See Walter v. Bond, 54 N.E.2d 691 (N.Y. 1944), aff'd 45 N.Y.S.2d 378 (App. Div. 1943). Not long after, the New York legislature enacted what is now N.Y. VEH. & TRAF. LAW. § 1210(a) (McKinney, 1996), which provides that "no person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, [and] removing the key from the vehicle." That "statute changed the prior case law and it is now clear that the intervention of an unauthorized person no longer operates to break the chain of causation." Guaspari v. Gorsky, 319 N.Y.S.2d 708, 711 (App. Div. 1971).
third person who harms the plaintiff or the defendant and the plaintiff.28 Certain well-known cases, such as *Tarasoff v. Regents of the University of California*,29 in which a mental health professional was held liable for failing to warn a woman whom his patient had told him he intended to kill, adopted the language of "special relationship" to sort out when a duty to control a third party might exist. New York courts follow the Restatement and use the moniker "special relationship" to explain when a duty exists. Nonetheless, it is not clear why, in New York, certain relationships are deemed "special." As Judge Guido Calabresi has noted:

What then does the New York Court of Appeals mean when it says that it has "imposed a duty to control the conduct of others where there is a special relationship: a relationship between defendant and [an intervenor] whose actions expose plaintiff to harm such as would require the defendant to attempt to control the third person's conduct; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others[?]"30

Judge Calabresi concluded that "[i]t cannot mean that a duty will be imposed only where there is privity between the defendant and the victim."31

On this small point, Calabresi was right: a "special" relationship is not just a relationship defined by privity. Calabresi recommended in *McCarthy v. Olin Corp.*32 that a relationship should be deemed "special" if the defendant was in a position to "substantially reduce" the risk of harm posed by a third party onto the plaintiff.33 Calabresi's colleagues on the Second Circuit rejected this proposed test. They held that under New York tort law, a manufacturer of bullets designed to maim owed no duty to those shot by Colin Ferguson on the Long Island Railroad. They rejected the suggestion that the hypothetical opportunity of the defendant ammunition manufacturer to hinder a gunman's violent crime (ostensibly by not making the bullets which were used in the crime available to begin with) was enough to create a special relationship.34 Judge Calabresi, in dissent, argued that the

29. 529 P.2d 553 (Cal. 1974).
31. *Id.*
32. *Id.*
33. *Id.*
34. McCarthy, 119 F.3d at 156-57 ("Common law in the State of New York does not impose a duty to control the conduct of third persons to prevent them from causing injury to others. This
question should be certified and, at least, posed to the New York Court of Appeals.

The majority in McCarthy was right. The best argument the plaintiffs could muster for imposing a duty on the ammunition manufacturer was a version of the "cheapest cost avoider" theory penned by Judge Calabresi when he was an academic. New York has clearly rejected that approach. When asked by the Second Circuit to clarify its views in another enabling tort gun case, the New York Court of Appeals responded with the following explanation for when there would be a duty to reduce the risk of a third party harming the plaintiff:

A duty may arise, however, where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others. Examples of these relationships include master and servant, parent and child, and common carriers and their passengers.

The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.

The court, following its reasoning in Purdy v. Public Administrator rejected the claim that simply being able to "help out" the plaintiff is enough to create a special relationship; it held that the defendant must be in the "best position" to protect the plaintiff. This leads, of course, to the inevitable next question—what does it mean for a defendant to be in the "best" position to help the plaintiff with regard to controlling a third party intentional tortfeasor?

It helps here to look at the examples offered by the court. It suggested that a defendant is in the best position among all possible interveners in cases where the defendant is a master (who can control or protect a servant), and parent (who can control or protect a child), or a common carrier (who can control or protect a passenger). It is easy to misunderstand the lesson of Hamilton as it applies to the events of September 11th. Because the hijackers were passengers and the airlines were common carriers, a literal application of the New York

is so... even where as a practical matter defendant could have exercised such control." (quoting Purdy, 526 N.E.2d at 7).
37. Id.
39. Id. at 7.
Court of Appeals dicta places the airline defendants squarely within the rule. So even if one adopted the restrictive, anti-Calabresian reasoning of McCarthy and Hamilton, one could still argue that a duty could be based on the relationship that existed between the hijackers and the airlines.

What one cannot do is equate the following two arguments: (1) That a special relationship existed between the terrorists qua passengers and the airlines because airlines are in the best position to observe and care for their passengers; and (2) that a special relationship existed between the terrorists qua criminals because the airlines were in the best position to protect the ground victims from criminals who used their status as passengers to threaten people on the ground. To equate (2) with (1), one would have to take the word “best position” (as used by the Hamilton court above) to mean cheapest cost avoider. This interpretation is not only undercut by the rejection of the Calabresian reasoning in the cases themselves, but merely by a moment’s reflection about the Hamilton court’s own choice of language. The reference to “master and servant, parent and child, and common carriers and their passengers” is certainly not accidental. These are traditional common law categories. Each is anchored in a status relationship with certain social and historical roots. In fact, it is not obvious that, as compared to other parties, parents, masters, and common carriers are always in the best position to protect or to protect others with regard to torts involving children, servants, and passengers. The persistence of these traditional categories has as much to do with the particular quality of the relationship between parents and children, masters and servants, and common carriers and patients as it does with the empirically proven efficacy of these classes of actors with regard to protecting the public.40

2. Plaintiff’s Membership in a “Limited Class”

In New York, it is not enough that the defendant’s relationship with either the third party who injured the plaintiff or the plaintiff pass the threshold test described above. There is a parallel requirement that must also be met. The defendant may only be held to have a duty to any particular member of the community if that person belongs to a “limited class.”41 As with the term “special relationship,” the term

40. Another relationship that is often lumped together with parent-child, master-servant, and common carrier-passenger is doctor-patient. See Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553, 559 (Cal. 1974).

41. Hamilton, 750 N.E.2d at 1061.
“limited class” is vacuous unless one interprets it in light of the principles articulated by the New York Court of Appeals.

In Hamilton, the court said that the reason it is important to identify with whom the defendant has a special relationship (as defined above) is because this relationship will determine whether any given member of the community who could have been aided by the defendant was a member of the limited class of persons to whom the defendant owed a duty. As indicated in the previous section, the principles that determine the grounds for membership in the limited class of plaintiffs are hard to summarize. They may even be ad hoc. The point of this section, however, is to stress that the identification of a limited class is analytically necessary for a claim of duty involving cases of third party enablement in New York.

Throughout a line of cases beginning with Pulka v. Edelman, New York courts have suggested that a claim of duty would be suspect if it was not possible for the plaintiff to identify what feature of her position vis-à-vis the defendant (and all plaintiffs like her) was distinctive. In Pulka, the plaintiff, a pedestrian on a Manhattan street, was struck by a patron of the defendant parking garage as the patron exited the garage. The plaintiff sued the garage, arguing that the garage had a duty to take steps to ensure that its patrons exited safely. The Court of Appeals held that the suit failed because the garage did not owe the pedestrian a duty to protect it from its patron’s negligence, even if it could have taken practical steps to reduce the hazard. The court tested the proposition that such a duty existed by arguing that the duty proposed by the plaintiff would lack any definition—it would include everyone “within our sight or environs.” The point made by the Court of Appeals might seem to lack great significance because in most tort cases there are reasons to treat the class of

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42. "The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm... the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." Id.
43. 358 N.E.2d 1019 (1976).
44. Id.
45. Id. at 1020.
46. Id. at 1021.
47. Id. at 1022.
48. The court stated:
If a rule of law were established so that liability would be imposed in an instance such as this, it is difficult to conceive of the bounds to which liability logically would flow. The liability potential would be all but limitless and the outside boundaries of that liability, both in respect to space and the extent of care to be exercised, particularly in the absence of control, would be difficult of definition.
Id. at 786.
persons to whom the defendant owes a duty as a subclass of all persons within the defendant’s “sight or environs.” Nonetheless, even if it is rarely necessary, the New York courts have returned to Pulka's admonition again and again.

Thus, in *Eiseman v. State*, the New York Court of Appeals held that the defendant, the state prison system, had no duty to reduce the substantial risk posed by a criminally violent third party who had once been in its control. In *Eiseman* the defendant had, arguably, a “special relationship” with the third party who injured and killed the plaintiffs. Nonetheless, the court argued that the plaintiffs, who were members of the community attending a college to which the criminally violent third party had been released, could not explain why they were members of a limited subset of the community. Without such an argument, the plaintiffs’ suit failed because they were claiming membership to an “indeterminate class” of potentially injured plaintiffs. In *Waters v. New York City Housing Authority*, the court held that a landowner owed no duty to a passerby to ensure that the landowner’s property could not be used in a foreseeable (and ostensibly preventable) assault. The court argued that even if imposing liability on the defendant would increase public safety, it did “not warrant the extension of the landowner’s duty to maintain secure premises to the millions of individuals who use the sidewalks of New York City each day.” It was from *Waters* that the *Hamilton* court drew the lesson that a duty cannot “extend beyond [a] limited class of plaintiffs to members of the community at large.”

There is a temptation to interpret the New York Court of Appeals demand (that the plaintiff must demonstrate that he or she belongs to an “identifiable subclass” of potential victims) as an indirect way to ensure that no defendant faces unlimited liability in terms of damages. It is true that one of the earliest cases to emphasize the “subclass constraint” justified the introduction of the constraint on the basis of limiting liability in order to ensure that the defendant did not go


51. Id. at 1128.

52. Id. at 1136.

53. Id. at 1135.


55. Id.

56. Id. at 924.

57. Hamilton, 750 N.E.2d at 1061 (citing Waters, 505 N.E.2d 922).
bankrupt. In *Strauss v. Belle Realty Co.*, the New York Court of Appeals held that a utility had no duty to an elderly man to reduce the risk that the elderly man's landlord would injure him by maintaining defective stairs throughout a blackout. The court explained that the plaintiff was not a member of a "narrowly defined class" and then noted that one reason to restrict the duties owed by the utility to only those injured persons who belonged to the proper subclass was that otherwise the utility could find itself facing "crushing liability." But we should not overlook *Strauss's* more theoretical point: even if the class of victims to which the plaintiff belonged (people injured in the blackout) was limited, the number of duty-holders to which the plaintiff claimed to belong was unlimited. This point was amplified in *Milliken & Co. v. Consolidated Edison Co.*, and *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.* Although these cases concerned only economic losses, not personal injury, they dealt with the same problem of defining duty in the context of reducing the risk of third-party wrongdoing. In each case, the court endorsed *Strauss* and rejected the plaintiffs' effort to demonstrate that, because of something especially salient about the location where their injury occurred, they belonged to a subclass of plaintiffs per *Strauss*. The court rejected this reasoning, holding that, to focus on "[t]he locale in which the injuries occur, in circumstances such as these, is a distinction without a . . . difference because, regardless of the situs, the same unlimited, undefined class of potential plaintiffs is implicated." The plaintiffs, who were commercial tenants in New York City, could not explain what made their status distinct from those of residential tenants or anyone else with an interest in life, limb, and property in the urban environment. As the *Milliken* court explained in somewhat poetic language, *Strauss* stands for the proposition that New York rejected the plaintiff's "reasoning because it would hold . . . [defendants] liable to every tenant in every one of the countless skyscrapers comprising the urban skyline."

59. *Id.*
60. *Id.* at 37, 39. This rationale will be examined more closely in subpart (3).
61. *Id.* at 34.
63. 750 N.E.2d 1097, 1102 (N.Y. 2001) (No duty was owed to a business owner whose custom was disrupted by ground damage with the observation that there could be no duty if that duty would include "every tenant in the skyscrapers embodying the urban skyline.").
64. See *Milliken*, 644 N.E.2d at 271.
65. *Id.* at 268.
66. *Id.* Accord *532 Madison Ave.*, 750 N.E.2d at 290.
To summarize, the cases reviewed thus far show that, in cases involving a duty to control third parties in New York, the plaintiff must belong to a "subclass" smaller than the whole community. This principle clearly applies when, because the number of potential victims is large, the number of plaintiffs is so large that any single plaintiff's identity is indeterminate from the defendant's *ex ante* perspective. This principle applies even in cases where the number of potential victims is limited, but the defendant's failure to control a third party creates a risk so fluid and mobile that the identity of that determinate number is *ex ante* indeterminate. This is (arguably), of course, exactly what happened on September 11th. The problem with applying the "subclass principle" to the type of case that occurred on September 11th is that it seems to make duty turn, ultimately, not on the defendants' relations, nor on the plaintiffs' identity, but on the third-party injurers' particular pattern of risk creation. A comparison between a "typical" aircraft ground damage case and September 11th will illustrate my point.

As noted above, it is well-established in New York that a plane operator must exercise ordinary care to avoid negligently flying into people and their property on the ground. In that sense, an airline's duty to people who live near airports is no different from the duty that the operators of ground vehicles have to persons and their property who live near roads. The duty persists if the negligence that created the risk of injury to persons and their property *near* airports arose out of negligently performed security that allowed either joy-riders or hijackers to gain control of airplanes and crash them either on take-off or landing.

But if an airline owes a duty to the persons who live near airports, why do they not owe a duty to those who live directly under well-known flight paths? If people who live a quarter mile from an airport belong to the subclass of persons to whom the airlines owe a duty because unauthorized personnel are bad at taking off and landing, why does that subclass not include all the people who might be injured by an airplane that crashes because unauthorized personnel are simply bad at flying? Furthermore, why presume that unauthorized personnel, who get hold of airplanes because of negligent security, want to stay on the plane's flight path? Is it not also foreseeable that a plane whose passengers have been negligently screened at check-in might fly and crash hundreds of miles from its intended destination, either because the criminals on board want to crash it, or just because they cannot properly maintain control of the plane? But if that is the case, then is not the subclass of persons who might be plaintiffs in a suit
based on ground damage caused by a plane seized as a result of negligent airline security coexistent with everyone who lives in parts of America that can be reached by an airplane? If that is the case, then the "narrowly defined subclass" to whom the airlines owe a duty is identical to all of America. And yet, if the subclass is identical to all of America, then, instead of saying that all of America was owed a duty, the New York courts seem to say that none of America was owed a duty. How can that be?

3. Public Policy

The answer is, of course, that in hard cases involving enabling torts, the New York courts always appeal to a third consideration—"public policy." In virtually every case discussed in subsections 1 or 2, the court acknowledged that, in the end, considerations of public policy will play a role. Thus, before exploring the existence of a special relationship between the defendant and either the plaintiff or the person who shot the plaintiff, the court in *Hamilton* acknowledged that, in general, a determination of duty by a court in New York resulted from a balancing of many factors, including a variety of policy-like concerns. Similarly, in *Eiseman* the court prefaced its analysis of whether the plaintiffs belonged to a limited class to whom the defendant owed a duty with the observation that "the imposition of duty presents a question of law for the courts... resting on policy considerations of whether plaintiff's interests are entitled to legal protection against defendant's conduct." In fact, a brief review of *Strauss, Waters, Milliken*, and *532 Madison Avenue* reveals an almost ritualistic invocation of public policy to ultimately answer the hard questions posed by cases in which it was not obvious whether the defendant has evidenced a special relationship or whether the plaintiff truly belonged to a "narrowly defined class."

The reference to public policy is ritualistic but not necessarily empty. Like every ritual, it serves a function: it allows the court to place a thumb on one side or the other of the scale when it decides whether the parties fit into the analytic categories described in subsections 1 or 2. This observation should not come as a surprise, given how much of modern law, and especially modern tort law, can be ex-

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plained by legal realism. What might come as a surprise is how often a New York court will use public policy to place its thumb on the scale to help the defendant and to limit duty. In fact, while in theory adjudication driven by concerns of "public policy" should not be predestined to favor plaintiffs or defendants, in cases involving a duty to control third parties, I would hazard a guess that, more often than not, the New York courts use public policy as a way to cut off slippery-slope arguments for the expansion of duty (in exactly the kind of case described above in the context of the September 11th claims by the ground victims).

Perhaps the best known invocation of public policy to limit the duty inquiry in New York is Strauss, in which the New York Court of Appeals cited the spectre of "crushing liability" against Consolidated Edison as its main reason for declaring that Strauss did not belong to a "narrowly defined class." The dissent in Strauss deemed the majority's approach as a covert grant of immunity to utilities, something which, if a good idea, could only be put into effect by legislation. The dissent's argument was not literally true, but it nicely framed an undercurrent in Strauss that no court has fully denied: the New York courts must act like a legislature when deciding duty in certain kinds of cases. And, more often than not, they act like a legislature that wants to limit liability, not expand it. Thus, in Waters, the court cited Strauss to support its holding that there could be no duty on the part of a property owner to reduce the risk that a third party would exploit a negligently secured building to assault the plaintiff.

70. See De Angelis v. Lutheran Med. Ctr., 449 N.E.2d 406 (N.Y. 1983). In De Angelis, the New York Court of Appeals rejected the plaintiffs' appeal to expand duty, and justified its refusal by noting that duty in New York required the courts to choose "between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." Id. at 407.
71. This is in contrast to California where, for many years, "public policy" seemed to inform decisions that helped plaintiffs prove duty and thereby (in the eyes of the court and many academics) promoted both deterrence and cost-spreading. For a discussion of California's use of public policy to promote a "progressive" tort agenda, see John C.P. Goldberg & Benjamin Zipursky, The Moral of MacPherson, 146 U. Pa. L. Rev. 1733, 1738 (1998).
72. Strauss v. Belle Realty Co., 482 N.E.2d 34 (N.Y. 1985) ("In exercising the court's traditional responsibility to fix the scope of duty, for application beyond a single incident, we need not blind ourselves to the obvious impact of a city-wide deprivation of electric power, or to the impossibility of fixing a rational boundary once beyond the contractual relationship, or to the societal consequences of rampant liability.").
building was not to "the world" or even to all of New York City. Yet the spectre of crushing liability led it to find no duty.\textsuperscript{74}

### III. Concluding Thoughts

The main purpose of this Article, in its current form, is to raise serious doubts about the tort baseline used by the parties who met and negotiated the cash value of the Fund. The persons who wrote the legislation that created the Fund had an obligation, not only to the American people, but also to the persons who would think about bringing suit after the horrible events of September 11th. They had an obligation to use the power of the federal government carefully; to take away rights only to the extent necessary and to spend the taxpayers' money to the extent that it was both fair and prudent.

I hope that I have demonstrated that it is at least questionable that under New York law most of the personal injury and property claims should survive a motion to dismiss. Therefore, the decision to base the Fund on the tort baseline raises some important questions.

#### A. Could the Tort System Have Handled the September 11th Suits?

The first question concerns how the parties approaching the legislation creating the Fund thought about the relevant law of negligence when they decided to replace the tort system. That is to say, why were the airlines so certain that the tort system would produce "crushing liability," as opposed to "no liability?" In particular, what role did the beliefs and attitudes of members of Congress about the integrity of the tort system play in their conclusion that a fund was necessary?

One response to this question is to treat the tort claims by the victims of the terrorist attacks on September 11th as simply \textit{sui generis}. That is to say, because they arose out of national tragedy, they could not be handled by the tort system as if they were simply four plane crashes and two building disasters, albeit unusually large. The risk that the law could not handle these suits could have been anticipated on a number of fronts. First, despite the almost universal practice of domestic air disasters ending up in settlement, the grief and anger felt by the families of the passengers could prevent the usual settlement practices that characterize American aviation law and force the claims of the passengers to trial, where the calculation of damages can some-
times be quite unpredictable. Second, the claims by ground victims
for personal injury and property damage, which arguably could not
pass the threshold of duty under New York law, would not be checked
by the usual filters that keep weak cases from going forward—the
paucity of attorneys willing to risk their own time and money on a
weak suit and the willingness of plaintiffs to settle weak cases at a
discount—because of lawyers hoping that if they could reach a jury in
just a handful of cases, the jury awards would be high and the settle-
ment value of the remaining cases enhanced. Third, the claims by
ground victims for personal injury and property damage, which argua-
bly could not pass the threshold of duty under New York law, would
not be dismissed by judges because they would refuse to extend the
public policy concerns of New York tort law itself into the determina-
tion of duty when confronted with pretrial dispositive motions.

There is very little that one can say about the first and second rea-
sons why the September 11th claims would not have been able to pro-
ceed like “normal” claims. The tort system is based on the human
emotions of its participants, and the emotions that would lead plain-
tiffs, their lawyers, and juries to behave as described above are simply
facts of life—they cannot be read out of the system without changing
it utterly.

But what about the third reason for why these cases might not be
handled as “normal?” Is it too much to expect of a trial judge to ap-
proach the question of duty in this sort of case and to dismiss a suit in
which so much political and emotional energy has been invested?
One way of testing this proposition is to look at what Judge Heller-
stein did with the motion to dismiss that was filed by the defendants in
the current litigation.

Judge Hellerstein rejected the motion to dismiss in its entirety. Be-
cause the focus of this Article is the status of duty in New York with
regard to ground victims of aircraft disasters, I am not going to evalu-
ate his reasons for denying the motion to dismiss brought by the WTC
Defendants or Boeing. I will discuss, as I have throughout this Arti-
cle, just the arguments that could have been raised on behalf of Avia-
tion Defendants.

75. See Aaron J. Broder, Judges, Juries and Verdict Awards, N.Y. L.J., Jan. 3, 1994, at 3 (com-
paring ten jury awards from the same air disaster); David W. Leebron, Final Moments: Damages

76. See supra note 9.

77. See id.

78. See id.
Judge Hellerstein's discussion of the Aviation Defendants' argument that the ground victims were owed no duty under New York law is peculiar to anyone familiar with the discussion of duty in the previous section. At the outset, Judge Hellerstein noted that "in New York, the existence of a duty is a 'legal, policy-laden declaration reserved for judges'" and that "New York courts have been cautious in extending liability to defendants for their failure to control the conduct of others, 'even where as a practical matter [the] defendant can exercise such control.'" Thus far, the opinion sets up the problem described above: the plaintiffs must demonstrate that the defendants had the requisite "special relationship" required by *Hamilton* and that they belonged to a limited class, distinct from the community at large, as required by many cases since *Pulka*. Furthermore, the opinion clearly anticipates that the ultimate determination of these claims will turn on considerations of public policy.

The opinion then took a strange turn. It based its analysis of duty on the admonition in *532 Madison Avenue* that, in New York, the court must "fix the duty point by balancing factors." This is an odd place to begin for two reasons. First, in *532 Madison Avenue*, the plaintiffs claimed that the defendants owed them a duty to avoid causing pure economic loss through their negligent conduct. The New York Court of Appeals decided that no such duty existed. But notice: the question presented to the court did not concern the limits of a well-established duty (e.g., the duty to avoid causing personal injury or property damage), but the existence of a new kind of duty. While there may be some overlap between the reasoning courts may use to establish duties and limit them, it is not obvious that the best place to learn about the latter would be cases that deal with the former. Second, the balancing of factors, described by the Court of Appeals in *532 Madison Avenue*, were used to buttress the court's determination that, in the absence of a special relationship, the plaintiffs did not belong to a limited class to whom the defendant owed a duty.

Judge Hellerstein used *532 Madison Avenue* for a purpose for which it was never designed. He concluded that because the court in *532 Madison Avenue* mentioned that, for example, courts should take into

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80. *Id.* at 16 (quoting D'Amico v. Christie, 518 N.E.2d 896, 901 (N.Y. 1987)).


82. Not surprisingly, the *532 Madison Avenue* opinion cited the *Strauss* court's concern that duties that were "limitless" would create "crushing liability." *Id.* at 1102.
account the "reasonable expectations of parties" when thinking about whether there should be a duty in New York, a court should conclude that a duty was owed by the airlines to people and property owners across America to screen passengers carefully because this is something people expect airlines to do.\textsuperscript{83} Needless to say, that is not how New York courts solve the question of whether a "special relationship" exists or whether a plaintiff belongs to a distinct subclass. At another point, Judge Hellerstein, noting the stated concern from \textit{532 Madison Avenue} that a court, in determining duty, must be mindful of a "proliferation of claims," argued that "proliferation should not be mistaken for size or number" and because the number of victims was fixed at the date of the attack on September 11th, the plaintiff class was not "limitless."\textsuperscript{84} Again, this misreads the New York case law, which is concerned, not just with "crushing liability" after the fact, but with the attribution of duty to an unlimited group of potential plaintiffs (e.g., an undifferentiated set) before the accident.\textsuperscript{85}

By invoking \textit{532 Madison Avenue}, which was a case in which the New York Court of Appeals limited duty in a case involving pure economic loss, Judge Hellerstein seemed to suggest that the policy concerns used by that court to limit duty were not applicable to the September 11th suit. Having dismissed the role of policy as a force to limit duty, Judge Hellerstein then based his analysis of the duty claims by the September 11th plaintiffs on \textit{Palka v. Servicemaster Management Services Corp.},\textsuperscript{86} a case in which duty to prevent an enabling tort was extended to a defendant in a case involving personal injury. \textit{Palka} turned on the New York Court of Appeals determination that the plaintiff, a patient injured by a falling light fixture, could specify a subclass to which she belonged and, thus, could claim that the defendant, a hospital equipment maintenance company, owed her a duty even though its only contractual relationship was with the hospital in which the patient was an invitee.\textsuperscript{87}

If the real work of his argument for rejecting the Aviation Defendants' motion to dismiss was to have been done by \textit{Palka}, Judge Hellerstein should have looked at this case more carefully. There is no doubt that \textit{Palka} is a landmark in the New York courts' jurisprudence of duty—it is, in fact, one of the few cases where the New York Court

\textsuperscript{83}. \textit{In re Sept. 11 Litig.}, 2003 U.S. Dist. LEXIS 15522, at *24.
\textsuperscript{84}. Id. at *26.
\textsuperscript{85}. \textit{In re Sept. 11 Litig.}, 2003 U.S. Dist. LEXIS 15522, at *25.
\textsuperscript{86}. \textit{In re Sept. 11 Litig.}, 2003 U.S. Dist. LEXIS 15522, at *6 (citing \textit{Palka}, 634 N.E.2d 189 (N.Y. 1994)).
\textsuperscript{87}. 634 N.E.2d 189 (N.Y. 1994).
of Appeals chose not to limit what appeared to be "open-ended" liability for the defendant out of policy concerns.88 Hellerstein's juxtaposition of *Palka* with *532 Madison Avenue* creates the false impression that, when enabling torts concerning personal injury or property damage are concerned, policy does not significantly limit duty. A full review of the case law concerning the application of policy to enabling torts concerning personal injury or property damage would have revealed a very different story. As subsequent cases such as *Milliken* and *Espinal v. Melville Snow Contractors* reveal, the court has viewed *Palka's* unwillingness to limit duty as a special case within the larger doctrine set out by *Palka, Eiseman, Strauss,* and *Strauss's* progeny.89

The failure of Judge Hellerstein to cite or discuss *Strauss* is especially odd. The parallel between the facts of *Strauss* and facts surrounding the claims of the ground victims of September 11th seems quite striking. In both cases a commercial institution that occupied a critical social role was accused of having allowed a major disaster through negligence or recklessness. In both cases, the negligence resulted in the creation of a substantial risk of personal injury and property loss to millions of people.90 The only major difference between the two cases is that, in *Strauss*, the defendant's conduct was alleged to have enabled the injury of the plaintiff by allowing a third party's negligence to harm him, while in the September 11th case, the allegation was that the defendant's negligence allowed a third party's intentionally wrongful act to harm the plaintiffs. But this difference is of no moment.

Judge Hellerstein's refusal to employ *Strauss* in his analysis of the motion by the Aviation Defendants provides an insight, perhaps, into why Congress was correct to think that no judge, no matter how well-intentioned, could treat the September 11th suits as "normal" tort claims under New York law. What would "normal" New York law have demanded of a judge faced with a motion to dismiss in a case

88. Id. at 193.
89. For an excellent illustration of this tendency in the New York Court of Appeals, see *Espinal v. Melville Snow Contractors*, 773 N.E.2d 485, 488 (N.Y. 2002).
90. Judge Hellerstein argued that because Congress capped the liability of all the defendants through the Stabilization Act, the "likelihood of unlimited liability" was removed by statute. *In re Sept. 11 Litig.*, 2003 U.S. Dist. LEXIS 15522, at *27. This is true but irrelevant. Judge Hellerstein is required by the statute to apply New York tort law, and New York tort law requires that he determine in the current litigation what duties were owed by the defendants to the plaintiffs on September 11, 2001. When Congress limited the liability of the September 11th defendant class, it altered New York tort law with regard to damages. There is no reason to think that, by capping liability on September 22, 2003, Congress was retroactively altering New York tort law with regard to duty. But see infra text accompanying notes 94-95.
involving an enabling tort with consequences like those outlined in Strauss? The law would have demanded that judges take seriously the possibility that they would have to "cut off" the duty owed to the plaintiff in order to promote the sort of public policy associated with "indeterminate" and "limitless" liability discussed above. But such a judgment is precisely what no trial judge could do in the context of the September 11th suits for the understandable reason that to do so would have required judges to invoke policy to frustrate and disappoint families who had been identified as important symbols of a national tragedy.

In Judge Hellerstein's September 9, 2003 opinion and his subsequent October 1, 2003 opinion, in which he denied the defendants' motion for an interlocutory appeal to the United States Court of Appeals for the Second Circuit, he evidenced a deep discomfort with the idea that New York law might require him to exercise discretion to cut off the plaintiffs' lawsuits at an early stage. In the October 1 opinion, Judge Hellerstein stressed that, unlike the New York Court of Appeals, which could, in a case like Hamilton, decide the question of duty after discovery and trial, the defendants were asking him to cut off the litigation as a matter of law before there were enough facts for him to weigh the relative strengths of the two sides' arguments about duty.

What was missing from Judge Hellerstein's appeal for patience (and full discovery) was the recognition that the purpose of making judgments about duty as a matter of law is something that the New York Court of Appeals has asked judges to do, and that such early determinations can have a beneficial effect on the legal system. Judge Hellerstein was surely correct that it is very difficult for a judge to make a decision about whether a duty exists as a matter of law on just the pleadings. But that is precisely what judges must do sometimes, and in New York, when it comes to enabling torts, they have been asked to do that with an eye toward the larger public policy consequences of their choices. To refuse to do so is itself an act of discretion, which itself must be justified.92


92. As Robert Cover illustrated, sometimes the refusal to exercise discretion by a judge is itself a substantive decision that must be justified within the legal system. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 233 (1975) (discussing how judges who wanted to avoid confronting the possible illegality of the Fugitive Slave Acts "raised the formal stakes" by exaggerating the mechanical operation of the law and minimizing the degree to which adjudication demanded discretion).
The point of this critique of Judge Hellerstein's treatment of the Aviation Defendants' motion to dismiss is not to suggest that Judge Hellerstein should have been more assertive and used policy to dismiss at least some of the suits. It is to suggest that the job that Judge Hellerstein was required to do—exercise discretion in the interest of limiting duty to promote a relatively vague conception of public policy—is not something that can be done easily in the context of the September 11th claims. Because it is very hard to do, Congress was not obviously wrong in its determination that the task ought to be taken away from the tort system.

B. Was Congress Acting as an Adjudicator of New York Law?

When Congress decided to act in anticipation of claims for damages by plaintiffs like the ground victims against defendants like the Aviation Defendants, it might not have been responding only to fears that the tort system would not be able to treat the suits as "normal" suits. It might also have been making a determination, on its own, about the claim that defendants like the Aviation Defendants owed duties to people on the ground across America. The Fund, in effect, offered personal injury plaintiffs a sum that reflected the discounted value of their civil claim. If that is its effect, why not attribute this to Congress as its intent? To attribute this intent, one would have to hypothesize that Congress not only made a judgment about the ability of the tort system to handle the claims, but the merit of the suits themselves.

Of course, there is no need to presume that Congress was crediting the claim that any of the defendants protected by the Air Transportation Safety and System Stabilization Act owed duties in tort to the ground victims. One could explain the Stabilization Act's adoption purely as a practical response to the problem of adjudication described above. One might wonder why, if Congress thought that it was unlikely the tort system could handle these case like "normal" cases, it did not simply immunize the defendants. One answer to this is that removing the right to sue without any quid pro quo would have

93. Having said this, it must be noted that this explanation for Judge Hellerstein's opinion explains his decision not to dismiss the suits by ground victims for personal injuries. It does not explain his refusal to dismiss the claims by ground victims for property damage. These plaintiffs were not the object of great public sympathy. Furthermore, as the Milliken and Palka courts take pains to point out, the policy concerns that might have led to an extension of duty in cases involving foreseeable personal injury caused by third parties are absent in cases involving economic injury. Furthermore, given that Congress capped the liability of the defendants in toto, it could only help the personal injury plaintiffs left in the litigation if Judge Hellerstein dismissed the property plaintiffs (whose losses could significantly dilute the personal injury plaintiffs' losses if there ever was a judgment or settlement).
been politically impossible and probably unconstitutional. But a deeper answer is that the fact that the tort system could not handle the September 11th cases does not entail that the duty claims underlying the plaintiffs’ claims should be barred. Even if one is skeptical of the claim, for example, that the Aviation Defendants owed the ground victims duties in negligence, and one suspects that courts are incapable of adjudicating that claim, it is a non sequitur to then conclude that no one should adjudicate that claim. New York law says that the duty question in cases must engage considerations of policy. When the tort system is operating normally, the consideration of policy is part of the judge’s task. However, the consideration of policy, even as applied to civil liability, is not something that only a judge can do. In fact, it would seem that, of all the kinds of reasoning that typically goes into the adjudication of legal questions (analogical reasoning, reasoning from precedent, sympathy), weighing public policy considerations is something that legislators could do as well as judges.94

So there is no reason to think that, from a perspective of institutional competence, Congress could not have answered the duty question relating to many of the September 11th claims by applying the same sort of reasoning as the courts which its legislation supplanted. But a brief reflection on how the Stabilization Act was produced and what it says reveals that Congress did not make much of an adjudicative effort. The bare fact that the Fund awards tort-like damages suggests that Congress thought that the claims that were taken away by the Stabilization Act had some value. But we do not know how it arrived at that determination of value. Was it because, as some may have thought, the tort claims, while meritless under normal circumstances, would have nuisance or blackmail value for the reasons described above? Or was it because, as many of the lawyers for the ground victims currently assert, the claims would have been deemed meritorious by the tort system for all the “right” reasons, and the ground victims were being asked by Congress to abandon a private law claim that would have been fully valued by the tort system? The answer to this question, had it been debated as a matter of New York tort law, would probably not have been simply “either/or,” as in a judge’s written order or a jury’s verdict, but would have allowed for weighing of nuance and probability. The answer might have been

94. In fact, the typical complaint against judges, by those who dislike the outcome, when judges inject public policy concerns into their legal reasoning is that the judicial branch is “not well-equipped to resolve broad, complex policy issues.” See Victor E. Schwartz & Leah Lorber, State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far, 33 Conn. L. Rev. 1215, 1220 (2001).
something like this: “Under New York law the Aviation Defendants [certainly/probably/barely/never] had a duty to protect the ground victims.”

Does it matter that Congress did not answer a question about New York law tort law, which required the exercise of policy-driven discretion, and which they could have answered? Is it any more realistic to imagine that Congress could have “adjudicated” the status of the defendants’ duties in the days after September 11th than to imagine that the tort system could do it? This is a very difficult question, and I shall provide only a sketch of how it might be answered.

First, if Congress were to take seriously its responsibility of “stepping into the shoes” of the courts in answering the duty question, the limitation it would have had to overcome was not institutional competency, but time. It is clear that it could not have made a considered judgment about the duty question within the few weeks it had set for itself to produce a piece of legislation. Had the proponents of the Fund been willing to uncouple it from the Stabilization Act, then the immunity portion of the Stabilization Act, which was extremely time-sensitive, could have been implemented first, and the details of the Fund later.  

Second, if Congress wanted to provide generous compensation to the victims of September 11th even after it had come to the determination that most of the defendants (the Aviation Defendants, in particular) did not owe a duty to most of the victims, it could still have enacted a generous compensation program. The reasoning behind such a program would have made clear, in a way that the current Fund does not, why the compensation scheme incorporates departures from the tort system. More importantly, if Congress had attempted to adjudicate the duty question in a way which fully incorporated the sorts of policy reasons frequently used by the New York courts, it could have explained the rationale behind the design of the Fund by reference to the fact that even tort law uses considerations of policy to constrain and shape recovery for civil wrongs. Whether this additional explanation would have made a difference to the critics of the Fund is not clear. It seems to me, however, that as a matter of both practical politics and principle, Congress would have done a better job had it taken seriously the actual law of duty in New York, and taken up the invitation in the law itself to examine the claim of duty by the victims of September 11th from a perspective that openly employs the sorts of policy concerns already present in the law.

95. Needless to say, the political calculation of exchanging support across party lines to pass both halves of the legislation would be complicated by breaking it into two halves.