

HOMELAND SECURITY AND FEDERAL RELIEF: A PROPOSAL FOR A PERMANENT COMPENSATION SYSTEM FOR DOMESTIC TERRORIST VICTIMS

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INTRODUCTION

In a remarkably rapid response to the terrorist attacks of September 11, 2001, Congress created the largest federally-backed no-fault compensation system in our nation's history: the September 11th Victim Compensation Fund of 2001 (September 11th Fund). The September 11th Fund was designed to address a discrete situation: the consequences of the worst terrorist attack in United States history. But the Fund raises policy questions that stretch beyond its specific application. More generally, to what extent should government spread responsibility for the victims of terrorist attacks, and what are the limits of public compassion?

A national conversation on this fundamental issue is taking place. It is fueled in part by the Final Report of the fund administrator, Special Master Kenneth Feinberg, and his subsequent book.¹ Others also have offered their perspectives on the work of the September 11th Fund.² Most commentators have been critical, arguing that the Fund

1. See DEPARTMENT OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004) [hereinafter FINAL REPORT OF SPECIAL MASTER]; KENNETH R. FEINBERG, WHAT IS LIFE WORTH? (2005).

2. See, e.g., MARSHALL S. SHAPO, COMPENSATION FOR VICTIMS OF TERRORISM (2005) [hereinafter SHAPO, COMPENSATION] (examining the political, historical, legal, economic, and behavioral contexts of the Fund); Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005) (evaluating the Fund as an administrative process); Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627 (2003) (analyzing the design of the Fund); John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027 (2003) (arguing that the terms of the Fund serve neither corrective nor distributive justice); Mathew Diller, *Tort and Social Welfare Principles in the Victims Compensation Fund*, 53 DEPAUL L. REV. 719 (2003) (discussing the Fund as a public benefit program that draws from tort law); Gillian K. Hadfield, *The September 11th Victim Compensation Fund: An Unprecedented Experiment in American Democracy*, (U. of S. Cal. Law School, Law & Econ. Working Paper Series, Paper No. 29, 2005) available at <http://law.bepress.com/usclwps/lewps/art29> (criticizing the Fund for failing to incorporate the democratic function of law); Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167 (2004) (arguing that a compensation system for victims of domestic and sexual violence should be modeled on the Fund); Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compen-*

was inequitable, inefficient, and unwieldy and that it did not serve the major goal of the tort system, namely deterrence.³ Even Special Master Feinberg argues that the Fund, as implemented, should not be repeated.⁴ This article examines the criticisms in light of the purposes of the September 11th Fund, compares this program to similar funds, and argues for the establishment of a permanent compensation fund for domestic terrorist victims.

The United States has a limited history of terrorist attacks. The 1995 bombing in Oklahoma City⁵ and the 1993 attack on the World Trade Center⁶ were the most dramatic episodes. Incidents such as the 1996 Centennial Park Bombing at the Olympics in Atlanta,⁷ the Amtrak derailment in Arizona,⁸ and the Unabomber bombings⁹ also made citizens seriously question their security against terrorist attacks on

sation Fund: Fund Approaches to Resolving Mass Tort Litigation, 9 CONN. INS. L.J. 121 (2002–2003) (comparing the September 11th Fund to other federal no-fault compensation schemes); Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events not Likely to be Duplicated*, 53 DEPAUL L. REV. 209 (2003) (discussing the creation of the Fund); Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831 (2002) [hereinafter Rabin, *Indeterminate Future Harm*] (arguing that the Fund should have compensated exposure victims); Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769 (2003) [hereinafter Rabin, *Circumscribed Response*] (finding the principle behind designating victims of terrorism as beneficiaries of a no-fault scheme problematic); Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 HOFSTRA L. REV. 1245 (2002) [hereinafter Shapo, *Specialized Jurisprudence*] (analyzing the legal theories that informed the policy decisions involved in creating the Fund); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355 (2004) (arguing that the Fund's creators should have considered the psychology of harm and justice); Lisa Belkin, *Just Money*, N.Y. TIMES MAGAZINE, Dec. 8, 2002, at 92 (discussing the disparities in Fund awards and the failure to compensate victims of other tragedies); Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, NEW YORKER, NOV. 25, 2002, at 42 (describing the issues involved in calculating Fund awards).

3. See Ackerman, *supra* note 2, at 138–39; Goldscheid, *supra* note 2, at 174.

4. FEINBERG, *supra* note 1, at 178 (“I think it would be a mistake for Congress or the public to take the 9/11 fund as a precedent for similar programs.”).

5. See Linda Greenhouse, *Again, Bombs in the Land of the Free*, N.Y. TIMES, Apr. 23, 1995, § 4, at 1 (calling the bombing the “worst incident of terrorist violence on American soil”).

6. See Barbara Presley Noble, *Crisis at the Twin Towers: The Aftershock; Trying to Relieve Trauma and Stress*, N.Y. TIMES, Mar. 1, 1993, at B6 (discussing the psychological aftermath of the bombing).

7. See Ben Sherwood, Editorial, *No Safe Place*, N.Y. TIMES, July 29, 1996, at A19 (stating that the bombing “destroyed the confidence that there is anything anymore called security”).

8. See Stephen Labaton, *F.B.I. Studies Note for Clues on Derailment*, N.Y. TIMES, Oct. 11, 1995, at A1 (discussing the investigation by the F.B.I.'s national security division into the derailment).

domestic soil. President George W. Bush has warned that terrorist attacks will continue in the United States.¹⁰

Congress responded to these terrorist attacks by aiding American victims on an ad hoc basis. In response to the Oklahoma City bombing and the 1993 attack on the World Trade Center, the federal government provided indirect assistance to victims by providing money at the state and community levels.¹¹ Congress acted solely in response to individual episodes of terrorism; it has never established a permanent system to deal exclusively with victims of terrorism on a continuing basis.¹²

The September 11th Fund is another example of the ad hoc approach. The Fund was enacted eleven days after the attacks on the World Trade Center and the Pentagon.¹³ Its goals were to protect those primarily affected by the attacks—the airline industry (which

9. See Neil MacFarquhar, *At the Places Where Bombs Killed, a Day for Memories and Nervous Optimism*, N.Y. TIMES, Apr. 4, 1996, at B13 (describing the victims' reactions to the bombings).

10. See Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. DOC. 145, 146 (Jan. 31, 2006) (“Terrorists like bin Laden are serious about mass murder, and all of us must take their declared intentions seriously. . . . In a time of testing, we cannot find security by abandoning our commitments and retreating within our borders. If we were to leave these vicious attackers alone, they would not leave us alone.”); Address to the Nation on Iraq, 38 WEEKLY COMP. PRES. DOC. 1716, 1717, 1720 (Oct. 7, 2002) (“The danger is already significant, and it only grows worse with time. . . . The attacks of September the 11th showed our country that vast oceans no longer protect us from danger.”); Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133, 134 (Jan. 29, 2002) (“[O]ur war against terror is only beginning. . . . Thousands of dangerous killers, schooled in the methods of murder . . . are now spread throughout the world like ticking timebombs, set to go off without warning.”).

11. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 233, 110 Stat. 1214, 1244–45 (codified in scattered sections of U.S.C.) (authorizing grants to states to provide assistance to victims of terrorism through states' crime victim compensation and assistance programs).

12. Congress included victims of domestic and international terrorism among those eligible for assistance from the Crime Victims Fund. See 42 U.S.C. § 10603b(a)(1) (2000 & Supp. I 2001) (authorizing grants to States, victim service organizations, public agencies, and nongovernmental organizations for emergency assistance to victims of terrorism that occurred outside of the United States); *id.* § 10603b(b) (authorizing grants to States, victim service organizations, public agencies, and nongovernmental organizations for emergency assistance to victims of terrorism that occurred within the United States); *id.* § 10603c(b) (authorizing use of emergency reserves to compensate victims of international terrorism that occurred outside of the United States). Fines paid for crimes against the United States fund the Crime Victims Fund. *Id.* § 10601. Congress may also appropriate up to \$5 million per year (for fiscal years 2005 through 2009) for the Crime Victims Fund. *Id.* § 10603e(c).

13. The Fund was enacted on September 22, 2001, as part of the Air Transportation Safety and System Stabilization Act. Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended in scattered sections of 49 U.S.C.).

faced crippling liability costs) and the individual victims and their families.¹⁴ But the September 11th Fund was limited to the September 11th attack.¹⁵ It did not provide a system of compensation to address future acts of violence or terrorism.

In contrast to the retrospective and ad hoc approach of the September 11th Fund and most other governmental disaster relief efforts, the federal government has occasionally established compensation funds that are ongoing.¹⁶ These long-term compensation funds are specific reactions to industry threats to withdraw from providing certain services or products because of perceived incapacitating litigation. For example, the National Childhood Vaccine Act¹⁷ encourages the pharmaceutical industry to remain in the vaccination market by ensuring government compensation to individuals who may become ill as a result of a vaccination.¹⁸ Similarly, the Price-Anderson Act¹⁹ promises to compensate victims of nuclear accidents in order to protect the nuclear power industry from overwhelming litigation costs.²⁰

14. The introduction to the Act states its purpose is to “preserve the continued viability of the United States air transportation system.” Pub. L. No. 107-42, 115 Stat. 230, 230 (2001). Title IV of the Act states that the purpose of the Fund is “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” *Id.* § 403, 115 Stat. at 237.

15. The Act lists three categories of eligible claimants: (1) individuals who were “present at the World Trade Center . . . , the Pentagon . . . , or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001” and “suffered physical harm or death as a result,” Pub. L. No. 107-42, § 405(c)(2)(A), 115 Stat. at 239; (2) individuals who were “member[s] of the flight crew or [passengers] on American Airlines flight 11 or 77 or United Airlines flight 93 or 175,” excluding those who participated or conspired in the crashes, *Id.* § 405(c)(2)(B), 115 Stat. at 239; and (3) personal representatives of decedents listed under one of the first two categories. *Id.* § 405(c)(2)(C), 115 Stat. at 239.

16. See *infra* Section III.

17. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to 300aa-34 (2000).

18. See *Stotts v. Sec’y of Dep’t of Health and Human Servs.*, 23 Cl. Ct. 352, 358 (1991) (observing that by enacting the National Childhood Vaccine Act, Congress intended “to reverse the spiraling cost of childhood vaccines and the dwindling number of vaccine manufacturers caused by injured individuals seeking relief through the traditional tort system”).

19. Price-Anderson Act of 1957, 42 U.S.C. § 2210 (2000).

20. Listed among the congressional findings is the following statement:

In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2012(i).

States have also created broad no-fault compensation systems outside the common law torts system. For example, to foster a burgeoning industrializing nation, states set up workers' compensation programs to aid employees faced with strong assumption of risk defenses.²¹

Other countries have also recognized the need for long term compensation funds, specifically to address terrorist attacks. The most notable examples are the comprehensive and permanent funds of Israel²² and Great Britain²³—programs that reflect an acknowledgment of the longstanding presence of terrorism in those countries.²⁴

The September 11th Fund's primary goal was to protect the airline industry from immobilizing liability costs; its secondary goal was to aid the victims of the attack.²⁵ Accordingly, Congress capped liability costs at the airlines' insurance limits²⁶ and established an optional no-fault compensation system funded by federal monies.²⁷ Those who made claims under the September 11th Fund waived their right to sue in tort for compensatory and punitive damages.²⁸ Regulations promulgated under the enabling statute created a table of presumptive compensatory damages and a uniform award for pain and suffering.²⁹ The right to apply for compensation under the September 11th Fund expired in December 2003.³⁰

21. See generally ALA. CODE §§ 25-5-1 to -340 (2000); ALASKA STAT. §§ 23.30.005–.400 (2004); ARIZ. REV. STAT. ANN. §§ 23-901 to -1091 (2003).

22. Victims of Hostile Action (Pensions) Law, 5730–1970, 24 LSI 131 (1969–1970) (Isr.).

23. Criminal Injuries Compensation Act, 1995, c. 53 (Eng.).

24. See *infra* Section IV for a discussion of the Israeli and British compensation programs.

25. See Air Transportation Safety and Stabilization Act, *supra* note 14 and accompanying text.

26. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(a), 115 Stat. 230, 240 (2001) (“[L]iability for all claims . . . arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”).

27. *Id.* § 406(b), 115 Stat. at 240 (“This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.”).

28. *Id.* § 405(c)(3)(B)(i), 115 Stat. at 240 (“Upon the submission of a claim under this title, the claimant waives the right to file a civil action . . . for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.”).

29. 28 C.F.R. §§ 104.43–46 (2004) (regarding presumption of economic and non-economic losses for decedents and claimants who suffered physical harm); see September 11th Victim Compensation Fund, 67 Fed. Reg. 11,233, 11,235 (“[A] revised table of the special master’s estimated or ‘presumed’ awards . . . [is] available on the Victim Compensation Fund website at www.usdoj.gov/victimcompensation.”).

30. 28 C.F.R. § 104.62 (2004) (setting Dec. 22, 2003 deadline for filing claim).

The rationales supporting the establishment of the September 11th Fund and other permanent domestic and international compensation funds support the idea that the United States should establish a terrorism compensation fund on a permanent basis. The need for a permanent system is based, of course, on the grim assumption that terrorist attacks in this country will continue, an assumption followed, indeed promoted, by President Bush and his administration.³¹ With all the precautions and protocols the United States has instituted in the name of homeland security,³² establishing a permanent compensation system for victims of terrorism is a logical step in preparing the Nation if it finds itself in the midst of another terror-related crisis.

Several arguments support the establishment of a permanent federal compensation system to provide aid to victims of terrorism. First, a permanent system is a far more efficient and equitable way to address a perceived ongoing problem. Having a system in place to award and administer funds rather than reinventing a system after each attack should save a significant amount of resources and time.³³ This is a lesson taken from mass tort law (i.e. the tobacco and asbestos litigations), in which there is constant pressure to move away from the traditional tort system in favor of a broader, fixed compensation system.³⁴ Moreover, under a permanent system, the amount of awards and the choice of industries singled out for special protection would

31. See *supra* note 10 and accompanying text.

32. President Bush established the Office of Homeland Security and the Homeland Security Council shortly after the attacks. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001). Later, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.), and the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of U.S.C.). President Bush also implemented a Homeland Security Advisory System, which defined specific threat conditions and designated protective measures for each. Directive on the Homeland Security Advisory System, 38 WEEKLY COMP. PRES. DOC. 394 (Mar. 11, 2002).

33. See *infra* Part V.A.1 for a discussion of how a permanent compensation system could provide enhanced efficiency.

34. See Samuel Isaacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1619–25 (2004) (describing asbestos class actions as example of mature tort that resolved itself into bureaucratized, aggregated settlement structures); Francis E. McGovern, *The What and Why of Claims Resolutions Facilities*, 57 STAN. L. REV. 1361, 1362, 1365, 1379–1381 (2005) (describing pressures to create claims resolution facilities to meet demands for more efficient payment of damages, and the movement away from traditional adversarial model); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 593 (1987) (defending class actions, despite their bureaucratic nature, as effective method of individual verdict resolution in mass tort context); Peter H. Schuck, *Mass Torts: An Institutional*

seem less arbitrary, more even-handed, and thus more acceptable.³⁵ In general, it would depoliticize a government relief system that could easily be driven by politics.

Second, the psychological effect of having a permanent system could be significant. As the terrorists clearly intended, the September 11th attacks served to heighten our sense of vulnerability.³⁶ A permanent system would be capable of tending to the affected parties immediately, which would help alleviate this sense of vulnerability as citizens look to the government for support and order.³⁷ Moreover, since the primary perpetrators of terrorism are rarely available to sue under the tort system,³⁸ victims cannot achieve the sense of vindication and retribution typically gained through litigation; a permanent fund would at least publicly recognize the suffering of the victims.

Third, a permanent compensation system would avoid constitutional questions that could arise with ad hoc systems. Although it is well established that Congress may preempt state tort systems prospectively and replace them with its own, it is less clear whether it may displace tort claims already accrued without offending the Constitution.³⁹

With those arguments in mind, Part I of this article examines the September 11th Fund. Part II discusses the issues underlying whether the government has an obligation to provide compensation to terrorist victims. Part III overviews other domestic compensation schemes, focusing on the Price-Anderson Act, the National Childhood Vaccine Injury Act, and the workers' compensation system. Part IV examines compensation systems for terrorist victims adopted by Great Britain and Israel. Part V argues that although the Fund was successful, it did not go far enough; to ensure greater success, a compensation fund for terrorist victims should be permanent. Part VI makes recommendations for legislation.

This article addresses the help government extends to victims of terrorism, which, as the President⁴⁰ and the bombings in London⁴¹

Evolutionist Perspective, 80 CORNELL L. REV. 941, 945–47 (1995) (describing beginnings of modern era of mass torts).

35. See *infra* Parts V.B.1 and V.B.3.

36. See *infra* Part V.A.2.

37. *Id.*

38. Many times the primary perpetrators of terrorism are dead, unknown, or unreachable. Therefore, the Foreign Sovereign Immunities Act of 1976 allows victims to sue governments that sponsor terrorism. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(5) (2000).

39. See *infra* Part V.A.3.

40. See *supra* note 10 and accompanying text.

remind us, remains a real threat. At the same time, the catastrophe in New Orleans as a result of Hurricane Katrina prompts us to recognize the many other forms of disasters that call into question a host of issues about government responsibilities.⁴² Although the victims of terrorism and natural disasters may share the same fate, this article leaves to another day the question of government responsibility to victims of natural disasters and focuses solely on victims of terrorism. The chaos in the aftermath of Hurricane Katrina, however, not only demonstrates palpably the need for planning, but also teaches us that the populace has a clear expectation that the federal government, rather than state or local governments, will ultimately be responsible for relief efforts. This expectation is as great, if not greater, with regard to relief efforts in connection with terrorist attacks.

I.

SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

A. *The Fund*

The September 11th Fund was enacted just eleven days after the terrorist attacks, at the height of national trauma over the attacks.⁴³ At the time, Congress faced intense lobbying from the airline industry, which claimed that it would face bankruptcy without some bail-out from the federal government.⁴⁴ Once Congress decided to limit the liability of the airlines and the World Trade Center to their insurance limits, the plaintiffs' tort bar through the American Trial Lawyers As-

41. See Eric Lipton, *Authorities Step up Security on American Transit Systems*, N.Y. TIMES, July 8, 2005, at A10 (discussing increased security measures taken in the United States after the London bombings).

42. See James Dao, *U.S. Plans \$18 Billion More for Gulf, but Local Officials Are Skeptical*, N.Y. TIMES, Feb. 3, 2006, at A18 (discussing disagreements between Bush administration, members of Congress, and Louisiana and Mississippi officials over aid for reconstruction); Adam Nagourney & Anne E. Kornblut, *White House Enacts a Plan to Ease Political Damage*, N.Y. TIMES, Sept. 5, 2005, at A14 (discussing Bush administration's response to criticism of how it handled Hurricane Katrina); Alessandra Stanley, *Reporters Turn from Deference to Outrage*, N.Y. TIMES, Sept. 5, 2005, at A14 (discussing reporters' criticism of how Bush administration responded to Hurricane Katrina).

43. See *supra* note 13 and accompanying text.

44. See Laurence Zuckerman, *Some Airlines Say the Pace of Bailout Aid Is Too Sluggish*, N.Y. TIMES, Oct. 23, 2001, at C1 (discussing airline industry's concern that airlines are close to failing and the Air Transportation Stabilization Board is moving too slowly); Laurence Zuckerman, *Do All Airlines Deserve a Taxpayer Rescue?*, N.Y. TIMES, Oct. 21, 2001, § 3, at 1 (noting that "the pressure from state and national politicians to make sure that their home airlines survive is . . . enormous"; "after an intensive round of lobbying," the OMB gave the Air Transportation Stabilization Board "wide leeway" to extend loans).

sociation (ATLA) joined the airline industry in an unusual alliance to push for legislation enacting a victims' compensation fund and shielding the industry from liability exposure.⁴⁵ The ATLA, which usually lobbies for more expansive rights to sue, helped draft the legislation that required claimants filing under the September 11th Fund to forego their right to sue.⁴⁶

In response, Congress swiftly enacted the Air Transportation Safety and System Stabilization Act (ATSSSA),⁴⁷ seeking to aid the airline industry⁴⁸ and the victims at the same time.⁴⁹ The result was a

45. Belkin, *supra* note 2, at 94; see FEINBERG, *supra* note 1, at 19–20 (“Congress debated the airline bailout bill for days, but it added the compensation program in one day as a hasty afterthought.”).

46. ATLA then voluntarily imposed a moratorium on filing lawsuits connected with the attacks. Remarks of Leo Boyle, President of the Association of Trial Lawyers of America and Vice President of Trial Lawyers Care—October 15, 2001, News Conference, Grand Hyatt Hotel, New York City (2001), <http://911lawhelp.org/info/news/leotalk.htm> (“ATLA’s first response to September 11 was to call for a moratorium on civil lawsuits. We urged restraint and respect, putting relief for the families above all else.”). See Peck, *supra* note 2, at 215 (quoting President of ATLA that it was not “a time for finger-pointing among our own people There are greater needs that must be served at this time.”).

47. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended in scattered sections of 49 U.S.C.).

48. The introduction to the Act states its purpose is to “preserve the continued viability of the United States air transportation system.” *Id.*

In addition to the airline protections written into the September 11th Compensation Fund described above, the ATSSSA subsidized the airlines in two other ways. First, it created a direct compensation fund for the airlines. The first section of ATSSSA, entitled “Airline Stabilization,” created federal compensation for air carriers “in an aggregate amount equal to \$5,000,000,000 for . . . direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order.” *Id.* § 101(a)(2), 115 Stat. at 230. This amount also includes “the incremental losses incurred beginning September 11, 2001 . . . by air carriers as a direct result of such attacks.” *Id.* § 101(a)(2)(B), 115 Stat. at 230.

Second, the ATSSSA limited “liability for all claims, whether for compensatory or punitive damages” at the “limits of the liability coverage maintained by the air carrier.” *Id.* § 408(a), 115 Stat. at 240. Although this is not a direct subsidy, it essentially serves as one by limiting the airlines’ responsibility to their insurance coverage.

These two subsidies also reflect ways in which Congress decided to avoid application of the tort system.

49. Title IV of the Act states that the purpose of the Fund is “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” *Id.* § 403, 115 Stat. at 237.

Legislative history of the Act is scant, given the haste in which it was passed, but it supports these two main goals. Legislators expressed a desire to protect the airlines from liability stemming from the events of September 11th while preserving the right of the victims to seek compensation. Senator John McCain explained:

One of the most difficult issues we had to grapple with was the enormous potential liability that airlines faced if courts determine that [airlines] were negligent and in some way responsible for the damage wrought by

compensation fund without precedent in the level of government compensation offered to victims of crime. It reflected a desire to compensate the victims who had served as symbolic representatives of the federal government in the attacks,⁵⁰ an attempt to aid the airlines by forestalling the filing of lawsuits,⁵¹ and an effort on the part of the plaintiffs' tort bar to avoid adverse publicity for pursuing lawsuits in connection with the attack.⁵²

Two major themes pervade the September 11th Fund: to resolve claims quickly and to discourage the filing of tort claims. Both of these themes reveal a strong reaction against the tort system,⁵³ even while much of the structure of the September 11th Fund is borrowed from that system.⁵⁴

To promote the goal of expediency, all claims were to be resolved within 120 days of filing under the September 11th Fund.⁵⁵

the terrorist attacks The vast uncertainty of our litigation system posed significant challenges to crafting reasonable limitations on airline liability while providing compensation for the victims of the terrorist attacks and their families. Disturbingly, while courts could order the liquidation of our biggest airlines if they are deemed liable for the catastrophic damage of September 11, victims could also receive no compensation from the courts if they determine that corporate entities, including airlines, were not responsible for the devastating damage arising from the terrorist attacks. . . . To ensure that the victims and the families of victims who were physically injured or killed on September 11th are compensated even if courts determine that the airlines and any other potential corporate defendants are not liable for the harm; if insurance monies are exhausted; or are consumed by massive punitive damage awards or attorneys' fees, the bill also creates a victims' compensation fund.

147 CONG. REC. S9594 (daily ed. Sept. 21, 2001) (statement of Sen. McCain). *See generally* Alexander, *supra* note 2, at 692–94 (describing legislative history of ATSSSA).

50. In the "Statement by the Special Master" section of the Interim Final Rule for the Fund, Feinberg called the Fund "an unprecedented expression of compassion on the part of the American people to the victims and their families devastated by the horror and tragedy of September 11." September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified as amended at 28 C.F.R. pt. 104).

51. *See supra* note 44 and accompanying text.

52. *See supra* note 46 and accompanying text.

53. *See* Hadfield, *supra* note 2, at 6 (noting the September 11th Fund reflects a "fundamental erosion of our understanding of courts as institutions of democratic accountability, participation, and governance.").

54. *See* FEINBERG, *supra* note 1, at 36 (calling the fund a "tort-based compensation program" that was turned into "a type of social welfare program"); Diller, *supra* note 2 at 720 (discussing the Fund as a public benefit program that draws from tort law).

55. Air Transportation Safety and System Stabilization Act § 405(b)(3), 115 Stat. at 239. Payments were to be made within twenty days of that determination. *Id.* § 406(a), 115 Stat. at 240.

The claimants, who had two years to file a claim,⁵⁶ did not need to prove fault; they had only to demonstrate proof of damages.⁵⁷ These damages included economic and non-economic losses associated with death or physical injury.⁵⁸ Under the Act, the September 11th Fund was to be administered by a special master, who would subsequently refine the provisions of the Act by issuing regulations.⁵⁹ President Bush appointed Kenneth Feinberg, a lawyer well known and respected in mass tort circles, to serve in that role.⁶⁰

The determination of damage awards under the September 11th Fund was based on notions of distributive justice.⁶¹ Distributive fairness in compensation delivery systems is generally guided by some combination of three allocation principles: equity, equality, and need.⁶² The allocation principle of equity refers to the distribution of resources based on merit.⁶³ In the workplace, for example, compensation and noncompensatory rewards are usually based on level of skill, productivity, and market value.⁶⁴ Equitable distribution, in the sense of replacement value, is the usual basis for tort awards.⁶⁵ The second allocation principle of equality, usually found in political or community settings, generally means that individuals in similar circumstances

56. *Id.* § 405(a)(3), 115 Stat. at 238. This deadline, which ended in December 2003, was not extended, even though there was some pressure to do so since a significant number of claimants had not taken advantage of the fund until the very end of the filing period. *See* Diana B. Henriques, *Concern Growing as Families Bypass 9/11 Victims' Fund*, N.Y. TIMES, Aug. 31, 2003, § 1 at 1. New York State extended its two-year statute of limitations to March 2004, to allow ample time for claimants to file in court. *Id.*

57. 28 C.F.R. § 104.21(b)(3) (2004) (describing documents required to prove damages).

58. Air Transportation Safety and System Stabilization Act § 405(b)(1)(B)(ii), 115 Stat. at 238 (“[T]he amount of compensation to which the claimant is entitled [shall be] based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.”).

59. *Id.* § 404, 115 Stat. at 237–38.

60. *See* Diana B. Henriques & David Barstow, *Mediator Named to Run Sept. 11 Fund*, N.Y. TIMES, Nov. 27, 2001, at B1 (discussing Feinberg’s appointment).

61. *See* DAN B. DOBBS, *THE LAW OF TORTS* § 9 (2000) (explaining that distributive justice, unlike corrective justice, deals with how to redistribute goods justly in society).

62. Tyler & Thorisdottir, *supra* note 2, at 370.

63. *Id.*

64. *Id.*

65. *See* DOBBS, *supra* note 61, § 377 (describing basic compensatory damages for personal injury); MARSHALL S. SHAPO, *BASIC PRINCIPLES OF TORT LAW* § 71.02 (West Publ’g 2003) (describing general principles of personal injury damages); Tyler & Thorisdottir, *supra* note 2, at 373.

should be compensated similarly.⁶⁶ The third allocation principle distributes resources based on need; for example, relief organizations usually rely upon this principle when distributing aid after a disaster.⁶⁷

The majority of the award would be based on tort law's traditional formula, which in turn is based on the distributive principles of equity.⁶⁸ Accordingly, the September 11th Fund regulations contained presumptive income tables for economic loss and replacement costs based on age and current income levels.⁶⁹ Special Master Feinberg also indicated that social fairness required taking need and equality into account although equity was the major principle of distribution.⁷⁰ To guarantee that all victims would receive some compensation under the September 11th Fund, Feinberg declared that all eligible claimants would receive a baseline payment of \$250,000 merely by applying to the fund⁷¹ or \$500,000 where a decedent had a spouse or dependent.⁷² Feinberg did not precisely limit awards for

66. Tyler & Thorisdottir, *supra* note 2, at 370, 373; *see* FEINBERG, *supra* note 1, at 37 ("Congress might have chosen to give all the families equal money. In that case, the special master's role would have been limited to determining claimant eligibility.").

67. Tyler & Thorisdottir, *supra* note 2, at 374.

68. FEINBERG, *supra* note 1, at 73 ("The 9/11 statute simply reflects and reinforces the economic status of the victim at the time of death . . . differential fund awards are as American as apple pie.").

69. September 11th Victim Compensation Fund, 67 Fed. Reg. 11,233, 11,234–35 (Mar. 13, 2002) (describing the tables of presumed awards and their availability on the DOJ's website). ATSSSA defined economic loss as any pecuniary loss resulting from harm, to the extent available under state law. Air Transportation Safety and System Stabilization Act, § 402(5), 115 Stat. at 237. The Act contains examples of what may be considered economic losses, including lost earnings, employment benefits, replacement services, and burial costs. *Id.*

70. FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 8 ("The Special Master and the Department understood that the presumed award methodology might be inadequate for claimants with extraordinary needs or circumstances . . . [C]laimants who believe that the presumed methodology will not address their individual circumstances can request that the Special Master depart from that methodology."); FEINBERG, *supra* note 1, at 47 ("I was convinced that I should use my discretion to *narrow the gap* between high-end and low-end awards. Although the statute prohibited me from awarding the same amount to all claimants, Congress had protected itself by conferring undefined discretion on a special master.").

71. FEINBERG, *supra* note 1, at 50.

72. September 11th Victim Compensation Fund, 28 C.F.R. § 104.41 (2002). Although the regulations left the ultimate determination of who is an eligible claimant to the special master, both the ATSSSA and the regulations provided a definition of eligibility. *See* Air Transportation Safety and System Stabilization Act § 405(c), 115 Stat. at 239; September 11th Victim Compensation Fund, 28 C.F.R. § 104.2 (2001). Congress and the special master also placed temporal and geographic boundaries on the definition of "victim." Only those individuals present at the World Trade Center, Pentagon, or the Pennsylvania crash sites who suffered physical injury as a "direct result" or in the "immediate aftermath" of the crashes, and personal representatives of

victims who were on the upper end of the earning spectrum, but he indicated that he thought it would be inappropriate if fifteen percent of the people received eighty-five percent of the September 11th Fund's money.⁷³ The Act also required him to consider "the individual circumstances of the claimant" which indicates that the special master may consider a particular claimant's financial needs and resources.⁷⁴ Thus, instead of strictly applying the usual formula for tort damages, Feinberg set an unofficial minimum and maximum limit on awards and made distinctions among individual claimants.⁷⁵

The regulations limited non-economic damages to \$250,000 for pain and suffering plus \$100,000 for a spouse and each minor child left behind,⁷⁶ even though there was no express legislative ceiling on the September 11th Fund.⁷⁷ While these figures were criticized as

those who died on American Airline Flights 11 and 77 or United Airlines Flights 93 and 175 were eligible for compensation. *Id.* This meant that only those who suffered physical harm could file under the Fund and not those whose sole claim was emotional injury or property damage or who may have suffered latent injuries.

73. Belkin, *supra* note 2, at 97. Feinberg has also indicated that he would not give out awards greater than six million dollars, except in very rare circumstances. Kolbert, *supra* note 2, at 47. Feinberg indicated that he received informal direction from Congress in this regard. FEINBERG, *supra* note 1, at 47 ("Senator Kennedy provided me some very thoughtful advice: 'Ken, just make sure that 15 percent of the families don't receive 85 percent of the taxpayers' money.'").

74. Air Transportation Safety and System Stabilization Act § 405(b)(1)(B)(ii), 115 Stat. at 238.

75. See FEINBERG, *supra* note 1, at 91 ("The law required me to make distinctions among claimants, and I personally intervened to limit high-end awards and raise depressed payments.").

76. September 11th Victim Compensation Fund, 28 C.F.R. § 104.44. Feinberg said that this figure conformed roughly to the amounts paid under existing federal programs that compensate the families of police officers and military personnel killed in the line of duty. After public dissent was expressed at the amount, Feinberg raised the cap for non-economic damages for each spouse and dependent from \$50,000 to \$100,000. September 11th Victim Compensation Fund, 67 Fed. Reg. 11,233, 11,239 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104). The presumed loss for decedents remained at \$250,000. 28 C.F.R. § 104.44.

The Air Transportation Safety Act also established that amounts paid out must be reduced by the amount any family received from collateral sources. See § 402(4), 115 Stat. at 237. This set off a huge debate about whether this included charitable donations, which Feinberg ultimately decided that it did not. See Diana B. Henriques & David Barstow, *A Nation Challenged: The Special Master; Mediator Named to Run Sept. 11 Fund*, N.Y. TIMES, Nov. 27, 2001, at B1. That awards would still be offset by other collateral sources such as life insurance proceeds appears to indicate a Congressional desire to base awards in part on need.

77. See Air Transportation Safety and System Stabilization Act § 404(b), 115 Stat. at 238 ("There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title."); *id.* at § 406(b), 115 Stat. at 240 ("This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title."). Spe-

arbitrary, they indicated an acceptance of the idea that the absence of any life has some monetary value, thus reflecting the distributive principle of equality.⁷⁸

The trade-off for this expediency and certainty was that those who made claims waived their right to sue in tort for compensatory and punitive damages.⁷⁹ Moreover, while claimants were allowed to be represented by attorneys and request a hearing,⁸⁰ the system was designed to streamline the processing of claims. Most significantly, all decisions by the special master were final and nonreviewable.⁸¹

The Fund was a success on its own terms. Although potential claimants were slow to file, a surge of last-minute filings brought the percentage of those seeking compensation from the September 11th Fund to over ninety-seven percent of those eligible to file by the deadline of December 22, 2003.⁸² Fewer than ninety people ultimately decided to opt out of the September 11th Fund and sue the airlines and other defendants.⁸³ The Fund operated efficiently, with administrative costs representing a tiny percentage of the total funds disbursed.⁸⁴

Congress created the September 11th Fund to operate as a parallel rather than exclusive compensation system, giving claimants the choice of pursuing their claims either through the Fund or in federal

cial Master Feinberg “worried about an open-ended run on the U.S. Treasury.” FEINBERG, *supra* note 1, at 42.

78. The regulations promulgated by Feinberg also suggested a limit on attorney fees. In the Statement by the Special Master for the Interim Final Rule, Feinberg stated that “the Fund is a no-fault, administrative scheme that should not involve the kind of risks and expense that would justify any significant contingency fees” and suggested that “contingency arrangements exceeding 5% of a claimant’s recovery from the Fund would not be in the best interest of the claimants.” 66 Fed. Reg. 66,274, 66,280 (Dec. 21, 2001) (codified at 28 C.F.R. pt. 104).

79. Air Transportation Safety and System Stabilization Act § 405(c)(3)(B)(i), 115 Stat. at 239–40. To help claimants make their decision whether to file for compensation under the Fund, the Final Rule to the Fund provided for claimants to receive a preliminary, non-binding estimate of recovery. 67 Fed. Reg. at 11, 234.

80. Air Transportation Safety and System Stabilization Act § 405(b)(4)(A)–(B), 115 Stat. at 239.

81. *Id.* at § 405(b)(3), 115 Stat. at 239 (The special master’s “determination shall be final and not subject to judicial review.”).

82. See FEINBERG, *supra* note 1, at 164–65; David W. Chen, *Man Behind September 11th Fund Describes Effort as a Success, With Reservations*, N.Y. TIMES, Jan. 1, 2004, at B1 [hereinafter Chen, *Success with Reservations*]; David W. Chen, *After Weighing Cost of Lives, 9/11 Fund Completes Its Task*, N.Y. TIMES, June 16, 2004, at A1. Claimants filing on behalf of deceased victims received almost six billion dollars in compensation. FEINBERG, *supra* note 1, at 164.

83. FEINBERG, *supra* note 1, at 164.

84. *Id.* at 165.

court.⁸⁵ Congress could have chosen to create an exclusive compensation system similar to workers' compensation systems.⁸⁶ Instead, following the model created by other compensation funds such as the Childhood Vaccination Act, Congress allowed a tort remedy as an alternative to seeking compensation under the September 11th Fund.⁸⁷ But even though Congress preserved the victims' right to sue in the tort system, it capped the amount the airlines ultimately would have to pay by limiting liability to their liability insurance coverage.⁸⁸ Fewer than ninety people brought tort lawsuits against the airlines and other defendants, seeking compensation higher than would be awarded under the September 11th Fund or attempting to establish responsibility for the attacks.⁸⁹

B. *The Response*

Various criticisms have been lodged against the September 11th Fund.⁹⁰ On one hand, some criticisms stem from a failure to provide sufficient compensation to victims of the attacks. Cantor Fitzgerald, a company that lost over 600 employees in the tragedy, criticized the September 11th Fund for failing to implement the purposes of the legislation by not awarding full compensation to wage earners at the highest end of the scale.⁹¹ It argued that because Congress did not cap awards, the special master had overstepped his bounds by informally

85. Air Transportation Safety and Systems Stabilization Act § 405(c)(3)(B)(i), 115 Stat. at 240 (requiring claimants to waive their rights to file civil suits).

86. I have suggested elsewhere that Congress may have wanted to avoid constitutional problems that might have been raised under the Commerce Clause. See Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 536 (2002).

87. Air Transportation Safety and Systems Stabilization Act § 405(c)(3)(B)(i), 115 Stat. at 240.

88. *Id.* at § 408(a), 115 Stat. at 240.

89. FEINBERG, *supra* note 1, at 164. See *In re September 11 Litigation*, 280 F. Supp. 2d 301 (E.D.N.Y. 2003). The defendants in that case included terrorists and nonterrorists. The nonterrorist defendants moved to dismiss themselves from the action, arguing that they did not owe a duty to protect plaintiffs against the terrorists, and even if they did, the attack was so extraordinary as to constitute an intervening and superseding cause, but the district court denied the defendants' motions. *Id.* at 314. Approximately seven eligible families of deceased victims filed neither a lawsuit nor an application with the September 11th Fund. FEINBERG, *supra* note 1, at 161.

90. See Ackerman, *supra* note 2, at 156–57; Diller, *supra* note 2, at 753–60; Goldscheid, *supra* note 2, at 224; Rabin, *Indeterminate Future Harm*, *supra* note 2, at 1854–57.

91. As Cantor Fitzgerald argued, “The Fund was established to compensate victims’ families for actual economic losses—and not to provide a mechanism for the special master to lessen income disparities by applying non-neutral value-laden principles.” Submission of Cantor Fitzgerald, L.P., eSpeed, Inc. and Tradespark L.P. to the Special Master of the September 11th Victim Compensation Fund of 2001 and to the

imposing a cap on compensation,⁹² and stressed that Congress could have, but did not, create a government program to compensate victims based on a needs model.⁹³ The smallest award for families of victims was \$250,000, and the largest, over \$7.1 million.⁹⁴ On the other hand, some critics considered the compensation model, which is based on the traditional replacement value of the torts system, to be unfair given that each victim had suffered a common disaster.⁹⁵

Others criticized the program for being underinclusive by failing to provide support for certain individuals who suffered health problems after the initial attack, such as firefighters and police officers who were exposed to pulverized glass, concrete, lead, and traces of asbestos while searching for victims and remains.⁹⁶ Nor did it cover victims of other terrorist attacks, such as the Oklahoma City bombing or anthrax cases, or other victims of crime or accidents.⁹⁷

United States Department of Justice, Sept. 12, 2002, at 38, *available at* <http://news.findlaw.com/legalnews/us/terrorism/documents/finance.html>.

92. *Id.* at 37. As Special Master Feinberg has said, “The law gives me unbelievable discretion. . . . It gives me discretion to do whatever I want. So I will.” Kolbert, *supra* note 2, at 48. See Diller, *supra* note 2, at 756–60 (criticizing unfettered discretion of special master granted by ATSSSA). Despite this cap, the September 11th Fund ended up paying more than 5,000 families over \$7 billion. FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 1.

93. See Kolbert, *supra* note 2, at 47.

94. FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 110 tbl.12. In addition, 2,680 personal injury claimants were awarded damages ranging from \$500 to \$8.6 million. *Id.*

Regarding claims for deceased victims, the average award was \$788,022 for unemployed decedents; \$1,102,135 for decedents who earned less than \$24,999; \$1,520,155 for decedents who earned between \$25,000 and \$99,999; \$2,302,235 for decedents who earned between \$100,000 and \$199,999; \$3,394,625 for decedents who earned between \$200,000 and \$499,999; \$4,749,654 for decedents who earned between \$500,000 and \$999,999; \$5,671,816 for decedents who earned between \$1,000,000 and \$1,999,999; \$6,253,705 for decedents who earned between \$2,000,000 and \$3,999,999; and \$6,379,288 for decedents who earned more than \$4,000,000. *Id.* at 97 tbl.2.

95. FEINBERG, *supra* note 1, at 47; Ackerman, *supra* note 2, at 161–62; Culhane, *supra* note 2, at 1107; Diller, *supra* note 2, at 740.

96. See Rabin, *Indeterminate Future Harm*, *supra* note 2, at 1847–48; *but cf. In re World Trade Center Disaster Litigation*, 270 F. Supp. 2d 357, 380 (S.D.N.Y. 2003) (holding that ATSSSA preempted claims by persons working at World Trade Center site to whom inadequate respiratory protection was provided that arose within 18 days of attacks but not claims that arose after 18 days).

97. Belkin, *supra* note 2, at 94.

It’s impossible to justify this money in terms of a defined system of justice. We should not be saying that a death caused by one terrorist is worth more than a death caused by another, or that a death caused by a terrorist is worth more than a death caused by a drunk driver. And isn’t that what this fund is saying?

Id. (quoting Professor Peter Schuck); *see also* Ackerman, *supra* note 2, at 157–58.

Even Special Master Feinberg publicly criticized the program. He said that ATSSSA had several deficiencies, including vague criteria defining eligibility to file a claim and collect an award.⁹⁸ He stressed that the program suffered from conflicting theories of damage awards, following principles of equitable distribution, in terms of replacement value, while also following the principles of equality and need, so that he “ultimately devised the program to prevent it from favoring the wealthy over the financially disadvantaged.”⁹⁹ Most significantly, he recognized that the authorizing statute did not address whether the federal government would make this type of payoff every time the United States is attacked and suggested that the program “should not be viewed as a template for future attacks, and certainly not ‘as an end-run around the tort system.’”¹⁰⁰

In the end, however, the September 11th Fund successfully fulfilled its purpose by achieving a high percentage of eligible claimants filing for the fund and keeping down the number of tort suits for personal injury filed in the courts.¹⁰¹ Initially, though, eligible claimants were slow to avail themselves of the September 11th Fund. The delayed filing occurred due to several factors, although we do not know the extent to which these factors dictated individual deci-

98. See FEINBERG, *supra* note 1, at 39–40, 66–69; Chen, *Success with Reservations*, *supra* note 82, at B1.

99. Chen, *Success with Reservations*, *supra* note 82, at B1. He also criticized the failure to follow the collateral source rule: “It’s one thing to tell a stockbroker’s widow you’re going to get \$2 million, and another stockbroker’s widow is going to get \$3 million because she didn’t have \$1 million worth of life insurance. So the taxpayer subsidizes the difference. I mean, talk about fueling emotional divisiveness.” *Id.* See also FEINBERG, *supra* note 1, at 34–36, 47–48.

100. Chen, *Success with Reservations*, *supra* note 82, at B2. When the September 11th Fund finally disbanded, an editorial in the New York Times opined:

[E]ven if a disaster like 9/11 does strike, it seems unlikely that Congress will choose to replicate this program. The price was high, and the chance of total equity virtually nil. Even Feinberg, an experienced and skilled mediator, agrees that the responsibility he undertook was too great for one person.

Editorial, *9/11 Fund Closes Its Doors*, N.Y. TIMES, June 18, 2004, at A30.

101. Ninety-seven percent of potential death claimants filed a claim with the Fund, a total of 2,880 claims, while only two percent filed a claim in court. FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 1; Ackerman, *supra* note 2, at 182. The total amount distributed by the September 11th Fund was nearly \$8.5 billion for death claims and over \$1.5 billion for injury claims. FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 10.

Professor Hadfield criticizes use of this criteria as a measure of the September 11th Fund’s success. She argues that these figures demonstrate that the Fund worked well as a social insurance system, but that it really exposes a disparaging view of the American justice system as an “institution[] of democratic accountability, participation, and governance.” Hadfield, *supra* note 2, at 6–7, 11.

sions.¹⁰² Some people simply could not deal emotionally with seeking any recourse, either through the September 11th Fund or in the courts.¹⁰³ The sudden and violent nature of terrorism may have left the victims' families particularly incapacitated. Others bypassed the September 11th Fund, filing lawsuits in court, either because they thought that the tort system was a better way to establish and deter faulty behavior of the secondary tortfeasors or because they thought compensation would be greater.¹⁰⁴ They may have opted for the tort system because they wanted the validation or catharsis offered by the remedy. But the hesitation to file with the September 11th Fund also stemmed, in part, from Congress's dereliction in signaling clearly to the victims' families whether the public policy basis for the September 11th Fund derived from tort or from social welfare. Because that fundamental question was not answered in the original legislation, Special Master Feinberg struggled with how to allocate the monies under the September 11th Fund. The enabling statute did not give each family a set amount or put a cap on the awards, but Feinberg instinctively moved in that direction. Many families were left adrift, feeling confused, dissatisfied, and distrustful.¹⁰⁵

These problems were not the fault of Feinberg. The September 11th Fund was beset with these problems because Congress did not address them. At bottom, the Fund raises the question of the extent and limits of the government's responsibilities for its citizens when faced with terrorist activities.

102. See Henriques, *supra* note 56, at 1. Special Master Feinberg stated that early on, families hesitated to file with the Fund because of uncertainty regarding the size of their likely award: "A rough approximation drawn from a chart wasn't enough to convince them that foregoing a lawsuit would be in their long-term interest." FEINBERG, *supra* note 1, at 78. As the deadline grew closer, "more and more families expressed a reluctance or inability to file early, citing grief, anger, confusion, or occasionally a 'wait-and-see' attitude," while others "continued to question the legitimacy and bona fides of the fund itself." *Id.* at 160. See Tyler & Thorisdottir, *supra* note 2, at 356 (listing reasons why the pace of applications was slow: some families said they were not emotionally ready; some found the procedure too complicated; some said that they did not trust the fund to be fair; others found the concept of the fund offensive; and others felt it was a "shut up fund" to sweep the incident under the rug).

103. Ultimately, approximately seven families chose neither to file a claim with the Fund nor to pursue tort litigation: "Paralyzed by grief, clinically depressed, they sat on the sidelines and avoided the hard decisions that closed the final chapter of a life." FEINBERG, *supra* note 1, at 161.

104. Feinberg indicated that those who did pursue litigation—fewer than ninety people—did so with hopes of receiving higher awards or "to use the lawsuits as leverage to force disclosures about our nation's preparedness for the 9/11 attack." *Id.* at 164–65.

105. See Henriques, *supra* note 56, at 36.

II.

GOVERNMENTAL OBLIGATION TO PROVIDE COMPENSATION
TO VICTIMS OF TERRORISM

Terrorism is generally targeted at a specific ethnic, religious, or governmental group.¹⁰⁶ As an all-encompassing definition of “terrorism” has proven elusive, for purposes of this article, terrorism will be defined as premeditated acts of violence by a person or group, motivated by religious, political, or ideological reasons, against people for the purpose of intimidating, coercing, or destroying societies, regimes, or cultures.¹⁰⁷ Although individuals are targeted to be injured or

106. Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83, 85 (2001).

107. While a comprehensive definition of terrorism is elusive, three different types of terrorism seem to exist: domestic terrorism, international terrorism, and state-sponsored terrorism. Some definitions of terrorism attempt to encompass all three types of terrorism, and others deal mainly with one type. Most of these definitions are tailored to be narrow or broad, depending on their application. For example, the Secretary of State must report annually to Congress on terrorism that is “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(a), (d)(2) (2000 & Supp. IV 2004). This simple definition excludes environmental and economic terrorism. Aaron J. Noteboom, Comment, *Terrorism: I Know It When I See It*, 81 OR. L. REV. 553, 569 (2002). Further, it fails to account for religiously motivated acts of terror, such as those performed not to change policy, but rather out of a belief that he or she has a religious duty to kill. The United States Code on Crimes and Criminal Procedure contains another definition, which addresses only international terrorism. “International terrorism” is defined as activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion;
or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331 (1)(A)–(C) (West 2000).

The Federal Bureau of Investigation uses the definition of terrorism found in the Code of Regulations, which defines terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” The definition is further defined as either domestic or international depending on the origin, base, and objectives of the terrorist. 28 C.F.R. § 0.85(l) (2004).

The Department of Commerce Insurance Division also has a definition of terrorism which includes acts “committed by an individual . . . acting on behalf of any

killed, they are generally randomly selected from the larger culture.¹⁰⁸ Often the real motive is to change governmental policy, and the individual victims, considered symbolic representatives of the government, are incidental to the larger goal.¹⁰⁹ Because one's government, one's culture, or one's society is generally the true target of terrorism, the paramount question is whether the government has any obligation to provide compensation to the victims of terrorism.

Four rationales would favor governmental action to provide compensation. The first two stem from a quasi rights-based notion of governmental obligation: first, a social contract view of government; and second, a tort obligation to protect citizens. The other two rationales stem not from any legal obligation, but from certain governmental policies: one, a desire to be compassionate toward the citizens/victims;

foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion." Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 102(1)(A)(iv), 116 Stat. 2322, 2324 (amended 2005). This includes an express limitation for acts that are committed "as part of the course of a war declared by the Congress." *Id.* § 102(1)(B)(i). Unfortunately, the line between war and terrorism has converged to the extent that it may no longer be distinguishable.

Attempts at a globally accepted definition for terrorism have been largely unsuccessful, mainly because they are all very broad and leave a lot of room for interpretation. This is so because no country wants to be seen as harboring terrorists. Thus, for a definition to be acceptable, it must allow a host country to classify the terrorist as a "freedom fighter" or "revolutionary." As a result, the United Nations has over a dozen different protocols dealing with hijackings, use of nuclear material, hostage seizures, and so forth.

Academics have crafted various definitions of terrorism. Alex P. Schmid, a terrorism expert, formed a consensus among academics of the definition of terrorism in 1988, considering terrorism as:

an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.

U.N. Office on Drugs and Crimes, *Definitions of Terrorism*, http://www.unodc.org/unodc/terrorism_definitions.html (last visited Jan. 19, 2006) [hereinafter *Definitions of Terrorism*]. See also SHAPO, COMPENSATION, *supra* note 2, at 25–27.

108. See *Definitions of Terrorism*, *supra* note 107.

109. "Terrorist acts are generally designed 'to compel governments into making concessions.'" Mostaghel, *supra* note 106, at 85 (quoting Martha Crenshaw, *Unintended Consequences: How Democracies Respond to Terrorism*, 21 FLETCHER F. OF WORLD AFF. 153, 154 (1997)).

the other, a belief that providing compensation enhances government by promoting certain economic interests. These two groups of rationales are discussed below.

A. *Governmental Rights-Based Obligation*

Governmental aid to victims of crime is not a new idea. Governments have assumed the duty both on the state¹¹⁰ and federal¹¹¹ level and, as one commentator pointed out, one state even construes this aid as a governmental obligation, based on a “rights” theory that “a state which has failed to adequately protect its citizens from crime is obligated to provide compensation to those who become victims.”¹¹² Under this rationale, the obligation of the state to protect its citizens derives from contract and tort theory. If citizens enter into a social contract with the state to provide them with security in exchange for a relinquishment of individual rights, then the government breaches that contract when it fails to protect them adequately.¹¹³ Similarly, if the state undertakes the duty to protect its citizens, when the government fails to provide that security it breaches that duty.¹¹⁴

Thus, under a rights-based theory, if the federal government has a legal duty to protect its citizens from terrorism, the breach of that duty triggers the right to compensation. Notwithstanding its arguable theo-

110. California codified a right to restitution for crime victims in 1965. See CAL. WELF. & INST. CODE § 11211 (West 1965) (repealed 1967); James F. Culhane, Note, *California Enacts Legislation to Aid Victims of Criminal Violence*, 18 STAN. L. REV. 266, 266 (1965). By 1992, all of the states had passed legislation to aid victims of crime. See Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L. & CRIMINOLOGY 333, 334 (1994).

111. See Victim and Witness Protection Act, 18 U.S.C. § 3663 (2000) (granting restitution to victims); see also 18 U.S.C. § 3663A (2000) (mandating restitution to victims of certain crimes).

112. Charlene L. Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51, 61–62 (1985) (referring to New Jersey’s view of government aid). Margery Fry is usually credited with proposing the first modern state victims compensation program. See Margery Fry, *Justice for Victims*, THE OBSERVER, July 7, 1957, reprinted in *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 191, 191–94 (1959). Relying on a “rights” rationale, she argued that where citizens pay taxes based on the expectation that the money will be used to finance security and that security fails, the citizens should receive reparations out of the public treasury created by the taxes. *Id.* at 192–93.

113. See Smith, *supra* note 112, at 63; Lesley J. Friedsam, *Legislative Assistance to Victims of Crime: The Florida Crimes Compensation Act*, 11 FLA. ST. U. L. REV. 859, 862 (1984); LeRoy G. Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 19 ST. LOUIS U. L.J. 238, 241 (1965); *contra* SHAPO, COMPENSATION, *supra* note 2, at 182–83 (arguing that social contract theory does not support governmental obligation to provide compensation for crime victims).

114. See Smith, *supra* note, 112 at 63.

retical appeal, this argument has not been successful in practice.¹¹⁵ The Supreme Court made clear that no affirmative right to governmental protection exists under the Due Process Clause of the Constitution in *DeShaney v. Winnebago County Department of Social Services*.¹¹⁶ The Winnebago County (N.Y.) Department of Social Services returned Joshua DeShaney to his father's custody although the Department had reason to know Joshua was being abused by his father.¹¹⁷ After her son was beaten so severely by his father that he fell into a coma, Joshua's mother sued the Department, claiming it breached its duty to protect Joshua.¹¹⁸ Chief Justice William Rehnquist, writing for the Court, held that the Fourteenth Amendment does not guarantee state protection against private violence, reading the Due Process Clause as guaranteeing only negative rights.¹¹⁹ The Court did note, however, that in certain situations affirmative duties could be imposed on the state by the Due Process Clause.¹²⁰ For example, the state owes an affirmative duty to provide reasonable protection and care to individuals whose liberty it has taken away, such as incarcerated prisoners.¹²¹ A similar duty can arise when the state endangers an individual's liberty or places him or her in a worse position from which to protect his or her own rights and interests.¹²² In these situations, the state's use of its power renders the individual unable to defend his or her own liberty, triggering the right of the individual to state protection.¹²³

115. See Goldscheid, *supra* note 2, at 213.

116. 489 U.S. 189, 195 (1989). The Supreme Court reaffirmed this holding recently. See *Town of Castle Rock, Colorado v. Gonzales*, 125 S. Ct. 2796, 2803 (2005) (holding that no protected property interest existed under Due Process Clause alone in the context of police enforcement of restraining order).

117. *DeShaney*, 489 U.S. at 192.

118. *Id.* at 193.

119. *Id.* at 195. The Court also made clear that it would read the Fifth Amendment (containing the Due Process Clause for the federal government) in the same way as it did the Fourteenth, stating that "[l]ike its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Id.* at 196 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

120. *Id.* at 198.

121. *Id.* at 198–99.

122. *Id.* at 200.

123. *Id.* In *DeShaney*, the Court held that the state had no duty to protect Joshua because he was not in the custody of the county agency when his injuries occurred. Furthermore, by taking Joshua into custody and returning him to his father, the county did not place him in a worse position than he had been in previously and in no way impaired his ability to defend his rights. *Id.* at 201. The Court also rejected plaintiff's argument that because the agency knew of the danger that Joshua's father posed to him and had endeavored to help him, a "special relationship" was created, giving rise to an affirmative right to state protection. *Id.* at 197–98. According to the Court,

Many states have followed a similar line of reasoning in rejecting common law tort claims based on a governmental duty to protect citizens against personal injury or attack,¹²⁴ while recognizing that there are some exceptions, as the Supreme Court noted in *DeShaney*.¹²⁵

awareness of a private threat to an individual is not enough to create a duty to protect, and endeavoring at one time to help the threatened individual in no way makes the state “the permanent guarantor of an individual’s safety.” *Id.* at 201. Justice Brennan, in dissent, vigorously disagreed, arguing that when a state creates a child-welfare system specifically designed to help children like Joshua, and then refuses aid itself, “it cannot wash its hands of the harm that results from its inaction.” *Id.* at 207 (Brennan, J., dissenting).

124. *See* *Castellani v. Del. Police*, 751 A.2d 934, 939–40 (Del. Super. Ct. 1999) (where traffic lights were out and plaintiff was injured, police had no duty to respond quickly; duty is to public generally and not any individual absent a special relationship); *Vann v. Dep’t of Corrs.*, 662 So.2d 339, 340 (Fla. 1995) (Department of Corrections owed a duty to the public generally, and not to any individual person); *Smith v. City of Bayard*, 625 N.W.2d 736, 737–38 (Iowa 2001) (City’s regulation of dogs and subsequent failure to enforce the regulations did not constitute supervision or control necessary to create exception to rule of no duty of protection to those attacked by dogs); *Beck v. Kan. Adult Auth.*, 735 P.2d 222, 231 (Kan. 1987) (state university hospital was not responsible for providing protection or adequate police force on premises where disturbed gunman entered building and fired on people with a shotgun); *Kilmetis v. N.Y.C. Transit Auth.*, 580 N.Y.S.2d 779, 780 (App. Div. 1992) (in absence of a special relationship between the police and the victim, there exists no duty of police protection); *Clark v. Red Bird Cab Co.*, 442 S.E.2d 75, 78 (N.C. Ct. App. 1994) (upholding dismissal of claims against city, police, and police officer, because they owed no duty to passengers regarding the issuance of taxicab permits to unqualified drivers); *Williams v. Phila. Hous. Auth.*, 873 A.2d 81 (Pa. Commw. Ct. 2005) (municipality not responsible for shooting of visitor at housing project); *Arthurs v. Aiken County*, 551 S.E.2d 579, 583–84 (S.C. 2001) (sheriff’s statutory duties were to public at large and not to the victim, who was murdered by her husband); *Hurd v. Woolfork*, 959 S.W.2d 578 (Tenn. Ct. App. 1997) (sheriff’s failure to execute a search warrant did not breach duty to victims subsequently murdered by the subject of the warrant, upholding the public duty doctrine of governmental immunity); *Benson v. Kutsch*, 380 S.E.2d 36, 42 (W. Va. 1989) (in absence of a special relationship, City had no duty to plaintiff regarding its failure to enforce housing codes designed to prevent structure fires).

125. Although most state courts have held that in general, government entities owe no duty of protection to individuals, many courts have recognized that in certain situations, a “special relationship” may arise between an individual (either the victim or a third party) and the state which creates a duty on the part of the state to reasonably protect the individual. *See* *Dybas v. Town of Chester*, 505 S.E.2d 274, 275 (Ga. Ct. App. 1998) (denying Dybas’s claim, yet recognizing that an affirmative undertaking by a municipal police department to protect an individual could give rise to a duty of police protection based on the reliance of individual); *Serviss v. Ind. Dep’t of Natural Res.*, 721 N.E.2d 234, 234 (Ind. 1999) (holding that once a state established a public recreational facility it was required to maintain it in a reasonably safe manner); *Brandon v. County of Richardson*, 566 N.W.2d 776, 780 (Neb. 1997) (where rape victim offered to testify and assist in prosecution of rapists, a special relationship between victim and police was created, giving rise to a police duty to protect her from further harm); *Schuster v. City of New York*, 154 N.E.2d 534, 537 (N.Y. 1958) (where victim has collaborated with police in prosecution, police owe a reciprocal duty of reasonable

It is difficult to argue that the government will have an affirmative duty to protect citizens from terrorist violence. The courts have outlined two exceptions that exist under the general no-duty rule.¹²⁶ The first arises when the government has taken away an individual's ability to protect his or her liberties from violation. It can be argued that, because the federal government claims the power to conduct foreign relations, it has, in effect, taken away the power of citizens to protect themselves from foreign aggression.¹²⁷ It is doubtful, however, that the federal government's plenary power in the area of foreign affairs¹²⁸ is enough to create a duty to protect individuals from terrorism within the United States. On an abstract level, the federal government is controlled through democratic means, and by electing individuals to serve in the federal government, citizens share the ability to control foreign relations and thus protect themselves from international aggressors. Moreover, this argument raises separation of powers issues: it would require the courts to review the actions of the executive and the legislature in the realm of foreign affairs which are typically un-reviewable because they represent political questions.¹²⁹ On a more pragmatic, non-constitutional level, this type of policy decision-making is protected from examination by the well-established doctrine of sovereign immunity.¹³⁰

care in providing protection); *Harvey v. County of Snohomish*, 103 P.3d 836, 841 (Wash. Ct. App. 2004) (911 call may create special relationship that imposes duty when express assurances are made).

126. See *supra* notes 121–123 and accompanying text.

127. Cf. Rabin, *Indeterminate Future Harm*, *supra* note 2, at 1867 (suggesting that it may be fair for the federal government to fund the September 11th Fund, unlike other compensation funds which are funded privately, because the failure in intelligence gathering may be a principal cause of what went wrong).

128. The United States Constitution vests the power to conduct foreign affairs in both the executive and legislative branches. See U.S. CONST. art. II, § 2 (authorizing the President to be Commander in Chief of the Army and Navy and empowering the President to make treaties and appoint ambassadors while requiring Senatorial “advice and consent” in treaty-making and ambassadorial appointments).

129. See *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948) (“[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy They are decisions of a kind for which the judiciary has neither aptitude, facilities, nor responsibility”).

130. See SHAPO, COMPENSATION, *supra* note 2, at 54–59 (describing application of the “discretionary function” exception to the Federal Tort Claims Act which bars any claims against government employees arising from any decision involving discretion); Shapo, *Specialized Jurisprudence*, *supra* note 2, at 1245.

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680 (2000), waives sovereign immunity for suits for money damages against the United States “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . . if a private per-

Even when the government undertakes more specific duties, such as federalizing airport security, it is difficult to invoke this exception. Instead, such undertakings would be analogized to governmental actions in creating a police force. Such actions, without more, do not give rise to a governmental affirmative duty to rescue citizens from private harm.¹³¹ And, as suggested above, as a non-constitutional matter,¹³² it is likely that any negligence in undertaking these duties would be immune from suit under the discretionary function exception to the Federal Torts Claim Act.¹³³

The second exception occurs when the government places an individual in a worse position from which to defend his or her liberty. It may be argued that by pursuing certain policies abroad, the federal government has increased the danger of terrorist action against United States citizens.¹³⁴ This argument would probably fail for the same

son . . . would be liable to the place where the act or omission occurred.” *Id.* § 1346(b)(1). The “discretionary function” exception to the waiver of sovereign immunity under the FTCA provides protection for governmental decisions that are clearly policy choices. *Id.* § 2680(a) (barring claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”). The seminal decision interpreting the discretionary function exception is *Dalehite v. United States*, 346 U.S. 15 (1953). In *Dalehite*, the Court established that the purpose of the exemption was to permit the Government to make planning-level decisions without fear of suit. *Id.* at 34–36. *See also* *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984) (stating exception designed to prevent courts from second-guessing the way that government officials balance economic, social, and political factors in carrying out their official duties). The Court established a two-part test to determine the applicability of the exemption in *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991). First, the court must determine whether any “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *Id.* at 322. If so, then the employee must follow the directive. *Id.* If not, and the challenged conduct “involves an element of judgment,” then under the second part of the test, the court must determine whether the “judgment is of the kind that the discretionary function exception was designed to shield.” *Id.* at 322–23. This includes governmental actions and decisions grounded in considerations of public policy. *Id.* at 323.

Governmental decisions involving national security, foreign surveillance, and assessment of terrorism threats would very likely be protected by this exception, as those decisions are inextricably tied to a variety of public policy considerations. *See Macharia v. United States*, 334 F.3d 61, 67 (D.C. Cir. 2003) (finding claims brought against the United States based on decisions regarding security at embassy and warnings of possible threats were barred by the FTCA’s discretionary function exception).

131. *See supra* notes 124–125.

132. *See supra* note 130 and accompanying text.

133. 28 U.S.C. § 2680(a) (2000). *See supra* note 130 and accompanying text.

134. *See* F. Gregory Gause III, *Can Democracy Stop Terrorism?*, FOREIGN AFF., Sept.–Oct. 2005, at 62, 71–72 (noting that studies indicate that strong anti-American sentiment in Arab countries stems primarily from U.S. policy); Susan B. Glasser, *U.S. Figures Show Sharp Global Rise in Terrorism*, WASH. POST, Apr. 27, 2005, at A1

reasons as described above: (1) the federal government is controlled by democratic means, and as such, each citizen enjoys the same ability to control the direction of national foreign policy; (2) examination of these policies would engender separation of powers problems; and (3) these policy decisions would be protected by the doctrine of sovereign immunity. Moreover, should one overcome these barriers, the causal link between foreign policy and acts of terrorism is attenuated, and would probably not give rise to any kind of right to protection.¹³⁵

Although there may be no constitutional, statutory, or common law duty of protection and thus no duty to compensate victims of terrorism, democratic means are available to create such a duty, as well as to create a national compensation system when that duty is breached. Support for the argument that the government should adopt, as a matter of policy, a duty to protect citizens from terrorism may be found in common law tradition and social contract theory.¹³⁶ Thus,

(serious international terrorist incidents tripled in 2004 despite U.S. efforts to combat terrorism); CNN.com, Terror Threat to U.S. Called "Significant" (Apr. 27, 2005), <http://www.cnn.com/2005/US/04/27/terror.report> (suggesting that U.S. war in Iraq has contributed to the rise in terror-related incidents and the increased threat to the U.S., but U.S. officials attribute the increase to a more comprehensive review process).

135. Generally, a criminal act is considered a superseding cause, so that a defendant who may have created the opportunity for the criminal act will not be held liable in tort. See DOBBS, *supra* note 61, § 190.

136. Professor Steven Heyman, in an important article arguing against *DeShaney* and for the adoption of a legal right to protection grounded in the Fourteenth Amendment, examined the common law to support his theory. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991). First, he looked at the writings of Sir Edward Coke, in *Calvin's Case*, which emphasized the idea that the bond between subject and sovereign was based on a "mutual bond and obligation," whereby the subjects swore loyalty to the king in return for governance and protection. *Id.* at 513 (quoting *Calvin's Case*, 77 Eng. Rep. 377, 382 (1608)). For Coke, this relationship, of loyalty and obedience in return for protection, was the natural state of man, and therefore unchangeable. *Id.* at 514.

For further evidence, Professor Heyman turned to the constitutional theorists of the seventeenth century, who took Coke's ideas about the relationship between the sovereign and his subjects, and transformed them so that the obligations were not based in nature, but in an unwritten social contract. Under this philosophy, if the king failed to live up to his end of the bargain, the subjects were under no obligation to remain loyal. *Id.*

The most influential of these constitutional theorists was John Locke, whose SECOND TREATISE OF GOVERNMENT supports the proposition that it is the government's duty to protect its citizens. Although Locke's conclusion (that the relationship between a citizen and his government is one of mutual obligation) is the same as Coke's, he rejected Coke's idea about man's natural state, and instead viewed the state of nature as one where man is in a "State of perfect Freedom," governed only by his reason. *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 4). Locke described this state of nature as one where man's liberty is very insecure, and subject to the will of those more powerful than himself. *Id.* at 515. According to Locke, it is

even though the law does not recognize an affirmative legal right to protection, there are strong policy reasons, based on fundamental fairness, to create such a right, as discussed below.

B. Policy Reasons Supporting a Voluntary Assumption of a Governmental Duty

The argument for federal compensation for victims of terrorism as a matter of policy is compelling because terrorists choose their targets as symbols of a national government or culture, not as individuals. Terrorists are not concerned with whom they kill, as long as the victims are citizens of the target government or members of the target culture.¹³⁷ If the United States is the target, all Americans are potential victims of terrorism, and the nation has a moral, rather than legal, duty to make whole the families of those who died or were harmed as representatives of the country.

The idea that governmental compensation rests on notions of fundamental fairness has been recognized by other governments. For example, during the German attacks against England in World War II, Prime Minister Winston Churchill thought it unfair to allow the burden of the attacks to fall entirely on those who were hit. Therefore, he ordered

because of this insecurity that reasonable men have agreed to give up certain liberties and form governments in return for the security that comes from the mutual protection of individual rights. *Id.*

Locke's ideas about natural rights and the existence of a social contract had become widely accepted by the mid-18th century. *Id.* at 516. Sir William Blackstone, in his *COMMENTARIES ON THE LAWS OF ENGLAND*, claimed that it is legal maxim "that protection and subject are reciprocal." *Id.* at 517. Blackstone summed up the social contract as follows:

[T]he whole should protect all its parts, and that every part should pay obedience to the will of the whole, or in other words, that the community should guard the rights of each individual member, and that . . . each individual should submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any.

Id.

In keeping with Coke, Locke, and Blackstone, Heyman summarized his argument for the existence of a legal right to protection succinctly: in the state of nature (perfect freedom), man's liberty is a negative right that exists but is not enforceable. *Id.* In order to secure his liberty, man entered into a social contract to ensure that he would have the positive benefit of society protecting this right. *Id.* at 517-18. Therefore, "protection is a positive right—a claim on the community to provide something to which the individual is entitled," but could not have on his own. *Id.* at 518.

137. WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* 81 (1999) (stating that new terrorism is not aimed at clearly defined political demands but at the destruction of society and elimination of large segments of the population).

that all damage from the fire of the enemy must be a charge upon the State and compensation be paid in full and at once. Thus the burden would not fall alone on those whose homes or business premises were hit, but would be borne evenly on the shoulders of the nation.¹³⁸

When Israel enacted its first compensation statute for victims of terrorism in 1951, the Knesset's Finance Committee Chairman, M. K. David Pinkas, similarly described the rationale for the statute: "It is inconceivable that the damage from this war which we had to withstand will be borne by individuals and not by the whole public."¹³⁹ Both governments, in assuming a duty of compensation to citizens who are victims of terrorism, base their policy on notions of fundamental fairness of spreading the cost of terrorism among the general populace.

The scant legislative history to the September 11th Fund indicates that compassion was a primary motivation behind the legislation. Senator John McCain expressed his concern for adequate victim compensation:

No amount of money can begin to compensate the victims for their suffering The intent of the fund is to ensure that the victims of this unprecedented, unforeseeable, and horrific event and their families do not suffer financial hardship in addition to the terrible hardships they already have been forced to endure.¹⁴⁰

In this sense, one goal of the September 11th Fund was altruistic, stemming from a moral sense of collective responsibility, to spread the loss among the nation at large. This view is particularly evidenced by the public funding for the program, which suggests a generalized form of distributive justice.¹⁴¹

A similar concern that the unfortunate victim should not have to pay for injuries aimed at the public as a whole animates many countries, including the United States, to provide compensation to members of the armed forces and their families when they suffer a loss.¹⁴²

138. WINSTON S. CHURCHILL, *THEIR FINEST HOUR* 349 (1949).

139. Hillel Sommer, *Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience*, 36 *IND. L. REV.* 335, 338 (2003) (citing D.K. (1951) 983).

140. 147 *CONG. REC.* S9589, S9594 (daily ed. Sept. 21, 2001) (statement of Sen. McCain). See also Goldscheid, *supra* note 2, at 204 (describing legislative history showing compassion as the intent behind the legislation, in addition to protecting the airline industry).

141. Goldscheid, *supra* note 2, at 215.

142. See 10 U.S.C.A. § 1478(a) (West Supp. 2006) (providing a \$100,000 "death gratuity" to the survivor of a member of the armed forces killed while on active duty or in inactive duty training).

In addition to fundamental fairness, undertaking the duty to provide federal compensation to terrorist victims may also stem from possible negligence or poor policy choices that could be ascribed to the federal government through its failure to prevent the attacks.¹⁴³ Although, as noted above, any negligence likely would be protected by the Federal Tort Claims Act, this could still provide a policy rationale for governmental funding of compensation.

Other policy reasons suggest more practical purposes for offering compensation at the federal level. Primary examples include protecting certain industries, considered critical to the public interest, from devastating liability costs and expressing compassion for limited segments of society. In these instances, legislatures reject the traditional tort system as inadequate.¹⁴⁴ In fact, as discussed below, the govern-

143. A major question is whether the government should have discovered the plot and prevented the attacks. Suspicions and warnings reached the highest levels of government: the FBI, the CIA, and the White House. With respect to the FBI, a Phoenix agent warned the FBI that Osama bin Laden "might be sending terrorists to train at U.S. flight schools," and one FBI supervisor even warned that suspected terrorists might fly an airliner into the World Trade Center. Ken Guggenheim, *Report Says FBI Rejected pre-9/11 Attack Warnings*, SAN DIEGO UNION-TRIB., Sept. 25, 2002, at A1. See also Dan Eggen, *FBI Whistle-Blower Assails Bloated Bureaucracy*, WASH. POST., June 7, 2002, at A2 (discussing "the FBI's mishandling of clues" before September 11). The CIA also may have been negligent in failing to discover and prevent the attacks. The 9/11 Commission Report states that CIA Director George Tenet received a briefing on August 23, 2001, stating that Zacarias Moussaoui, the alleged 20th hijacker, "wanted to learn to fly a 747, paid for his training in cash, was interested to learn the doors do not open in flight, and wanted to fly a simulated flight from London to New York." THE 9/11 COMMISSION REPORT 275 (2004). According to the Commission, Tenet said that "[s]eeing it as an FBI case, he did not discuss the matter with anyone at the White House or FBI." *Id.*

The Presidential Daily Briefing of August 6, 2001, entitled "Bin Ladin Determined to Strike in U.S.," referred to a report in 1998 that "Bin Ladin wanted to hijack a US aircraft to gain the release" of extremists, noting that "FBI information since that time indicates patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York." *Id.* at 262.

The 9/11 Commission commented that "the institutions charged with protecting our borders, civil aviation, and national security did not understand how grave this threat could be, and did not adjust their policies, plans, and practices to deter or defeat it." *Id.* at xvi. The Commission characterized the problems it discovered during its investigation as "symptoms of the government's broader inability to adapt how it manages problems to the new challenges of the twenty-first century." *Id.* at 353.

144. See DOBBS, *supra* note 61, § 391, at 1096 (noting deep-seated criticisms of tort methods of resolving disputes, allocating compensation, and promoting deterrence have led to alternative systems); Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 951 (1993) [hereinafter Rabin, *Mass Toxics*] (arguing that legislatively devised no-fault alternatives to tort system are "triggered by a sense that common-law adjudication [is] an overly expensive, time-consuming, and poorly adapted process for deciding personal injury claims").

ment has already assumed a duty of governmental compensation for private harm in certain limited situations.¹⁴⁵

Even if the law does not recognize a constitutional or common law right to governmental protection against terrorism, there are strong policy reasons to create such a right. Congress certainly has the power to create such a right, in the interest of good policy, as long as it does not offend the Constitution. Discussed below are examples of instances in which Congress or states have chosen to create a duty of compensation based on policy reasons.

III.

DOMESTIC NO-FAULT COMPENSATION SCHEME

Although compensation to tort victims traditionally has been provided through the common law tort system, over the years legislative bodies have created alternatives to that system. These alternatives generally have been motivated by the perception that the tort system is inefficient, expensive, and not well-suited to dispersing awards to particular victims.¹⁴⁶ The no-fault compensation systems focus on specific torts and highlight the tension between the traditional tort approach, with its emphasis on individual corrective justice and deterrence, and a broad-based system of categorical compensation, with its focus on insurance notions of pooling of resources.¹⁴⁷ Compensation systems generally address a continuing activity that results in a tort and are intended to provide a form of social insurance against risk. They are largely funded by the firms engaged in the risk-generating activity, either through special taxes or insurance premiums.¹⁴⁸ And, in exchange for equity, efficiency, and a minimal burden of proof, compensation systems sharply reduce the amount of compensation to a fraction of what could be recovered under the traditional tort system. While there are significant differences between these compensation systems and the September 11th Fund,¹⁴⁹ there are lessons in these

145. See *infra* Section III.

146. See generally Rabin, *Mass Toxics*, *supra* note 144 (describing how criticisms of the tort system as a way of resolving disputes have led to efforts to create alternative systems).

147. *Id.* at 951.

148. See *infra* note 161 and accompanying text (discussing funding of Price-Anderson Act compensation); note 185 and accompanying text (discussing funding of Vaccine Act compensation); note 223 and accompanying text (discussing funding of workers' compensation systems).

149. For example, the September 11th Fund was financed by the federal government and focused on a single event. It was aimed at providing reparation for the symbolic representatives of a country attacked by terrorists by mimicking the recovery potentially available through tort compensation. See *supra* Part I.A.

examples that may inform whether and how to implement a permanent compensation system for victims of terrorism.

This article discusses three domestic no-fault compensation systems:¹⁵⁰ the Price-Anderson Act,¹⁵¹ the National Childhood Vaccine Injury Act,¹⁵² and the workers' compensation system.¹⁵³ All three models represent extensive systems of no-fault compensation; furthermore, the Price-Anderson Act was used as a model for the creation of the September 11th Fund.¹⁵⁴ These compensation systems provide valuable guidance for creating a permanent terrorist victims compensation fund.

A. *The Price-Anderson Act*

During the 1950s, the government became aware of the potential uses of nuclear materials. Through the passage of the Atomic Energy Act of 1954, private entities were allowed to use nuclear materials for

150. Other no-fault compensation systems exist in the United States. *See, e.g.*, Black Lung Benefits Act, 30 U.S.C. § 901 (2000) (aid to workers suffering from black lung disease who were unable to qualify under workers' compensation statutes not covering occupational diseases); Social Security Act, 42 U.S.C. §§ 301–1397 (2000); Health Insurance for the Aged Act of 1965, Pub. L. No. 89-97, 79 Stat. 290 (codified as amended in scattered sections of 5, 18, 26, 31, 41, 42, 45, 47, and 50 U.S.C.); National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976) (codified at 42 U.S.C. §§ 247b(j)-(l) until repealed in 1978) (providing that the only remedy available would be against the government by administrative remedy and insulating manufacturers and administrators of the vaccine from liability); ARK. CODE ANN. § 23-89-202 (1999) (establishing minimum medical, hospital, disability, and accidental death benefits to be provided without regard to fault); FLA. STAT. § 627.736 (2001) (requiring insurers to provide personal injury protection benefits); MASS. GEN. LAWS ANN. ch. 90, § 34M (West 2001); WASH. REV. CODE § 48.22.085 (2000) (requiring insurers to offer personal injury protection as optional coverage); Gary T. Schwartz, *Auto No Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000) (discussing the development of no fault as an alternative to tort). For a good overview of these domestic no-fault systems see Mullenix & Stewart, *supra* note 2.

151. Price-Anderson Act of 1957, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210 (2000 & Supp. II 2002)) (promoting investment in the nuclear energy industry by shielding it from mass tort liability in the event of a nuclear accident).

152. National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-11 to 34 (2000 & Supp. II 2002)) (promoting a steady supply of vaccines by shielding vaccine manufacturers from tort liability).

153. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1021 (2003) (establishing employees' right to compensation); KY. REV. STAT. ANN. § 342.340 (LexisNexis 2005) (requiring that all employers provide workers' compensation benefits); OHIO REV. CODE ANN. § 4121.01(A) (West 2001) (defining covered employers and employees).

154. *See* Peck, *supra* note 2, at 220.

peaceful purposes such as generating power.¹⁵⁵ Because it “soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial,”¹⁵⁶ Congress amended the Atomic Energy Act in 1957 with the Price-Anderson Act,¹⁵⁷ which provided operators of nuclear power plants with a system of private insurance, government indemnification, and limited liability for claims of “public liability,” defined generally as “any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation.”¹⁵⁸ This was one of the earliest legislatively-created alternatives to the tort system implemented to deal with mass tort litigation.

Price-Anderson is designed to limit the liability of the nuclear power industry while ensuring compensation for damages caused by a nuclear accident.¹⁵⁹ Price-Anderson establishes a system of strict liability in which claimants are only required to prove that their injuries resulted from a nuclear power plant accident, and all affirmative defenses are waived.¹⁶⁰ The Act limits the liability of licensees of the Nuclear Regulatory Commission to \$560 million, or the amount of

155. Pub. L. No. 83-703, 68 Stat. 919 (1954) (codified as amended in scattered sections of 42 U.S.C.).

156. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 63 (1978). The absence of private insurance was a substantial motivation for the passage of the Price-Anderson Act. Marcie Rosenthal, Note, *How the Price-Anderson Act Failed the Nuclear Industry*, 15 COLUM. J. ENVTL. L. 121, 130 (1990).

157. 42 U.S.C. § 2210 (2000 & Supp. II 2002).

158. *Id.* § 2014(w). The Act defines “nuclear incident” as “any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.” *Id.* § 2014(q).

159. Listed among the congressional findings is the following statement:

In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2012(i) (2000).

160. All claims related to an “extraordinary nuclear occurrence,” as defined in 42 U.S.C. § 2014(j) (2000), are consolidated in the federal court in the district where the event occurred. *Id.* § 2210(n)(2). The Price-Anderson Act calls for the expeditious handling of claims by creating strict liability for licensees involved in nuclear accidents and requiring indemnified parties to waive certain defenses, such as governmental immunity and statute of limitations. *Id.* § 2210(n). The injured party is still required to prove causation based on state common law tort theories. *See* 10 C.F.R. § 140.81 (2005). Successful plaintiffs would collect from the fund. *See* 42 U.S.C. § 2210(o) (2000).

financial protection required of the licensee if it is in excess of \$560 million, for all claims arising from a single nuclear incident.¹⁶¹

As the author of the original draft of the September 11th Fund described, “the Price-Anderson Act was utterly appealing for the task of creating a compensation program. It assured that plaintiffs who might give up their right to trial by jury would still have an opportunity to seek full compensation without needing to prove fault in a manner that was constitutionally sound.”¹⁶²

Price-Anderson has not gone without criticism. The limitation of liability¹⁶³ is one of the most criticized aspects of the fund. Critics argue that the fund does not provide a legal right to full compensation because of the limitation and therefore victims would ultimately subsidize those benefited by the use of nuclear power.¹⁶⁴ The causation

161. *See id.* § 2210(e)(1)(C). The funding for the compensation fund is created through a pooling mechanism. Except where the Commission has established a lesser amount on the basis of certain written criteria, licensees are required to obtain up to the maximum amount of liability insurance available from private sources. *Id.* § 2210(b). This amount is currently set at \$200 million. *See Price-Anderson Act Reauthorization: Hearing before the S. Subcomm. on Transp., Infrastructure, and Nuclear Safety of the Comm. on Environment and Public Works*, 107th Cong. 48 (2002) [hereinafter *Price-Anderson Reauthorization Hearing*] (statement of William F. Kane, Deputy Executive Director for Reactor Programs). Licensees must also obtain private liability insurance based on an industry retrospective rating plan. *Id.* at 50. Premium charges for the industry rating plan are deferred until public liability from a nuclear incident exceeds or is likely to exceed the level of primary financial protection required of the licensee involved in the incident. 42 U.S.C. § 2210(b)(1) (2000). In the event that liability exceeds the pool of funds combined with the primary financial protection, the United States will indemnify the licensee up to a \$560 million limitation on aggregate public liability or to the amount of financial protection required of the licensee. *Id.* § 2210(e)(1)(C).

162. Peck, *supra* note 2, at 220.

163. 42 U.S.C. § 2210(e)(1)(C)(ii) (2000) (limiting liability to \$560 million, or the amount of financial protection required of the licensee, whichever is greater, for all claims arising out of a single nuclear incident).

164. Dan M. Berkovitz, *Price-Anderson Act: Model Compensation Legislation?—The Sixty-Three Million Dollar Question*, 13 HARV. ENVTL. L. REV. 1, 48–49, 55 (1989). *See also* Arnold W. Reitze & Deborah J. Rowe, *The Price-Anderson Act—Limited Liability for the Nuclear Industry*, 17 ENVTL. L. REP. 10185, 10189 (1987) (arguing that individuals living close to nuclear power plants face the potential loss of the economic value of the uninsured risk, whereas those living away from power plants benefit from the use of nuclear power without facing potential economic loss from an accident). For example, at a Senate subcommittee hearing in January of 2002, a witness testified that a spent fuel pool fire could create \$59 billion in personal and property damages, well over the current limit on liability. *See Price-Anderson Reauthorization Hearing, supra* note 161, at 25–26 (statement of Christie Brinkley, member, Star Foundation).

The constitutionality of this limit was challenged on due process grounds in 1978 in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 82 (1978). When residents close to a nuclear power plant challenged the limitation on liability as

requirement is also criticized due to the uncertainties of biological effects of low dose radiation, the need to rely on epidemiological evidence, and the recognition that radiation fallout can affect populations hundreds of miles from nuclear accidents.¹⁶⁵ And it has been argued that Price-Anderson helped to promote unbalanced and uncontrolled growth of the nuclear power industry, allowing the industry to deteriorate.¹⁶⁶

Although Price-Anderson may have been an appealing model for the September 11th Fund, its limits have never been tested. It has been invoked infrequently,¹⁶⁷ and when it has, it has never had to administer a large amount of claims expeditiously. It has never reached its liability limitation, thus never requiring the pooling of industry funds or the indemnification by the federal government. Price-Anderson has, however, served to encourage the growth of nuclear power plants in the United States.¹⁶⁸ It has been argued that the airlines needed similar protection.¹⁶⁹

B. *The National Childhood Vaccine Injury Act*

The use of vaccines to prevent childhood diseases became widespread throughout the twentieth century. Vaccines, however, present

not providing for adequate compensation for potentially injured parties, the Court held that the limitation was reasonable because of the small risk of an accident involving claims in excess of the statutory cap and the recognition that in the unlikely event of such an occurrence, the Act requires Congress to grant additional relief. *Id.* at 85. *See also infra* notes 345–50 and accompanying text.

165. Berkovitz, *supra* note 164, at 42, 46.

166. Rosenthal, *supra* note 156, at 137–40 (arguing that if the Act had remained a temporary measure instead of being renewed, market forces and insurance rates would have corrected the problems in the industry).

167. *See, e.g.,* El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473 (1999) (claiming damages for injuries suffered as a result of uranium mining operations under the Price-Anderson Act); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (holding that Price-Anderson Act is not exclusive and state tort remedy still available to employee suing for exposure to radiation); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998) (finding that federal courts have exclusive jurisdiction over all public liabilities resulting from nuclear incidents).

168. *Price-Anderson Reauthorization Hearing*, *supra* note 161 at 48 (statement of William F. Kane, Deputy Executive Director for Reactor Programs) (describing a heightened interest in extending the operating life of currently operating power reactors and submitting applications for new reactors); *id.* at 67 (statement of Marvin S. Fertel, Senior Vice President, Nuclear Energy Institute) (supporting renewal of the Act “to ensure availability of new nuclear power plants”); *see also* Rosenthal, *supra* note 156, at 128 (describing how nuclear power plants proliferated in the 1960s and 1970s, but the trend did not last as demand for electricity did not increase while costs of producing nuclear energy skyrocketed; arguing that Price-Anderson helped cause premature and uncontrolled expansion of nuclear industry).

169. *See supra* notes 44 & 48 and accompanying text.

a risk to the patient. A small percentage of patients suffer a variety of different ailments, ranging from minor fever to anaphylactic shock, and in some cases, death.¹⁷⁰ Concluding that the public health benefits from vaccination far outweigh the risks, all fifty states and the District of Columbia require children to be vaccinated before entering school.¹⁷¹ By requiring immunization, the governmental relationship with the vaccine industry is arguably a special relationship,¹⁷² but the government did not initially accept any financial responsibility for adverse effects from the vaccine. Until the mid-1980s, the government relied on the traditional tort system to compensate those who suffered injury as a result of vaccination.¹⁷³

The atmosphere surrounding the traditional tort claim for vaccine injuries gradually began to change, however. The expansion of the doctrine of strict products liability in the 1950s and 1960s placed a heavy burden on vaccine manufacturers.¹⁷⁴ Fearing “frivolous suits” would be cost-prohibitive, insurers declared they would stop providing coverage to vaccine manufacturers.¹⁷⁵ Some manufacturers discontin-

170. See Comment, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149, 149 & n.3 (1988); H.R. REP. NO. 99-908, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6345.

171. Theodore H. Davis, Jr. & Catherine B. Bowman, *No-Fault Compensation for Unavoidable Injuries: Evaluating the National Childhood Vaccine Injury Compensation Program*, 16 U. DAYTON L. REV. 277, 280 & n.21 (1991) (citing STAFF OF HOUSE SUBCOMM. ON HEALTH AND THE ENVIRONMENT OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS. REPORT ON CHILDHOOD IMMUNIZATIONS I (Comm. Print 1986)).

172. See *supra* note 125 and cases cited therein.

173. 42 U.S.C. § 300aa-10(a) (2000) (originally enacted as National Childhood Injury Act of November 14, 1986, Pub. L. 99-660, Title III, § 311, 100 Stat. 3758 (1986)).

174. Russell G. Donaldson, Annotation, *Construction and Application of National Childhood Vaccine Injury Act*, 129 A.L.R. FED. 1, 30 (1996). Although cases based on harms from vaccines often fell under an exception from strict liability for ‘unavoidably unsafe’ products, whose benefits to the public outweighed the harms, RESTATEMENT (SECOND) OF TORTS, § 402A cmt K (1965), the Fifth Circuit in *Reyes v. Wyeth Laboratories* held polio vaccine manufacturers strictly liable for failing to provide product warnings directly to patients receiving the vaccine. 498 F.2d 1264, 1295 (5th Cir. 1974), cert. denied, 419 U.S. 1096 (1974).

175. Michael Greenberger, *The 800 Pound Gorilla Sleeps: The Federal Government’s Laxadaisical Liability and Compensation Policies in the Context of Pre-Event Vaccine Immunization Programs*, 8 J. HEALTH CARE L. & POL’Y 7, 11 (2005). See also *Alvarez v. United States*, 495 F. Supp. 1188, 1190 (D. Colo. 1980) (describing collapse of the commercial liability insurance market for manufacturers of swine flu vaccine in part because of *Reyes* decision).

ued vaccine production,¹⁷⁶ raising fears in Congress about the possibility of an eventual vaccine shortage.¹⁷⁷

Congress responded by passing the National Childhood Vaccine Injury Act of 1986 (NCVIA).¹⁷⁸ The Act is designed to induce vaccine manufacturers to continue supplying vaccines—considered essential to the public interest—by shielding them from the costs of defending traditional tort suits, while also making it easier for potential plaintiffs to recover damages by allowing them to avoid the burdens of proof associated with traditional tort actions.¹⁷⁹ The NCVIA establishes a “no fault” compensation system,¹⁸⁰ which allows those who suffer injury or death from the administration of a listed vaccine¹⁸¹ to recover “actual unreimbursable expenses . . . which resulted from the vaccine;” up to \$250,000 for pain, suffering, and emotional distress;¹⁸² and compensation for lost earnings.¹⁸³ Thus, the Act balances between individual and scheduled compensation, while allowing for a more efficient administration of damages than the traditional tort system. When the table of injuries and damages was originally created, the number of injuries from vaccines was fairly predictable and allowed Congress to set an appropriate amount for damages without fear of bankrupting the vaccine fund.¹⁸⁴

The money for the payments comes from the Vaccine Injury Compensation Fund, which gets its funding from an excise tax placed

176. Donaldson, *supra* note 174, at 30.

177. See Rabin, *Mass Toxics*, *supra* note 144, at 958. Similar fears about the possibility of the airlines declaring bankruptcy led to the September 11th Fund legislation. See *supra* notes 44–49 and accompanying text.

178. 42 U.S.C. §§ 300aa-1–34 (2000 & Supp. II 2002).

179. See Donaldson, *supra* note 174, at 30–31; THOMAS BURKE, *LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 163 (2002) (arguing that the vaccine program helped foster an explosion in vaccine research by reducing drug companies’ exposure to litigation); see also *infra* note 189 and accompanying text.

180. 42 U.S.C. §§ 300aa-22(b)–(c) (2000) (establishing that manufacturers will not be liable for either unavoidable side effects or for mere failure to warn about potential side effects).

181. *Id.* § 300aa-14(a). The program covers all vaccines recommended by the Center for Disease Control for routine administration to children. *Id.* § 300aa-14(e).

182. *Id.* §§ 300aa-15(a)(1)(A), (a)(4).

183. *Id.* § 300aa-15(a)(3). The measurement for earnings compensation depends on whether or not the injury occurred before or after the person reached the age of 18. *Id.* If injury resulted before age 18, compensation is determined on the average gross weekly earnings of workers in the private, non-farm sector. *Id.* § 300aa-15(a)(3)(B). If injury occurred after age 18, “generally recognized actuarial principles” are used to calculate compensation. *Id.* § 300aa-15(a)(3)(A).

184. See Mullenix & Stewart, *supra* note 2, at 135.

on certain vaccine sales.¹⁸⁵ Thus, the Fund creates a pooling mechanism which shifts responsibility from individuals to a larger group.

The NCVIA is not intended to preempt the traditional tort scheme but rather to provide a less burdensome alternative for vaccine manufacturers and those seeking compensation for vaccine-related injuries.¹⁸⁶ After the petitioner files a claim with the Fund, the special master, or a court, determines the amount of compensation to be paid to the injured party.¹⁸⁷ The petitioner can either accept the decision of the special master and waive his right to future civil action, or he can reject it and file a civil suit against the vaccine manufacturer in state or federal court.¹⁸⁸

Incentives are written into the NCVIA to encourage petitioners to seek compensation through it and avoid civil litigation. The most significant is a relaxed standard of proof for petitioners, particularly with regard to causation.¹⁸⁹ Furthermore, compensation is determined according to a table, depending on various factors, including the injured person's age and whether the injury was fatal.¹⁹⁰ Finally, if the peti-

185. 26 U.S.C. § 9510 (2000) (establishing Vaccine Injury Compensation Fund which will equal net revenues from taxes under 26 U.S.C. § 4131). *See also id.* §§ 4131–32 (listing taxing vaccines on the injury tables).

186. *See* 42 U.S.C. § 300aa-21(a) (2000) (stating that claimants may elect to file a traditional civil action after the United States Court of Federal Claims enters a judgment).

187. *See id.* § 300aa-13(a).

188. The system requires administrative exhaustion; only after a petition is filed with the Vaccine Injury Compensation Fund can a petitioner file a suit in state or federal court for anything over \$1,000. *Id.* § 300aa-11(a)(2)(A). The petitioner can also appeal the special master's decision in the Court of Federal Claims and then the Federal Circuit Court. *See Grimes v. Sec'y of Dep't of Health & Human Servs.*, 988 F.2d 1196, 1198 (Fed. Cir. 1993).

189. A petitioner must only show that he suffered an injury or death in a manner consistent with that listed in the Vaccine Injury Table provided by 42 U.S.C. § 300aa-14(a) (2000). Once the petitioner, through medical records or expert testimony, proves he has suffered an injury in accordance with those listed on the Vaccine Injury Table, he creates a rebuttable presumption that the injury was caused by the vaccine. Donaldson, *supra* note 174, at 34–35. This allows the petitioner to avoid proving that the vaccine actually caused the injury, a substantial roadblock in the development of a prima facie case for a traditional tort suit. After the petitioner has developed his prima facie case, the Secretary of Health and Human Services must prove by a preponderance of the evidence the vaccine did not cause the injury for which compensation is sought in order to defeat the claim. *Id.* at 37. Claiming an ailment not on the table shifts the burden of proof to the claimant. *Id.* at 36; *see* 42 U.S.C. § 300aa-13(a)(1)(A) (2000); *see also Terran v. Sec'y of the Dep't of Health & Human Servs.*, 411 Fed. Cl. 330, 333 (1998) (detailing means by which a plaintiff may demonstrate causation).

190. If a person dies as a result of a vaccine related injury, his estate is awarded an automatic sum of \$250,000. 42 U.S.C. § 300aa-15(a)(2) (2000). If a child given an oral polio vaccine transmits that disease to an adult, the adult is eligible for lost earn-

tioner rejects the compensation offered by the special master and pursues his claim in federal court, there are a number of statutory requirements he must meet in order to prevail, all of which are designed to discourage civil litigation against manufacturers and encourage the use of the compensation fund.¹⁹¹ In this way, the NCVIA protects the vaccination supply by discouraging costly civil suits against vaccine administrators and manufacturers.¹⁹²

Although almost every facet of the NCVIA has been attacked, most criticisms relate to three important areas: (1) the seemingly unchecked power of special masters to decide where and how compensa-

ings. *Id.* § 300aa-15(a)(3)(A). If the victim has reached the age of 18, compensation for his loss of earnings is to be determined by “generally recognized actuarial principles and projections.” *Id.* A specific statutory rule also limits the amount that can be recovered for non-tangible harm such as pain and suffering to \$250,000. *Id.* § 300aa-15(a)(4).

Other factors with regard to compensation include when the vaccine causing the harm was administered and the reasonableness of the attorneys’ fees associated with filing the petition for compensation. Donaldson, *supra* note 174, at 40–41. In marked contrast to civil litigation, awards of attorneys’ fees are given even when the petitioning party fails to qualify for other compensation, so long as the petition was brought “in good faith and on a reasonable basis.” *Id.* at 39. Without such generosity, few attorneys would want to represent potential petitioners, as the statute bars attorneys from charging any fees in addition to the amount awarded by the special master. 42 U.S.C. § 300aa-15(e)(3) (2000).

Punitive damages are prohibited under the statute. *Id.* § 300aa-15(d)(1). A petitioner may be awarded punitive damages only by bringing a civil action. *See id.* § 300aa-23.

191. First, the statute creates a presumption that the manufacturer exercised due care in both the manufacture and packaging of the vaccine, so long as the manufacturer complied with the applicable federal regulations. *Id.* § 300aa-22(b)(2). Second, the statute bars liability based on any failure to warn the injured party of the risks associated with vaccination. *Id.* § 300aa-22(c). Third, the statute bans the application of strict tort liability based on the unavoidable adverse side effects of an inherently dangerous product. *Id.* § 300aa-22(b)(1). Finally, the findings made under the statutory proceedings have no *res judicata* effect in the new civil trial. *Id.* § 300aa-22(d). *See generally* Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL., POL’Y & L. 59, 76–77 (1999) (“Since 1990, no commercial vaccine manufacturer has ceased production,” early childhood immunization rates have improved, and new vaccines have been created and approved).

192. *The National Vaccine Injury Compensation Program: Is it Working as Congress Intended?: Hearing Before the H. Comm. on Gov’t Reform*, 107th Cong. 8 (2001) (opening statement of Rep. Dan Burton, Chairman, H. Comm. on Gov’t Reform) (“The first goal was to protect vaccine manufacturers from lawsuits. That’s been successful.”). Through August, 2005, 7,263 claims had been brought under the Act, resulting in nearly \$655 billion in awards, including fees and costs. *See* U.S. DEP’T OF HEALTH AND HUMAN SERVS., HEALTH RES. AND SERVS. ADMIN., NATIONAL VACCINE INJURY COMPENSATION PROGRAM: POST-1988 STATISTICS REPORT, http://www.hrsa.gov/vaccinecompensation/statistics_report.htm (last visited Sept. 10, 2005).

tion is to be awarded; (2) the burden for establishing proof of causation; and (3) the increasingly adversarial, drawn out, and uncertain nature of the fund distribution.¹⁹³

The special masters of the NCVIA hold immense power over the claims they administer, which some view as a defect of the statute.¹⁹⁴ They are appointed by federal judges and can only be removed for incompetency, misconduct, or negligence.¹⁹⁵ This method of appointment and removal results in minimal review of a special master's abilities.¹⁹⁶ In addition, special master decisions are subject to a relaxed standard of review.¹⁹⁷ One author argues that giving special masters such wide latitude "contravenes Congress's intent to ensure the fair adjudication of claims for vaccine-injured persons."¹⁹⁸ Moreover, because of this broad discretion, receiving compensation under the NCVIA becomes more arbitrary, as different special masters may reach inconsistent results with regard to similar cases.¹⁹⁹

Another criticism of the NCVIA is that the acceptable proof to establish causation is very limited and therefore hinders a petitioner's ability to receive compensation. Petitioners can satisfy the causation element of their claim either by proving that the injury occurred in

193. See generally SHAPO, COMPENSATION, *supra* note 2, at 187–88 (describing criticisms of NCVIA).

194. See, e.g., Elizabeth A. Breen, *A One Shot Deal: The National Childhood Vaccine Injury Act*, 41 WM & MARY L. REV. 309, 321 (1999).

195. Special masters are appointed by federal judges of the United States Federal Claims Court and serve for a period of four years. 42 U.S.C. § 300aa-12(c)(1), (4) (2000). They can only be removed from office for "incompetency, misconduct, or neglect of duty or for physical or mental disability." *Id.* § 300aa-12(c)(2).

196. Breen, *supra* note 194, at 321.

197. A decision of a special master will only be reversed on appeal if his decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law." 42 U.S.C. § 300aa-12(e)(2)(B) (2000). This is generally construed as a rational basis standard of review. Breen, *supra* note 194, at 323 (citing Walker v. Sec'y of the Dep't of Health & Human Servs., 33 Fed. Cl. 97, 100 (1995)).

198. Breen, *supra* note 194, at 324 (noting that deferential review virtually ensures that special masters' decisions will not be overturned on appeal).

199. In *Sharpnack v. Secretary of the Department of Health & Human Services*, No. 90-983V, 1992 WL 167255 (Cl. Ct. July 28, 1992), Special Master French awarded compensation for a residual seizure disorder that began after a DPT vaccination, but in *McNally v. Secretary of the Department of Health & Human Services*, No. 90-3688V, 1991 WL 220277 (Cl. Ct. Oct. 11, 1991), Special Master Wright denied compensation for a similar claim. Likewise, in *Loe v. Secretary of the Department of Health & Human Services*, No. 89-83V, 1990 WL 292877 (Cl. Ct. Aug. 1, 1990), Special Master Wright awarded compensation for encephalopathy that occurred after a DPT vaccination, but in *Aldridge v. Secretary of the Department of Health & Human Services*, No. 90-2475V, 1992 WL 153770 (Cl. Ct. June 11, 1992), Special Master Abell denied relief for a similar claim. All four cases involved symptoms that began outside of the time frame allowed for table injuries.

accordance with the Vaccine Injury Table, or by proving the vaccine caused the injury by a preponderance of the evidence.²⁰⁰ A major complaint with regard to the Vaccine Injury Table is that it is “over-structured.”²⁰¹ Special masters have no discretion regarding the table and must follow it to the letter.²⁰² If causation is not based on the table, but instead established by a preponderance of the evidence, there is little guidance for special masters to follow when considering each petition, which may again lead to inconsistent results.²⁰³

Some argue that the process itself has created too many obstacles to recovery. One issue is the time limitations. Any claim under the program must be brought within three years of the onset of symptoms, even if the symptoms are only fully apparent years later.²⁰⁴ Exceeding the time limitations under the program may also preclude a lawsuit under state tort law, as two courts have ruled that the NCVIA creates a preemptive three-year statute of limitations even for state tort actions.²⁰⁵ This problem is exaggerated by requiring plaintiffs to exhaust their administrative remedies before pursuing a claim in court.²⁰⁶

Ultimately, the injuries addressed by the NCVIA are relatively narrow in scope. A limited number of cases arise, and the claims most often involve a single claimant, a single manufacturer, and a short

200. See 14 U.S.C. § 300aa-11(c)(1)(C) (2000).

201. Breen, *supra* note 194, at 327. For example, a child who had seizures seventy-eight hours after vaccination could not rely on a presumption of causation because the table stated that such an injury had to occur within seventy-two hours. *Ultimo v. Sec’y of the Dep’t of Health & Human Servs.*, 28 Fed. Cl. 148, 151 (1993). This result seems unfair, especially because the Vaccine Injury Table is revisable and based on averages computed by the Institute of Medicine and the Advisory Commission on Childhood Vaccines. Breen, *supra* note 194, at 326.

202. Breen, *supra* note 194, at 328; see also 42 U.S.C. § 300aa-13(b)(2) (2000).

203. Breen, *supra* note 194, at 325; see also 42 U.S.C. § 300aa-13(b)(1) (2000) (merely instructing the special master to look at the entire record); *Pafford v. Sec’y of the Dep’t of Health & Human Servs.*, 64 Fed. Cl. 19, 31 (2005) (“There appears to be no hard and fast rule for what specific, individual elements of proof a petitioner must present in order to establish a *prima facie* case of causation-in-fact [in off-table cases]; the rule is really one of reason”); *Stevens v. Sec’y of the Dep’t of Health & Human Servs.*, No. 99-594V, 2001 WL 387418 at *10 (Fed. Cl. Mar. 30, 2001) (noting how the outcome of cases depends on evidentiary standard employed, which frequently varies between individual special masters and even decisions by same special master).

204. 42 U.S.C. § 300aa-16 (2000).

205. See *Strauss v. Am. Home Prods. Corp.*, 208 F. Supp. 2d 711, 716 (S.D. Tex. 2002) (finding that failure to file timely petition under Vaccine Program bars subsequent state tort action); *McDonald v. Lederle Labs.*, 775 A.2d 528, 529 (N.J. Super. Ct. App. Div. 2001) (barring subsequent tort action where claim under Vaccine Program was dismissed as untimely).

206. 42 U.S.C. § 300aa-11(a)(2)(A) (2000).

period between exposure and injury.²⁰⁷ Causation is not a difficult problem, except in “off-Table” cases,²⁰⁸ and third parties are not usually involved. In contrast, the workers compensation systems developed by the states are more complex and address a broader range of injuries.

C. *The Workers’ Compensation System*

The workers’ compensation programs in the various states emerged at the beginning of the twentieth century. Scholars attribute the emergence of these programs to the immigration, urbanization, and industrialization changes that were permanently altering the face of America and putting new strains on the existing political and legal environment.²⁰⁹

Such strains were particularly felt in the area of tort law, as industrial expansion—and the dangers that it posed to workers—left judges searching for a way to balance industrial growth with the needs of workers injured on the job. In the nineteenth and early twentieth centuries, industry won out as judges shaped the common law in a way that left injured workers with little hope of recovery against their employers.²¹⁰

Courts limited recovery for industrial accidents with an “unholy trinity” of three common law defenses for employers:²¹¹ (1) assumption of risk; (2) contributory negligence; and (3) the “fellow servant

207. Rabin, *Mass Toxics*, *supra* note 144, at 959–60 (arguing claims under the Vaccine Fund are relatively unproblematic compared to complex environmental or mass tort cases).

208. *See Capizzano v. Sec’y of Health & Human Servs.*, 440 F.3d 1317, 1321 (Fed. Cir. 2006) (describing model for proving causation in off-Table injury claim for hepatitis B vaccination); *Althen v. Sec’y of the Dep’t of Health & Human Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005) (describing how plaintiffs can prove causation in fact for non-Table injury cases in an off-Table injury claim of acute disseminated encephalomyelitis from tetanus toxoid vaccine); *Kelley v. Sec’y of the Dep’t of Health & Human Servs.*, 68 Fed. Cl. 84, 86–88 (Fed. Cl. 2005) (describing ways to prove causation in Table and non-Table injury cases; stating that proof of causation by a preponderance is not as “easy” as proof of causation by operation of law in an off-Table injury claim of Chronic Inflammatory Demyelinating Polyneuropathy from tetanus toxoid booster).

209. *See, e.g.*, ORIN KRAMER & RICHARD BRIFFAULT, *WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 1* (1991) (noting that workers’ compensation programs were outgrowth of industrialization in America).

210. *See generally* ARTHUR LARSON & LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION LAW* § 2 (1997) (describing early historical development of workers’ compensation).

211. KRAMER & BRIFFAULT, *supra* note 209, at 14–15 (describing “unholy trinity”).

rule.”²¹² In practice, the three doctrines meant that the employee was often left without compensation, requiring him to go on poor relief and forcing the costs of industrial accidents off of industry and onto society as a whole.²¹³

Commentators have suggested that workers’ compensation programs emerged in various states because of the uncertainty of litigation raised by the three doctrines and their many exceptions.²¹⁴ It created an environment unsuitable for efficient industrial planning.²¹⁵ Given the financial costs of uncertainty in business, along with the costs of litigation, business owners may have seen the creation of workers’ compensation statutes as a cheaper alternative to traditional tort litigation.²¹⁶ If this was indeed the case, it assured the adoption of the workers’ compensation programs because both employers and employees found it to be in their best interest to push for approval.²¹⁷

Another reason for the emergence of the workers’ compensation programs may have been the desire on the part of industry as well as the political establishment to prevent the political radicalization of workers in the United States. At this time in history, anarchism and communism were taking a place on the world stage, preaching violent revolution to the masses and raising fears in governments across the world. The motivation to prevent a mass uprising against the existing order was strong.²¹⁸ In this context, workers’ compensation programs could be seen as a way to take the wind out of the sails of the revolutionary political movements, by making workers content with the existing order.²¹⁹

212. An employer is not responsible when an employee is injured due to the negligence of another employee. The leading case was decided in 1842 in *Farwell v. Boston & Worcester Rail Road Corp.*, 45 Mass. 49 (1842). In *Farwell*, Judge Shaw, writing for the Massachusetts Supreme Court, reasoned that those employed in relatively dangerous jobs were paid more than those in relatively safe jobs, and therefore assumed the risks inherent in the work they performed in exchange for more money, including the risk of his fellow employees’ negligence. *Id.* at 59.

Judges sympathetic to the workers’ plight began to reject the reasoning behind the “fellow servant rule.” Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 59, 61 (1967).

213. Friedman & Ladinsky, *supra* note 212, at 53, 56.

214. *See generally* LARSON & LARSON, *supra* note 210, § 2.03.

215. Friedman & Ladinsky, *supra* note 212, at 68–69.

216. *Id.*

217. *Id.*

218. *See, e.g., id.* at 69.

219. *See* DOBBS, *supra* note 61, § 392 (explaining that workers’ compensation originated in Germany as a defense against Marxism). This strategy had worked for Otto Von Bismark, who was instrumental in creating the first workers’ compensation program as a way to weaken the Socialist Party in the German Diet. *Id.* Such motivations are made clear by the National Association of Manufacturers statement in 1911,

Legislators probably were motivated by a combination of a desire for certainty in business and a healthy fear of radical political movements, as well as a true compassion for injured workers, in their support of workers' compensation statutes.²²⁰ Whatever the motivations, workers' compensation systems quickly spread across the country.²²¹

Although the state program structures vary, most systems have several traits in common. First, they are no fault systems—the employers are liable to injured employees regardless of fault.²²² Employers must either carry private insurance or put money into a state fund in order to guarantee benefits should a worker be injured.²²³ Further, liability is limited, so that workers who cannot work, either temporarily or permanently, receive only a percentage of their wages for a

which claimed that business had better get involved in the creation of workers' compensation programs, or else they would be shaped by "the demagogue, and agitator and the socialist with a vengeance." Friedman & Ladinsky, *supra* note 212 at 69.

220. *See id.* at 68–70.

221. The first valid workers' compensation system in the United States was passed in Wisconsin in 1911. MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 795 (7th ed. Foundation Press 2001). Other states quickly followed suit and by 1912 ten more states had created some type of workers' compensation program. From there the idea of workers' compensation spread across the country, and in 1949 Mississippi became the last state to enact a workers' compensation program. *Id.*

A workers' compensation system probably did not develop at the federal level because of the Supreme Court's interpretation of the Commerce Power at the time. During the early twentieth century, when various states were beginning to adopt workers' compensation statutes, Congress's power to regulate interstate commerce was read narrowly by the Court. *See Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (ruling that the production of goods bound for interstate commerce is not commerce itself and therefore cannot be regulated above the state level). It would not be until 1937 that the Court would change its approach toward the power of Congress to regulate interstate commerce. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that Congress can regulate any activity that has an appreciable effect on interstate commerce, even the local production of goods). Other federal statutes passed around the same time as the workers' compensation statutes suggest that Congress might have passed a national workers' compensation system in the early twentieth century had it had the power to do so. *See, e.g.*, Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60 (2000). In 1908, Congress passed the FELA, which replaced the common law doctrines of contributory negligence and assumed risk with a rule of comparative negligence, thus allowing an injured federal railroad employee a greater chance at recovering his losses. DOBBS, *supra* note 61, at § 392. Congress also passed the Jones Act, 46 U.S.C. § 688 (2000), which did the same thing as FELA, only for seamen. *Id.* § 392 n.6.

222. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1021 (West 2003) (establishing right of employee to compensation); KY. REV. STAT. ANN. § 342.0011 (LexisNexis 2005) (defining injuries eligible for workers' compensation claims); *see generally*, MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 7.3 (3d ed. West 2004); LARSON & LARSON, *supra* note 210, § 1.01.

223. DOBBS, *supra* note 61, at § 392. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-981 (West 2003) (establishing compensation fund based on premiums paid into the fund).

specified time, depending on the injury.²²⁴ There are also limits on the types of liabilities; an employer is liable only for tangible damages like medical expenses and lost wages and is not responsible for intangible damages like pain and suffering.²²⁵ Finally, the vast majority of states make participation in workers' compensation programs mandatory.²²⁶ Workers' compensation systems are typically exclusive, with no option for filing a lawsuit against an employer in court.²²⁷ This is justified on the basis of a quid pro quo: in exchange for relinquishing the rights to a lawsuit, the worker is assured of compensation even though it is unlikely to be as much as he or she could have received through the court system.²²⁸

224. See DOBBS, *supra* note 61, at § 392; ALA. CODE § 25-5-57 (2003) (stating compensation varies based on classification of disability); ARIZ. REV. STAT. ANN. § 21-11041 to -11047 (West 2003) (stating compensation varies based on classification of worker and injury); ARK. CODE ANN. §§ 11-519 to -527 (West 2003) (same).

225. DOBBS, *supra* note 61, at § 392; see *Raban v. Indus. Comm'n*, 541 P.2d 950, 952 (Ariz. Ct. App. 1975) (purpose of workers' compensation legislation is not to compensate for difficulty and pain, but for lost earning capacity).

226. See, e.g., ARIZ. REV. STAT. ANN. § 23-902 (West 2003) (defining employers subject to program); KY. REV. STAT. ANN. § 342.340 (LexisNexis 2002) (all employers must provide workers' compensation); OHIO REV. CODE ANN. § 4123.01 (LexisNexis 2001) (defining covered employees and employers); ROTHSTEIN ET AL., *supra* note 222, § 7.4.

Although the original workers' compensation systems were narrow in scope, the programs have typically expanded in three major areas: (1) the numbers and types of workers covered; (2) the definition of a compensable injury; and (3) the benefits available to injured workers. See KRAMER & BRIFFAULT, *supra* note 209, at 16–27. When workers' compensation programs were initially adopted, most injuries were the results of single accidents. *Id.* at 18. Today, workers' compensation programs have been expanded to include not only injuries arising out a single accident, but also injuries resulting from repetitive motion such as carpal tunnel syndrome. *Id.* at 18–19. Similarly, occupational diseases have also become compensable under most workers' compensation programs. *Id.* at 20. Because it is more difficult to determine whether injuries are the result of work or some outside activity, an occupational or regular disease, litigation has increased and contributed to the costs involved in the programs. *Id.*

Adding to the costs of workers' compensation programs generally has also been the expansion of the benefits available to a worker suffering a work-related injury. *Id.* at 20–21. Workers' compensation programs have traditionally provided injured workers with a portion of their wages, as well as medical expenses, or death benefits in the event of death. *Id.* at 23. Now, benefits have been expanded to include rehabilitation expenses, also adding to rising costs. *Id.* at 25.

227. See, e.g., ARIZ. REV. STAT. ANN. § 23-1022 (West 2003) (compensation as exclusive remedy); see also LARSON & LARSON, *supra* note 210, § 100.01; ROTHSTEIN, *supra* note 222, § 7.35.

228. See *Grammatico v. Indus. Comm'n* (Ariz. Ct. App. 2004), 90 P.3d 211, 213 (“guiding principle of workers' compensation system ‘is a trade of tort rights for expeditious, no-fault method by which an employee can receive compensation for accidental injuries in work-related incidents’” (quoting *Stoecker v. Brush Wellman, Inc.*, 984 P.2d 534, 537 (1999))).

Workers' compensation systems have been criticized on many fronts. From the workers' perspective, receiving approximately sixty percent (depending on the state) of their full time salary while injured is not enough to mitigate hardship. Further, despite its "no-fault" status, workers' compensation programs remain adversarial.²²⁹ Employers criticize the system for having grown too expensive, due to its expansion in the fields of compensable injury and benefits.²³⁰ Litigation costs have risen as well,²³¹ and fraudulent claims have also become a concern.²³² The largest complaint raised by employers is that the exclusive remedy provisions are not exclusive enough.²³³ Commentators have argued that workers' compensation statutes, when combined with conflicting federal statutes such as the Americans with Disabilities Act²³⁴ and the Family Medical Leave Act,²³⁵ create a situ-

229. See Ellyn Moscovitz & Victor J. Van Bourg, *Carve-outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYRACUSE L. REV. 1, 11-12 (1995) (arguing that the adjudication process has merely been transferred from courts to an administrative remedy). Many states allow businesses to carry private insurance as a way to guarantee that workers will be compensated for employment related injuries, creating an incentive to reject as many claims as possible. *Id.* at 14. Thus, injured workers often have to fight for the compensation to which they are entitled. Furthermore, the systems provide no extra benefits for a worker who was injured by an egregiously negligent employer. DOBBS, *supra* note 61, at § 392.

230. Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 683-90 (1998) (describing expansion of benefits to workers and rising costs to employers). See generally LARSON & LARSON, *supra* note 210, § 2.08 (noting that as adoption of workers' compensation systems grew throughout the states, extension of coverage broadened the categories of acts covered); see also, e.g., ARIZ. REV. STAT. ANN. § 23-1043.01(B) (West 1995) (extending coverage to emotional distress); CAL. LAB. CODE § 3208.3(b)(1) (West 2003) (same); MICH. COMP. LAWS ANN. § 418.301(2) (West 1999) (same).

231. See Moscovitz & Van Bourg, *supra* note 229, at 14-15; see also, e.g., RUSS REED, OR. DEP'T OF CONSUMER & BUS. SERVS., DEFENSE LEGAL COSTS OF OREGON WORKERS' COMPENSATION INSURERS, 2004 (2005), available at http://www.cbs.state.or.us/external/imd/rasums/2314/04web/04_2314.pdf (reporting that in 2004, Oregon workers' compensation insurance carriers and self-insured employers paid almost \$27.7 million for attorney salaries, attorney fees, and other legal services incurred in workers' compensation litigation).

232. This prompted California to enact anti-fraud legislation in 1992. See Moscovitz & Van Bourg, *supra* note 229, at 15.

233. See Joan T. A. Gabel, et al., *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403, 408 (2002). This stems from the many judicially-created exceptions to the rule that all work related injuries must be remedied through the workers' compensation system, including exceptions for intentional torts or acting with "bad faith" regarding benefit disbursement. *Id.* at 410-14.

234. 42 U.S.C. §§ 12101-12213 (2000) (prohibiting discrimination based on disability in employment, government services, housing, and public accommodations). The Act is a "national mandate for the elimination of discrimination against individuals with disabilities" that seeks to "provide . . . enforceable standards," "ensure that the

ation where the rights and duties of workers and employers are unclear.²³⁶

Because of these problems, alternatives to the current state-run programs have been suggested. One alternative, which has been tried in eight states, allows unions in certain occupations to collectively bargain with employers to create their own contractual workers' compensation programs.²³⁷ Another suggested alternative is the establishment of a federal workers' compensation system.²³⁸

Drawing on the lessons of these domestic no-fault compensation systems, several critical issues come to the forefront. First, it is important to realize that a no-fault compensation system necessarily engenders a series of trade-offs, the most significant being trading individual, corrective justice for more widespread compensation on a broader scale. This means that although the awards may not be as accurate in terms of replacement value for individuals, more people receive awards. These awards are based on averages but generally are smaller than what could be awarded through the common law tort system, reflecting the lower risk of using the no-fault system. Second, controls traditionally offered through individual adjudication and re-

Federal Government plays a central role in enforcing the standards," and "invoke the sweep of congressional authority" in addressing discrimination against the disabled. *Id.* § 12101(b).

235. 29 U.S.C. §§ 2601–2654 (2000) (entitling eligible employees to take up to twelve work weeks of leave during any twelve month period for the birth or adoption of a child, the need to care for a family member with a serious medical condition, or the employee's own serious medical condition). The Act seeks to "balance the demands of the workplace with the needs of families" while "accommodat[ing] the legitimate interests of employers." *Id.* § 2601(b).

236. See Gabel, *supra* note 233, at 415; S. Elizabeth Wilborn Malloy, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We Be Friends?*, 41 *BRANDEIS L.J.* 821, 821–22 (2003) (describing ways that state workers' compensation laws overlap and sometimes conflict with federal disability and federal family medical leave statutes, causing confusion in the application of state and federal laws).

237. See Moscowitz & Van Bourg, *supra* note 229, at 3 (citing programs in Massachusetts, California, Florida, Kentucky, Maine, Minnesota, New York, and Hawaii). In these states, however, few contractual workers' compensation systems have been created. *Id.* at 4. The typical contract for workers' compensation sets up an alternative dispute resolution process composed of an ombudsman, mediation, and arbitration. *Id.* at 3–4. Generally, injured workers are not allowed to have an attorney present until the final arbitration stage of the process and very few disputes actually make it that far. *Id.* at 4.

238. See Gabel, *supra* note 233, at 434. Such a system would be easier to streamline with other federal legislation such as the Americans with Disability Act. It would also discourage states from cutting workers' compensation costs as a way to attract business to the state. The uniformity of such a system would probably also be attractive to businesses, as they would only have to deal with one workers' compensation system, regardless of the number of states in which they conducted business.

view are traded for the expediency afforded by vesting more discretion in the decision-maker and lowering the threshold for proof. This means that although there is little review of the grant or denial of benefits, claimants generally receive their benefits more quickly. Efficiency decreases when the extent and frequency of review is increased, as in the workers' compensation system. Third, these systems are aimed at protecting certain industries in the public interest through governmental intervention, but are funded privately by the industries affected through a general tariff system. Finally, these systems are not uniformly exclusive, but even those that offer the option of using the common law tort system create numerous incentives to stay within the no-fault system, which helps ensure the success of the programs. All of them represent anomalies on the tort landscape that dominates the system of compensation in our country.

In contrast, a different approach to no-fault compensation systems is found in other countries that have developed compensation systems for victims of terrorism.

IV.

COMPENSATION SYSTEMS ENACTED BY ISRAEL AND GREAT BRITAIN

Several countries have adopted permanent compensation systems for victims of terrorism, including Israel, Great Britain, Spain, and Italy.²³⁹ This article focuses on Israel and Great Britain, which

239. The European Convention on the Compensation of Victims of Violent Crime of 1983 called on governments of member States to provide compensation for victims of intentional violence where compensation could not be ensured by any other means. Council of Europe, European Convention on the Compensation of Victims of Violent Crimes, art. 2, Nov. 24, 1983, CETS No. 116, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/116.htm>. As of August 31, 2006, the following countries had ratified the Convention: Albania, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Luxembourg, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland and the United Kingdom. Council of Europe, Simplified Charts of Signature and Ratification, <http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp> (last visited Aug. 31, 2006). Two years after the birth of the European Convention, the United Nations General Assembly also declared that States should provide financial compensation to victims and families of victims who have "sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes." Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., 96th plen. mtg., U.N. Doc. A/40/53 (Nov. 29, 1985).

Italy, Spain and France gave priority to terrorist, rather than criminal offenses, in their compensation schemes. An increase in terrorism in Italy during the 1970s combined with growth in organized crime caused Italy to make public the compensation rights of victims of acts of terrorism or of organized crime. Paolo Piva, *Italy, in COMPENSATING CRIME VICTIMS: A EUROPEAN SURVEY* 373, 376 (Desmond Greer ed.,

have developed the most comprehensive systems. Distributions under these systems are rooted in community-based notions of equality, although the systems differ in their governing principles. Israel's system is based on equating victims of terrorism with victims of war; it views its compensation to its citizens as an extension of compensation to its soldiers.²⁴⁰ In contrast, Great Britain's approach is based on treating victims of terrorism as a subset of victims of violent crime.²⁴¹

Although it is useful to examine these two examples of a permanent compensation system for victims of terrorism, several distinctions should be drawn at the outset. Unlike the United States, these countries have socialist governments and are accustomed to delivering welfare on a mass scale through a no fault system such as nationalized health coverage. Another significant difference from the United States' experience is that these countries have each had foreign wars fought on their land,²⁴² and the compensation systems were initially enacted as a response to those wars.²⁴³ Further, Israel in particular has experienced unrelenting terrorist attacks over a long period of time,²⁴⁴ which completely disrupts everyday domestic life, while comparatively the United States has only recently entered the realm of domestic terrorist attacks. Perhaps most significant, these countries do not have the massive tort system, with its civil jury system, punitive damages, and party-controlled discovery, that dominates the American compensation system. Thus, they do not have to contend with public acceptance of a system that would prohibit or inhibit recovery that could be larger or implemented differently under the tort system. Despite these major differences, lessons can be drawn from these two countries' experiences with their permanent compensation systems.

1996). Spain similarly responded to an increase of terrorist acts in the 1980s. Angel Torío-López, *Spain*, in COMPENSATING CRIME VICTIMS: A EUROPEAN SURVEY 515, 517 (Desmond Greer ed., 1996). The French likewise experienced an increase in the number of terrorist acts in 1986, particularly in Paris, leading them to develop a special compensation scheme. Françoise Lombard, *France*, in COMPENSATING CRIME VICTIMS: A EUROPEAN SURVEY 191, 241 (Desmond Greer ed., 1996).

240. See *infra* Part IV.A.

241. See *infra* Part IV.B.

242. See, e.g., Sommer, *supra* note 139, at 336 (noting after it achieved independence, Israel suffered five wars in a forty-four year period).

243. *Id.* at 338–39 (discussing rationale for Israeli and British compensation systems).

244. *Id.* at 335 (Israel has experienced terrorism for several decades).

A. *Israeli Compensation System*

Almost since its inception, Israel has provided compensation to assist war victims and refugees.²⁴⁵ When the first compensation system was created in 1951, the rationale behind the act was to spread the loss among society.²⁴⁶ Gradually, these programs were modified and expanded to provide compensation to some of the victims of border raids.²⁴⁷ Following the Six-Day War of 1967, however, terrorist attacks in Israel began to occur not only near the country's borders, but also within the cities.²⁴⁸ As a direct result, Israel passed the Law of Compensation for Victims of Hostile Acts (VHAPL) to provide compensation to the civilian victims of terrorism equal to that provided to soldiers and their families.²⁴⁹

What is striking about the Israeli Act is its level of comprehensiveness, both in the extent of coverage and degree of detail in defining the coverage. The VHAPL liberally defines an "enemy-inflicted injury," the triggering event for compensation, to include injuries resulting from acts of terror, as well as those resulting from defense against terrorism.²⁵⁰ A judicially created presumption assumes that a

245. *Id.* at 336.

246. *Id.* at 338 (quoting David Pinkas, Chair of the Knesset's Finance Committee: "It is inconceivable that the damage from this war which we had to withstand will be borne by individuals and not by the whole public.").

247. *Id.* at 337

248. *Id.*

249. Victims of Hostile Action (Pensions) Law, 5730–1970, 24 LSI 131 (1969–70) (Isr.); Sommer, *supra* note 139, at 337. Over the years, amendments to the VHAPL have been introduced to bring it into closer alignment with the level of benefits provided to soldiers. *Id.* at 337 n.13. The VHAPL compensates not only victims of terrorism and their families, but it also covers any harm caused by "defensive measures aimed against terrorist aggression" or so-called "friendly fire." *Id.* at 339 (citing H.C. 92/83, Nagar v. Nat'l Ins. Inst., 39(1) P.D. 341 (holding that children wounded by playing with ammunition found in dumpster near military compound were victims of hostile act)).

250. An "enemy-inflicted injury" is defined as follows:

- (1) an injury caused through hostile action by military or semi-military or irregular forces of a state hostile to Israel, through hostile action by an organisation hostile to Israel or through hostile action carried out in aid of one of these or upon its instructions, on its behalf or to further its aims (all are hereinafter referred to as "enemy forces");
- (2) an injury inflicted by a person unintentionally in consequence of hostile action by enemy forces or an injury inflicted unintentionally under circumstances in which there were reasonable grounds for apprehending that hostile action as aforesaid would be carried out;
- (3) an injury through arms which were intended for hostile action by enemy forces, or injury through arms which were intended to counter such action, even if they were not operated, other than an injury sustained by a person of the age of 18 or over while committing a felony, or some other offense involving willfulness or culpable negligence.

specific act is a triggering event where the attack was done in furtherance of a nationalistic motive, regardless of whether the perpetrator was a member of a recognized terrorist organization.²⁵¹

The VHAPL provides compensation to Israeli citizens and residents, including Palestinian-Israelis who are victims of Jewish terrorism.²⁵² It also covers Israelis who are victims of terrorism while abroad,²⁵³ as well as foreigners injured while in Israel legally.²⁵⁴

Once a covered person has shown that he or she has been the victim of a hostile act, he or she is entitled to a host of benefits, including medical care, a living stipend while receiving medical care, and other benefits.²⁵⁵ The Act also provides benefits for families of victims who died as a result of the hostile act.²⁵⁶ The structure of the benefits is based on the structure used to pay families of soldiers killed during active duty.²⁵⁷

The remedies offered under the VHAPL are not exclusive, however. A victim can make a claim under the Act and simultaneously pursue a lawsuit based on other laws (like a tort claim).²⁵⁸ If he receives more compensation from a lawsuit, he can revoke his claim

24 LSI 131, ¶ 1 (1969–70) (authorized translation from the Hebrew prepared at the Ministry of Justice).

251. Sommer, *supra* note 139, at 341. The reasoning behind this presumption is that “one of the goals of terrorist organizations is the killing of Jews.” *Id.* Therefore, “the murder of a Jew for a nationalist motive causes the promotion of the goals of terrorist organizations and may therefore be viewed as a hostile act.” *Id.*

252. *See id.* at 342.

253. *Id.*

254. *Id.*

255. These benefits are administered by the National Insurance Institute, the Israeli equivalent of the Social Security Administration. 24 LSI 131, ¶ 18 (1969–70); *see* Sommer, *supra* note 139, at 343. Allocation of benefits is quite detailed under the statute. For example, if a person is incapacitated and unable to work as a result of the hostile act, the VHAPL allows for money to be paid to the victim until he can resume work, unless he is still receiving his salary. *Id.* at 344. The amount is based on the victim’s salary, limited at a rate of five times the average salary in Israel. *Id.* If the injury is permanent, the victim may be entitled to disability benefits, with the amount calculated by “multiplying the rate of disability by 105.1% of the salary of a low-level government employee.” *Id.* Additional benefits like home loans, care-taking expenses, professional rehabilitation and equipment are available for victims who qualify. *Id.* at 346–47.

256. *Id.* at 347–48.

257. *Id.* at 348. The family members are entitled to monthly benefits, which are calculated as a percentage of the salary of a low-level government employee and is influenced by the age of the widow/widower and whether he or she has children. *Id.* The statute also delineates the benefits for widows who remarry or remarry and then become divorced or rewidowed, and for parents of deceased victims. *Id.*

258. *Id.* at 351.

under the VHAPL.²⁵⁹ Thus, the claimant is only forced to make a choice after he has actually recovered damages.²⁶⁰

Decisions made by the Medical Committee, the initial decision-maker, are appealable to the administering agency, the National Insurance Institute (NII), within thirty days of the date the decision was communicated to the victim.²⁶¹ Those decisions are then appealable to the Labor Tribunal within six months of the date of the NII's decision.²⁶²

The Israeli compensation system represents the broadest approach to compensating injuries due to terrorism and reflects that country's long experience with terrorism.²⁶³ The other major example of a broad no-fault compensation scheme, that of Great Britain, does not limit its recipients to victims of terrorism. Instead, its rationale shifts to victims of intentional wrongdoing, which includes victims of terrorism.

B. *British Compensation Scheme*

The British Criminal Injuries Compensation Scheme is a state funded and administered program in which victims of violent crime

259. *Id.* Such revocation must be done with the consent of the National Insurance Institute, which has taken a liberal approach because of a Supreme Court decision that held it should "generally agree to the victim's decision to return the benefits in exchange for the right to collect on the personal injury lawsuit." *Id.* at 352.

260. *See id.* at 351–52. The victim then needs to refund all compensation payments previously received. *Id.* at 352.

261. *Id.* at 353.

262. *Id.* Appeals to the Labor Tribunal are only permitted for issues of law. *Id.* at 353 n.110.

263. Israel has a separate statute addressing property losses resulting from terrorist activities, which is based on the British model created during World War II to require insurance for property damage caused by war. *Id.* at 353. In 1961, the Property Tax and Compensation Fund Law was passed by the Knesset. *Id.* at 354. This compensation scheme has evolved from a type of mandatory insurance through a property tax, designed to fill the gap left by insurance companies who refused to cover war damage, to a general welfare type program supported by general taxation and society as a whole. *Id.* at 354–55. The property tax was repealed in 2001 but the compensation scheme it was designed to fund still exists and is still administered by the Israeli Tax Authority. *Id.* at 354. The compensation scheme covers "direct" and certain "indirect" damages. *Id.* at 355. Direct damages are defined by the law as "damage caused to assets from actions of war by the enemy's regular army, or from other hostile actions against Israel, or from actions of war by the Israeli army." *Id.* at 355 n.126. Indirect damages include lost earnings and are usually compensated only when incurred by those situated in named border settlements. *Id.* As with the VHAPL, the Compensation Fund Law does not permit double recovery. *Id.* at 357. Not all losses caused by terrorism are covered by these two acts. In particular, business loss is not compensated under the compensation systems. *Id.* at 358.

receive limited compensation for their injuries.²⁶⁴ It is intended to supplement other sources of compensation, from both the state and whatever is obtainable from the offender, either by civil action or criminal court order.²⁶⁵ Although terrorism is not specifically named, most intentional and reckless crimes are included.²⁶⁶ It does not include compensation for property damage.²⁶⁷ Introduced nearly forty years ago, the Criminal Injuries Compensation Board had awarded, by the end of 2000, £2 billion to 750,000 applicants.²⁶⁸

Two statutory agencies administer the scheme, the Criminal Injuries Compensation Authority (CICA) and the Criminal Injuries Compensation Appeals Panel (CICAP).²⁶⁹ After the victim or the victim's family reports the crime to the police, he or she has two years to send

264. See Criminal Injuries Compensation Act, 1995, c. 53, § 1(1) (Eng.); The Criminal Injuries Compensation Scheme, 2001, Issue No. 1 4/01, ¶ 1 (U.K.), available at http://www.cicap.gov.uk/publications/documents/crim_inj_comp2001.pdf [hereinafter COMPENSATION SCHEME 2001] (describing scheme for implementing Criminal Injuries Compensation Act, created by Secretary of State and approved by Parliament).

265. See Desmond Greer, *United Kingdom: Great Britain*, in COMPENSATING CRIME VICTIMS: A EUROPEAN SURVEY 573, 577–81, 590 (Desmond Greer ed., 1996).

266. The Act compensates “persons who have sustained one or more criminal injuries.” Criminal Injuries Compensation Act, 1995, c. 53, § 1(1) (Eng.). The Compensation Scheme defines “criminal injury” as a personal injury sustained in Great Britain as a direct result of (1) a crime of violence; (2) a trespass on a railway; or (3) the apprehension or attempted apprehension of an offender, the prevention or attempted prevention of a crime, or the rendering of aid to a constable. COMPENSATION SCHEME 2001, *supra* note 264, ¶ 8.

267. See COMPENSATION SCHEME 2001, *supra* note 264, ¶ 23 (describing types of compensation awarded). In 1993, the United Kingdom established a Pool Reinsurance Program to provide insurance against losses and damages caused by terrorist attacks on industrial, commercial and residential properties on the British Mainland. See *Terrorist Risk Insurance: Hearing on How the Insurance Industry Should Respond to Risks Posed by Potential Terrorist Attacks and the Extent to Which the Government Should Play a Role Alongside the Industry to Address These Risks, in Light of September 11, 2001, and How These Decisions Will Effect Insurance Coverage and Premiums on Property and Casualty Reinsurance Contracts as They Come Up for Renewal Before the S. Comm. on Banking, Housing and Urban Affairs*, 107th Cong. 99 (2001) (statement of Thomas J. McCool, Managing Director, Financial Markets and Community Development, U.S. General Accounting Office) (describing the British system as part of his congressional testimony). Claims are paid from a pool of accumulated premiums; the government will pay any claims in excess of 110% of the premiums. *Id.*

In a similar vein, the United States Congress passed the Terrorism Risk Insurance Act of 2002, which provides for payments from the federal government to policyholders above a certain deductible, with the losses to be recouped by virtue of a surcharge on all policyholders. See *infra* note 299.

268. CRIMINAL INJURIES COMPENSATION AUTHORITY, ANNUAL REPORT AND ACCOUNTS, 1999-2000, H.C. 356, at 6, available at https://www.cica.gov.uk/pls/portal/docs/PAGE/INFORMATION_PAGES/INFO_BOX_BOTTOM_WHODOWEHHELP/99-00.PDF.

269. See COMPENSATION SCHEME 2001, *supra* note 264, ¶ 2.

an application to the CICA.²⁷⁰ A claims officer will make an initial decision,²⁷¹ with reviews and hearings taking place several months later.²⁷² Appeals are heard by administrative adjudicators and judicial review is not available.²⁷³

Until 1995, the basis for the damage awards was common law.²⁷⁴ In an effort to gain control over the cost of the program and make it more efficient, the basic award became tariff-based under an Act of Parliament, which radically altered the calculation of damages.²⁷⁵ According to the Home Office, the philosophy underlying the tariff scheme “no longer tries to compensate victims in the same way as civil law damages, but simply provides a lump sum in recognition of the injury suffered.”²⁷⁶

Thus, the amount paid to the victim is determined by the “Tariff of Injuries” that forms a major part of the Criminal Injuries Compen-

270. *Id.* ¶ 18. A claim must meet three requirements. First, the crime in which the victim was injured must have taken place in Great Britain or aboard a British vessel or aircraft. *Id.* ¶ 8 and Note 1. Some coverage is available for military personnel serving overseas, as long as the injury was not sustained during war or warlike conditions. *Id.* at Note 1(b)(ii). Second, the injury must have been a result of a crime of violence, a recognized act of law enforcement, or a case of trespass on a railway. *Id.* ¶ 8. The CICA and the British courts have included in the term “crime of violence” such intentional acts as homicide, assault, rape, offenses involving firearms or explosives, riot, violent disorder and affray, kidnapping and false imprisonment, as well as arson and poison. Greer, *supra* note 265, at 595. And third, the injury or death must be “directly attributable” to the violent crime. COMPENSATION SCHEME 2001, *supra* note 264, ¶ 8. Courts have interpreted this third requirement to mean that a person whose injury may not be foreseeable (such as a stranger suffering shock at witnessing a murder) may still be compensated if direct causation can be established. *R. v. Crim. Injuries Comp. Bd. ex parte Parsons* (unreported), Queen’s Bench Division 22 May 1981, Transcript No. 454 of 1982.

There is no nationality or residency requirement; any visitor, no matter how briefly in the United Kingdom, can apply for compensation. Greer, *supra* note 265, at 595. In cases of death, the claimant must be a relative of the deceased, which includes common law spouses of more than two years. COMPENSATION SCHEME 2001, *supra* note 264, at ¶ 38. Compensation can be denied or reduced, however, for victims with criminal records, for those whose misconduct contributed to the injury, those who failed to assist in the conviction of the offender, and certain victims of sexual or family violence. *Id.* ¶¶ 13, 14, 17.

271. *Id.* ¶¶ 2–3.

272. *Id.* ¶ 59.

273. *Id.* ¶¶ 2–5. See Greer *supra* note 265, at 618.

274. The Criminal Injuries Compensation Act was enacted on November 8, 1995. Criminal Injuries Compensation Act, 1995, c. 53 (Eng.). See also Greer, *supra* note 265, at 604–05 (noting that British Scheme originally followed common law approach for assessing compensation but changed to tariff method on April 1, 1996).

275. See Criminal Injuries Compensation Act, 1995, ch. 53, § 2 (Eng.). See also Greer, *supra* note 265, at 612–13 (listing reasons for switch to tariff method).

276. David Miers, *Criminal Injuries Compensation: The New Regime*, 2001 J. PERS. INJ. L. 371, 375.

sation Scheme.²⁷⁷ Instead of an award based on an assessment of individual need and circumstances, the victim will receive a payment based on only a schedule of damages.²⁷⁸ Where there is an injury whose value clearly exceeds the minimum, the Secretary of State may determine its value, after which it will be added to the schedule of damages.²⁷⁹ The damage award is calculated to stand in for the prior common law formulation of expenses, lost earnings, and pain and suffering.²⁸⁰

Although the inflexibility of the scheme has been a subject of criticism, the scheme in its current state is considered more generous than any of its European or common law counterparts.²⁸¹ In 2000, Great Britain paid out £205 million, making Great Britain the “criminal injury compensation capital of the world.”²⁸²

The scheme also has been criticized for insufficient payments, lack of consistency, and delay.²⁸³ Payments may be lower because both the statutory agencies that administer the program and the courts

277. COMPENSATION SCHEME 2001, *supra* note 264, at 21–54.

278. The tariff of injuries and awards is divided into twenty-five levels of compensation, with more than 400 injury descriptions. *Id.* If a victim meets the standard of proof (an award will be granted “on the balance of probabilities”) and if the value of his injuries exceeds the minimum (currently £1,000), he or she will receive a standard amount of compensation. *Id.* ¶¶ 20, 25. This amount is calculated to replace the prior common law formulations of expenses, loss of earnings, and pain and suffering. *See* Greer, *supra* note 265, at 613–14. A victim may claim only three injuries. COMPENSATION SCHEME 2001, *supra* note 264, ¶ 27. Some compensation may be awarded for lost earnings for longer than twenty-eight weeks. *Id.* ¶ 30. There may also be special expenses, such as non-standard medical treatment (beyond that provided free by the National Health Service), cost of nursing care at home, and cost to make one’s home accessible to resulting disabilities. *Id.* ¶ 35. In case of death, the award includes funeral expenses, a bereavement award for each dependent relative, loss of maintenance, and loss of mother’s support. *Id.* ¶¶ 37–44. There is an overall cap of £500,000. *Id.* ¶ 24.

The award will be reduced by the amount of compensation the victim has received from other sources, or “collateral benefits,” including social security, statutory sick pay, occupational pensions, and payment recovered from the offender. *Id.* ¶¶ 45–49.

279. *Id.* ¶ 28.

280. Greer, *supra* note 265, at 610.

281. Miers, *supra* note 276, at 373.

282. Robert Verkaik, *Britain Becomes Compensational Capital of the World, With Payouts Still Rising*, INDEPENDENT (London), Mar. 27, 2001, at 6.

283. *See, e.g.,* Emma Hartley, *£125,000 Stress Award to Nickell Case Officer Stress Payout*, INDEPENDENT (London), Apr. 6, 2001, at 7 (discussing inconsistency of awards and failure of awards to correspond to severity of injury); Joy Lodico, *Agenda: 7 July Bombings Compensation Overshadows Memorial Event*, INDEPENDENT (London), Oct. 30, 2005, at 71 (describing bombing victims’ dissatisfaction at amount of awards and delay in disbursement); Nigel Morris, *Labour in Brighton: London Attacks: Blair Promises to Speed up Payments for Bomb Victims*, INDEPENDENT (London), Sept. 26, 2005, at 10 (discussing delay in injury compensation payouts).

interpret the duty of the agencies narrowly. One reason for the narrow interpretation is that the agencies are sensitive to the need to protect public funds, out of which the compensation is paid.²⁸⁴ Another reason is the need to curtail an increase in fraudulent claims.²⁸⁵ Moreover, cost escalation is a general concern, and was one of the primary reasons for changing from the common-law-based system to the tariff-based: the Home Office predicted that a twenty-five percent savings would result.²⁸⁶ Yet, the scheme has been criticized as “miserly” and inconsistent with other programs.²⁸⁷

Some argue that the lack of judicial review has led to abuses.²⁸⁸ The scheme has also been criticized for delay in processing claims, another reason for the implementation of the tariff scheme.²⁸⁹

Despite their weaknesses, the two examples from Britain and Israel demonstrate the feasibility of implementing permanent compensation schemes for victims of terrorism. Although both systems were created by socialist governments, they show that the populace can become accustomed to receipt of compensation through a no-fault system that delivers a standard, reduced rate of recovery. Both countries have created large, bureaucratic institutions, which may slow down delivery of compensation, but still deliver compensation faster than that awarded through the American tort common law system, notorious for its prolonged resolution of lawsuits. Standardizing payments

284. The panel considers itself to be managing a scheme “where it has to consider the payment of compensation out of public funds.” *R. (on the application of M.) v. Crim. Injuries Comp. App. Panel*, [2003] E.W.H.C. 243 (Q.B. (Admin.)) at ¶ 31.

285. A 2001 CICA report identified that record numbers of people are falsely claiming criminal injury compensation. Verkaik, *supra* note 282, at 6. Fraudulent claims doubled between 1999 and 2000. *Id.*

286. Richard Colbey, *Adding Insult to Criminal Injury: New Legislation Will Reduce Yet Further Compensation to Victims of Crime*, *GUARDIAN* (London), Nov. 11, 1995, at 32.

287. Colin Cottell, *Victims of Violence Forced to Battle for ‘Stingy’ Payouts*, *OBSERVER* (London), Apr. 8, 2001, at 14. For example, in 2001, the family of a murdered child received an award of £10,000. *Id.*

288. Going to court is a good thing in itself, because the best way “to deal with disputes about civil rights and obligations is a fully argued case, in adversarial proceedings, before an independent and impartial judge.” Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 *EUR. HUM. RTS. L. REV.* 457, 458 (2000). When three claimants who were refused compensation were also unable to inquire as to detailed reasons for the refusal, the CICA/CICB considered itself as “master of its own house and unanswerable to public law.” Ian Walker, *Quantum: The Judgment is Very Critical of the CICA on Three Applications for Judicial Review of Cases Where Compensation Had Been Refused by Them or the CICB*, 46 *J. PERS. INJ. L.* 281, 281 (2000).

289. The change seems to have been successful. In 1989, seventy-three percent of claims took more than twelve months to resolve, but ten years later, the average processing time was 8.4 months. Miers, *supra* note 276, at 392.

always creates inflexibility in a system, but as these two compensation systems exemplify, they generally allow payment to reach a greater number of people. Payments may be low, but that reduced rate discounts for the risk involved in pursuing payments through other means. The lower payments also reflect the existence of nationalized health systems, an option that currently does not exist in the United States except for the very poor or the aged.

Most significantly, these compensation systems represent an enormous financial undertaking on the part of their governments.²⁹⁰ To undertake such a financial responsibility by the United States federal government would require weighty reasons in favor of creating a permanent compensation system for victims of terrorism. This article examines possible reasons for doing so below.

V.

CREATION OF A PERMANENT COMPENSATION SYSTEM FOR PERSONAL INJURY VICTIMS OF TERRORISM

A. *Arguments in Favor of a Permanent Compensation System*

Three arguments support the establishment of a permanent victims' compensation fund sponsored by the United States federal government. First, an established compensation system would be more efficient and effective than the tort system or a temporary compensation system. Second, a permanent system would enhance the psychological benefits stemming from a compensation system. Third, a permanent system would avoid constitutional questions that could arise in connection with a temporary scheme. Each of these arguments is discussed below.²⁹¹

290. In 2001, for instance, Britain paid out 205 million pounds under its compensation scheme, and pay-outs were expected to rise in future years. Verkaik, *supra* note 282, at 6.

291. Another alternative is to provide no governmental compensation system—not even a temporary one—and have the traditional tort system as the only available recourse for victims of terrorism. Others have shown that a tort-based approach would have proven inadequate to deal with the type of public, mass disaster caused by terrorism. See Goldscheid, *supra* note 2, at 221 (explaining that like the September 11th Fund, state crime victims compensation funds developed as a result of the unavailability of the tort system as a source of recovery); Alexander, *supra* note 2, at 637 (arguing that tort damages were inappropriate because the primary defendants involved in 9/11 would be unavailable, and it would be unfair and against the public interest to hold secondary defendants liable); Rabin, *Circumscribed Response*, *supra* note 2, at 771 (reasoning that the tort system would not have provided adequate compensation because the airlines' potential insolvency would have limited the remedies for victims, claimants would have faced protracted litigation and its attendant financial and emotional costs, and claimants possessed a shared sense of identity so distinctions among them would have seemed arbitrary).

1. *Enhanced Efficiency*

A permanent compensation system would be more efficient and equitable than the tort system or temporary alternatives for a number of reasons. It more effectively protects the industries involved while lowering transaction costs for the parties and the administering body involved. Moreover, having a compensation system already in place would increase the speed at which compensation is delivered.

A no-fault compensation fund can save huge amounts in transaction costs, since it eliminates the need to prove fault and simply requires proof of injury in a certain setting. This saves litigation costs for both plaintiffs and defendants, avoids duplicate litigation of identical or nearly identical issues, and reduces the burden on the judicial system.²⁹² Most significantly, a no-fault compensation system can deliver compensation to the claimant much more quickly than the tort system.²⁹³

A permanent system avoids the need to create multiple administrative schemes and permits the appointment of a single decision-maker or decision-making body that would not have to be recreated with each ensuing crisis. A permanent system also allows for a fixed schedule of damage awards, which reduces the need for the decision-maker to review each damage award individually, and brings consistency to the awards. Under the September 11th Fund, although the special master issued a table of presumptive damages, each award was determined individually, as in the traditional tort system, and there was little or no precedential value attached to any of the awards.²⁹⁴

Although the September 11th Fund was ultimately successful in encouraging virtually all of the eligible claimants to use the Fund, it is unclear whether this success was due to the nature of the Fund itself, the efforts of the special master to encourage filings, or the unique circumstances of the attack. Special Master Feinberg credits all of these reasons.²⁹⁵ Moreover, it is unclear why a large group of eligible

292. Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1468 (2005) (stating that transaction costs in administrative compensation systems are significantly lower than in tort litigation).

293. See SHAPO, COMPENSATION, *supra* note 2, at 103 (compensation systems, as compared to tort systems, offer certainty of payment and relative efficiency of administration).

294. FEINBERG, *supra* note 1, at 78 (observing that it might not have been a good idea for the Act to require "individualized and different amounts of compensation").

295. *Id.* at 166. Feinberg attributes five reasons to the success of the Fund: (1) the alternative of litigation seemed uncertain and protracted; (2) the Fund publicized the likely amounts of recovery; (3) the Fund actively contacted each claimant and provided support for filing claims; (4) it offered informal and formal meetings to give

claimants did not file a claim under the September 11th Fund until the very end of the eligibility period—whether individuals were still considering their options, whether the Fund was so new a concept that individuals were mistrustful, whether the eligible claimants were simply recovering from the shock of the event, whether the claimants were confused by the district court’s decision to deny the motion to dismiss the action against the private defendants,²⁹⁶ or whether the claimants simply reacted to an imminent deadline. In any event, a permanent system may ease uncertainties and thus would not need to rely on the efforts of an individual special master to encourage participation by eligible claimants.

In a larger sense, a permanent compensation fund is more efficient because it helps the country return to normal as quickly as possible. Returning to the status quo ante quickly after an attack is critical to the smooth functioning of a society. In addition to restoring the affected infrastructure, restoration efforts should also include having a compensation system in place for victims to turn to immediately. Although the September 11th Fund was created quickly after the attack, it took months for the special master to be appointed, to create a staff, and to promulgate regulations addressing the structure of the program.²⁹⁷ Even though the September 11th Fund was a “fast-track” compensation system, it would be faster still to have a system already in place. A permanent fund would give the populace an immediate forum to turn to and from which they could receive aid quickly.

Furthermore, a permanent compensation system would more effectively reach the goal of protecting nationwide industries from crippling liability costs.²⁹⁸ As Price-Anderson and the Vaccine Act demonstrate, removing the threat of enormous liability costs helps protect industry. A permanent system should significantly reduce the

each claimant his or her “day in court;” and (5) it offered “closure” by giving the claimants certainty without delay. *Id.*

296. See *supra* note 89 and accompanying text.

297. Special Master Feinberg was not appointed until November 26, 2001, two and a half months after the attack. See Diana B. Henriques & David Barstow, *Mediator Named to Run Sept. 11 Fund*, N.Y. TIMES, Nov. 27, 2001, at B1 (discussing Feinberg’s appointment). Interim regulations were not promulgated for another month and were not finalized for another six months. See Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,282 (Dec. 21, 2001), codified at 28 C.F.R. pt. 104; Final Rule, September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002), codified at 28 C.F.R. pt. 104.

298. For example, fear of terrorism and its attendant costs often depress markets. See, e.g., *World Markets Decline; Fear of More Terrorism a Factor*, N.Y. TIMES, Nov. 18, 2003, at C12.

operational and insurance costs that industry might otherwise face and thus free up resources for more productive purposes.

For example, having a compensation system in place should affect insurance rates. In a situation like this, where the risk of a terrorist attack is small but the potential harm can be catastrophic, insurers may focus only on a year-to-year basis even though the annual expected value of the loss is small. In other words, insurers may set extremely high rates in an effort to avoid the short-term risk of a catastrophe occurring and not having the reserves to cover it. A permanent compensation system could help keep insurers from setting very high rates, especially if the government steps in with government guarantees or government regulation to keep insurance costs in line with the risks. This theory propelled the Terrorism Risk Insurance Act of 2002.²⁹⁹

Of course, creating a permanent compensation system has several disadvantages. Increasing efficiency in a compensation system usually has the cost of decreasing individual justice. Because most permanent compensation systems achieve efficiency by standardizing

299. In response to the September 11th attacks, Congress passed the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002), which was renewed in December 2005 by the Terrorism Risk Insurance Extension Act of 2005, Pub. L. No. 109-144, 119 Stat. 2660 (2005). This law is designed to create an incentive for insurance companies to continue to insure against losses due to terrorism. *Id.* § 101(b)(1). The Act provides that once the insurer pays losses that exceed a deductible amount based on the insurer's direct earned premiums, the federal government will reimburse the insurance company at 90% above that deductible in that year. *Id.* § 103(e)(1)(A). To be covered by the program, an act must cause at least \$5 million in damages. *Id.* § 102(1)(B)(ii).

At the same time, Congress also created an exclusive federal cause of action for all personal injury and property damage arising out of a terrorist act. *Id.* § 107(a)(1). The federal cause of action preempts state causes of action. *Id.* § 107(a)(2). See also WHARTON RISK MGMT. & DECISION PROCESSES CTR., THE WHARTON SCHOOL, U. OF PENN., TRIA AND BEYOND: TERRORISM RISK FINANCING IN THE U.S. 1-9 (2005) [hereinafter WHARTON] (discussing how the unique characteristics of terrorism create a need for government involvement in insuring against terrorism and proposing a temporary extension of TRIA until more equitable and efficient permanent system can be established); Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—and Crime* 37-39 (Univ. of Mich., John M. Olin Ctr. for Law & Econ. Working Paper No. 03-005, Univ. of Chi. Law Sch., Pub. Law & Legal Theory Working Paper No. 47, John M. Olin Law & Econ. Working Paper No. 189, 2003), available at <http://ssrn.com/abstract=414144> (arguing that the justification for government-sponsored crime insurance is stronger than the justification for government-sponsored terrorism insurance); Anne Gron & Alan O. Sykes, *Terrorism and Insurance Markets: A Role for the Government as Insurer?*, 36 IND. L. REV. 447, 450 (recommending that government not interfere with the insurance industry but instead “step in with an appropriate aid package ex post in the event of something catastrophic and uninsured”); see generally Richard L. Thomas, *Underwriting Terrorism Risk*, 18 ST. JOHN'S J. LEGAL COMMENT. 497 (2004) (discussing problems involved with insuring against terrorism).

results rather than engaging in a thorough case-by-case review, these systems are not tailored to the merits of each individual case.³⁰⁰

Further, the extent of loss from terrorism is unpredictable and, therefore, the traditional economic analysis of loss prevention is much more difficult to apply. Unlike members of the armed forces, victims of terrorism are not predictable in terms of the amount and extent of loss. Thus, from an economic standpoint, it is much simpler for the government to create a compensation system after the fact rather than in advance.

Moreover, waiting for an incident to occur rather than anticipating loss creates a flexibility that allows for a more accurate assessment of priorities. The government can decide at that point whether its paramount concern is to protect a certain industry from litigation, for example, or to provide redress for certain harms. For this reason, the *ex ante* approach to single-event disasters is the one the government has traditionally applied. Creating a permanent compensation system trades flexibility and accuracy for efficiency, but it is a trade-off that is valuable in regards to consistency, speedy delivery of compensation, and other benefits gained.

Ad hoc tribunals have less legitimacy than permanent tribunals, so in addition to promoting efficiency and fostering protection of industry, a permanent fund would enhance the sense of equity by creating the expectation that any compensation for victims of terrorism would be received mainly through this compensation delivery system. This leads to the second benefit of a permanent system: providing psychological support.

2. *Providing Psychological Support*

A permanent compensation system would have two important psychological benefits. First, quickly compensating victims for their losses achieves a form of closure, which in turn reduces the psychological impact of an attack. Second, a permanent fund helps create a sense of fairness for the victims.³⁰¹

300. See, e.g., David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 581 (1987) (attacking argument that “achieving process efficiency at expense of [individual] claimants’ substantive rights [is] offensive to notions of individual justice”); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74–76 (1989) (arguing that efficiency in mass torts comes at cost of offering corrective justice in disputes arising between private parties).

301. *But see* FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 83 (stressing that the September 11th Fund arose out of “profound conditions” and a “national sense of grief and compassion” and suggesting that creating a permanent fund outside of this

The lasting effects of the September 11th terrorist attacks cannot be overstated. Studies have shown that the attacks have caused people to increase their perception of the risk of terrorism in the United States.³⁰² These perceptions were vastly exaggerated in relation to objective measures of the actual risks involved.³⁰³ The exaggerated fear of attack is partly due to the media coverage of the September 11th attacks and the possibility of future attacks.³⁰⁴ This information shapes perceptions of the likelihood of an attack occurring and affects the way people make risk-related decisions.³⁰⁵

To the public, it was unclear whether the September 11th attacks were isolated incidents of crime or a mark of a new era of history, the beginning of a new war-like state. In other words, it was uncertain whether September 11th represented an exception to the norm or a new norm.³⁰⁶ This uncertainty remains, causing people's risk perceptions to be skewed. As Professor Neal Feigenson states, "[P]eople judge risks to be more serious, and fear them more, the more the risks are dreaded and unknown. The more a risk is dreaded, the more people believe that something should be done to regulate or eliminate it."³⁰⁷ Terrorism is dreaded because people believe they have little control over an attack, as opposed to other types of risk, and because the consequences could be catastrophic.³⁰⁸ Terrorism creates enormous fear because the threats are unknown.³⁰⁹

The primary effects of terrorism—unpredictability in terms of timing and type of attacks—are the most dreaded, and preventative measures are used to gain control over them. But the secondary effects of the attack—restoring the status quo—are also threatening and

context would be a mistake: "Only if Congress, the Administration, and the public at large conclude that a similar horrific attack justifies the establishment of such a fund should one be enacted.").

302. See Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 *BROOK. L. REV.* 959, 981 (2003); see also FEINBERG, *supra* note 1, at 120–21.

303. Feigenson, *supra* note 302, at 981 (describing study in which respondents rated the likelihood that they themselves or the average American would be hurt in a terrorist attack in the year following 9/11).

304. See SHAPO, *COMPENSATION*, *supra* note 2, at 216 (describing September 11th as the "media event of decades").

305. Feigenson, *supra*, note 302, at 982.

306. Keith Hayward & Wayne Morrison, *Locating 'Ground Zero': Caught Between the Narratives of Crime and War*, in *LAW AFTER GROUND ZERO*, 139, 139–40 (John Strawson ed., 2002).

307. Feigenson, *supra* note 302, at 982.

308. *Id.* at 993.

309. *Id.*

could be alleviated by having a compensation system in place.³¹⁰ In Britain and Israel, people respond to terrorism by quickly resuming normalcy in their lives, perhaps in part because both countries have permanent compensation systems.

Further, a permanent fund creates a “symbol of displaced vengeance and a marker of social compassion,”³¹¹ helping to diminish the psychological impact of terrorist attacks.³¹² If acts of terrorism are executed against citizens because of their symbolic value, then quickly compensating the targeted population may lessen the lasting effects of the incident.³¹³ Quick compensation and restoration may give victims and the public courage, knowing that they do not suffer in isolation and making them feel part of a nation unified under fire. In contrast, pursuing claims through the tort system would more likely lead to additional emotional and financial stress on the victims.

In addition, a government compensation system allows the nation to express its compassion for the victims. As Special Master Feinberg

310. See ORG. FOR ECON. CO-OPERATION & DEV., *Economic Consequences of Terrorism*, in OECD ECONOMIC OUTLOOK No. 71, 117, 119–21 (2002), available at <http://www.oecd.org/dataoecd/11/60/1935314.pdf> (describing how household and business confidence, as well as trust in government’s capacity to protect the country, would be badly shaken by terrorist attacks); AM. ACAD. OF ACTUARIES, *TERRORISM INSURANCE COVERAGE IN THE AFTERMATH OF SEPTEMBER 11TH 8* (2002), available at http://www.actuary.org/pdf/casualty/terrorism_may02.pdf (“[N]ot only is there uncertainty with respect to the very nature of timing, likelihood, and consequences of any terrorist event, but there is also uncertainty as to the impact of the very fear that such events may be uninsurable.”).

311. Shapo, *Specialized Jurisprudence*, *supra* note 2, at 1252; see also Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,282 (Dec. 21, 2001) (referring to the Fund as “an unprecedented expression of compassion on the part of the American people to the victims and their families devastated by the horror and tragedy of September 11”); FEINBERG, *supra* note 1, at 22 (suggesting that Congress acted out of compassion in creating a generous public compensation program).

312. See SHAPO, *COMPENSATION*, *supra* note 2, at 225 (giving compensation is “powerfully symbolic,” sending message that recipients are “special, if involuntary, representatives of a community imperiled”).

313. As the wife of one victim said:

You put your kids to bed; you stay up at midnight. When you fill out the papers it hurts when you look up personal records. But when it’s done, you have made a finality to your family where you can move on and you can help them. And although it is difficult, Feinberg, the fund has treated my family very reasonably and fairly.

60 Minutes: Mr. Feinberg (CBS television broadcast Sept. 11, 2005), available at <http://www.cbsnews.com/stories/2003/11/07/60minutes/main582529.shtml>. See also FEINBERG, *supra* note 1, at 129 (stating September 11th fund aided families’ resolve to “move on”). But see Tyler & Thorisdottir, *supra* note 2, at 361 (“People are less likely to find compensation acceptable in situations when the harm involves issues of moral wrong In such a situation, the primary focus of victims, their families and society . . . is on bringing to account ‘responsible people.’”).

described it, “[Public compensation] should be viewed as an expression of the collective cohesive spirit of the nation and its citizens toward the victims of a foreign terrorist attack here at home.”³¹⁴ This method of public support functions similarly to systems that provide compensation for members of the armed forces who suffer loss.³¹⁵ A permanent compensation system will allow the nation to comfort the victims of terrorist attack, while at the same time, provide comfort to the nation’s citizens by showing a country united.

Moreover, speedy and adequate compensation should help people achieve closure, work through their distress, rise out of their depression, and resume productive lives.³¹⁶ Research indicates that stress has an impact on people’s physical health, but that those with social support and material resources are better insulated from the stressors and suffer less.³¹⁷ Social support intervention through a compensation fund should enhance this effect.³¹⁸

Of course, some potential claimants would still choose to pursue a tort claim in court rather than apply to a government compensation fund, even though the experience of the September 11th Fund suggests otherwise.³¹⁹ Not every potential claimant finds the benefits offered by a permanent compensation fund to be sufficient. To some, pursuing a tort claim in court is more attractive: it gives the claimant the ability to pursue a “day in court” and have his story told, fulfilling the

314. FEINBERG, *supra* note 1, at 186.

315. See SHAPO, COMPENSATION, *supra* note 2, at 141 (describing death and survival benefits for soldiers); see also *supra* note 142 and accompanying text.

316. See SHAPO, COMPENSATION, *supra* note 2, at 227 (community burden sharing helps victims resume productive lives).

317. See Bert N. Uchino, Darcy Uno, & Julianne Holt-Lunstad, *Social Support, Physiological Processes and Health*, 8 CURRENT DIRECTIONS IN PSYCHOL. SCI. 145, 145 (1999) (examining data that suggests that it may be worthwhile to incorporate social-support interventions for prevention and treatment of physical health problems).

318. See, e.g., LARSON & LARSON, *supra* note 210, § 1.03[2] (workers’ compensation demonstrates social philosophy of “providing, in the most efficient, most dignified, and most certain form, financial and medical benefits . . . which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source”); Goldscheid, *supra* note 2, at 204–05 (stating that the September 11th Fund was created “to ensure that the victims of this unprecedented, unforeseeable, and horrific event, and their families do not suffer financial hardship in addition to the terrible hardships they already have been forced to endure” and was, in part, “driven by a concern for the victims that could be characterized as humanitarian, or serving social welfare”); Jordan H. Leibman and Terry Morehead Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS L.J. 287, 369–70 (1985) (workers’ compensation is both “an insurance concept and a social support mechanism”).

319. FEINBERG, *supra* note 1, at 160–61.

need for an accounting and retribution, and the potential for a larger compensatory award.³²⁰ These needs are not fulfilled by a compensation fund.³²¹ But these needs may be met in other ways because the government would have a strong interest in investigating the problems with security that led to the attack and would thus serve a role similar to that of a litigant in court.³²²

Related to the benefit of closure is the benefit of victims accepting a compensation system as just. Attempting to restore the status quo through a permanent fund will help victims gain a sense of dignity and respect while creating a sense of fairness.³²³ It is important for victims to believe they have been fairly treated, especially when it is difficult to quantify the value of their loss; in these situations, the procedures used to allocate compensation help establish the legitimacy and fairness of the awards.³²⁴ Establishing a permanent system would require an articulation of the principles by which compensation will be awarded. This form of procedural justice should help create a sense of fairness when compensation is distributed.³²⁵

320. See Hadfield, *supra* note 2, at 16 (describing victims' desire to go to court and noting that it is not always sufficient to rely on politicians for investigation).

321. *Id.*

322. Relying on governmental investigation may not be completely satisfactory, however. The President created a commission to investigate what led to the September 11th attacks, and the commission filed its final report in July 2004. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT xv-xvi (2004). Despite these efforts, some victims and families of victims do not feel that there has been a sufficient accounting of the failure to detect the 9/11 attacks. See FEINBERG, *supra* note 1, at 100 (anger of victims and families was "often fueled by their conviction that the tragedy could and should have been averted"); *id.* at 103 (some families "spen[t] an inordinate amount of time denouncing the government for failing to prevent the attacks"). The ten 9/11 Commission panel members have formed a private group, The 9/11 Public Discourse Project, to investigate the government's current counterterrorism efforts. Philip Shenon, *Sept. 11 Panelists Seeking U.S. Data on Terror Risks*, N.Y. TIMES, June 6, 2005, at A1. Governor Kean was "disturbed" and "alarmed" by the government's failure to act on some of the 9/11 Commission's recommendations, such as securing international supplies of nuclear weapons, unifying radio frequencies for emergency workers, and appointing a federal civil liberties board. *Id.* See also *infra* Part V.B.4 for a discussion of how a hybrid permanent compensation fund might fulfill these needs more successfully than an exclusive one.

323. See Tyler & Thorisdottir, *supra* note 2, at 381, 383 (explaining that one function of procedures enacted following victimization is to help restore the status of the victims by acknowledging their injury and treating them with dignity and respect).

324. See *id.* at 369 (noting that people are as concerned about whether they received a fair amount as they are about how much they received); *id.* at 379 (stating that the factors that shape the nature of subjective judgments in determining compensation for loss are important in judging whether the outcome is fair).

325. See *id.* at 370 (describing the three primary principles for distributive fairness—equity, equality, and need). Feinberg indicated that more specific direction

As discussed earlier, neither the statute creating the September 11th Fund nor its regulations articulated the principles of distribution, seeming to draw from all three major principles of distributive fairness: equity, equality, and need.³²⁶ Therefore, claimants were invited to interpret the principles individually and many were left dissatisfied. The families of the highly paid employees of Cantor Fitzgerald complained they did not receive a fair allocation based on the principle of equity.³²⁷ This was compounded by the collateral offset of insurance money: wealthier victims were more likely to have life insurance coverage and in larger amounts, thereby reducing their award.³²⁸ Others thought all the victims should receive the same amount based on the principle of equality.³²⁹ Still others thought the majority of the money should go to the lower rung of the economic scale, based on the principle of need.³³⁰

With articulated principles of distribution—more deliberative in permanent legislation rather than in an ad hoc reaction to an emergency situation—victims are more likely to accept the fairness of that compensation.³³¹ In a permanent system, Congress could clearly articulate which justice principle to apply when distributing compensation: need, equality, equity, or some combination of the three. The other compensation systems examined in this article—the Vaccine Act, workers' compensation, and British and Israeli compensation for terrorism victims—base their distribution on the principles of equality and need. This approach rejects that of the tort system, an appropriate response considering that these compensation systems are, at bottom, a rejection of the common law tort approach to compensation in those situations.³³²

from Congress would have eliminated some of the tension surrounding the September 11th Fund—by mandating different levels of compensation, “Congress virtually guaranteed a heated economic and philosophic debate revolving around the meaning and scope of ‘need.’” FEINBERG, *supra* note 1, at 151.

326. See *supra* notes 62–78 and accompanying text.

327. See *supra* note 91 and accompanying text.

328. The Air Transportation Safety and System Stabilization Act required the special master to reduce all awards “by the amount of the collateral source compensation the claimant has received or is entitled to receive.” Pub. L. 107-42, § 405(b)(6), 115 Stat. 230, 239 (2001). See *supra* note 76 for a discussion of collateral source payments.

329. See *supra* notes 68–78 and accompanying text.

330. See *supra* notes 91–94 and accompanying text.

331. See Tyler & Thorisdottir, *supra* note 2, at 379–80 (explaining that how the decision is framed and fairness of decision-making process are especially important to recipients when it is difficult to determine value of the harm).

332. See Goldscheid, *supra* note 2, at 219 (noting that for the September 11th Fund, “the calculation of awards approximating tort damages rather than awards more closely tracking disaster relief or emergency payments is unprecedented for a govern-

Still, establishing a permanent compensation fund will not avoid all inequities. Presumably any fund will limit who may be considered a beneficiary. For example, Congress may choose not to cover victims of natural disasters under such a fund because they are not the product of political acts against the United States. As Special Master Feinberg noted, “Government does not act as an insurer of last resort to compensate those who die as a result of their own choices or life’s misfortunes.”³³³ He argues that with limited government, citizens should have no expectation of entitlement to compensation for death or personal injury.³³⁴

It is important to observe that inequities inevitably occur in any governmental program where bright lines are drawn between beneficiaries and non-beneficiaries.³³⁵ Not everyone who is deserving receives welfare or Medicaid payments.³³⁶ If one goal of a terrorist victims’ compensation fund is to help alleviate risk perceptions of terrorism, then the government may rationally choose to single out domestic victims of foreign terrorism over other victims of harm for its largesse.³³⁷ And, at a minimum, establishing a permanent system of compensation would create an expectation regarding who would receive compensation through that system. This would avoid inequity arguments each time an attack occurred and the government was called on to aid the victims. At bottom, Congress can choose to make a pragmatic choice to aid certain victims and not others, and people will adjust their expectations to that choice.

The sudden and violent nature of terrorism may leave victims incapacitated, making it particularly difficult to pursue a claim. Certainly, speedy and adequate compensation delivered through a permanent no-fault system would help people bring closure to the trauma and resume productive lives.

ment program absent an admission of state liability, and therefore is difficult, if not impossible, to defend and replicate”).

333. FEINBERG, *supra* note 1, at 179.

334. *Id.*

335. *See supra* notes 72 & 96 and accompanying text for examples of some of the bright lines drawn for beneficiaries of the Fund.

336. *See* 42 C.F.R. §§ 435.600–.640 (2005) (describing eligibility requirements for Medicaid); *see also, e.g.*, ARIZ. REV. STAT. ANN. § 46-207.01 (2005) (tying state welfare benefits to federal poverty level).

337. *See infra* text accompanying note 410 (noting that vast majority of victims of international terrorism are military personnel covered by other compensation systems). *See also* FEINBERG, *supra* note 1, at 181–82 (speculating that the families of victims of the *USS Cole* and the Oklahoma City bombing recognized the uniqueness of the September 11th attacks).

3. *Avoiding Potential Constitutional Infirmities*

The third major benefit of a permanent victims' compensation fund is the avoidance of constitutional infirmities faced by ad hoc solutions.³³⁸ Three potential constitutional questions are raised by federal enactment of any victims' compensation system: (1) whether Congress has the power to create it; (2) whether Congress has to create a quid pro quo system when it removes access to the tort system; and (3) whether and when plaintiffs have a vested right in a common law tort claim. All three of these inquiries are interrelated.

Certainly, Congress has the power to preempt state tort claims under the Interstate Commerce Clause³³⁹—the cigarette cases being a prime example³⁴⁰—but Commerce Clause jurisprudence over the last ten years suggests limitations on this power may inhibit Congress's ability to enact an ad hoc federal compensation scheme.³⁴¹ Congress

338. A temporary federal compensation system that removes a state tort common law claim would be subject to challenge on federalism and Fifth Amendment grounds for denying injured parties access to state tort remedies that were available when the injury occurred. Although the September 11th Fund avoided this issue by offering the option of pursuing common law tort claims, even these claims are limited to the extent that all claims are removed to the federal court and governed by caps on potential remedies. See *supra* note 48; see also Erin G. Holt, Note, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513, 539 (2004) (stating ATSSSA's liability cap "raises a federalism concern insofar as it enables the federal government to limit the relief a citizen can get through his or her respective state tort law"). Having a permanent compensation system in place before the causes of action arise should help avoid these challenges.

339. U.S. CONST. art. I, § 8, cl. 3.

340. For example, in *Cipollone v. Liggett Group, Inc.*, the Supreme Court held that the Public Health Cigarette Smoking Act of 1969, creating federally mandated cigarette warning labels, preempted certain state common law tort claims relating to the adequacy of labeling, such as failure to warn claims. 505 U.S. 504, 524–25 (1992). Congress premised its authority on the Commerce Clause by noting that commerce and the national economy would be impaired by "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" so far as the policy of informing the public about the health and safety concerns of tobacco was concerned. See 15 U.S.C. § 1331(2) (2000 & Supp. IV 2004).

341. There is a presumption against preemption when construing congressional intent to preempt. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This presumption against preemption appears to be stronger when it involves preemption of state common law causes of action that would deny a plaintiff an adequate remedy for violation of his or her state-created rights. See Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L.Q. 1087, 1117 n.150 (1992) (traditional hesitation to find preemption where federal law provides no comparable remedy); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (refusing to preempt property owners' tort remedies, despite defendant's compliance with Clean Water Act, in order not to leave property owners remediless); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (rejecting preemption of a claim for unlawful conveyance of tribal land where to hold otherwise would leave claimants remediless); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984) (Blackmun, J.,

may not invoke the Interstate Commerce Clause power merely by suggesting that the law in question is tangentially related to interstate commerce;³⁴² the key to the analysis is whether there is a rational basis for believing that the activities sought to be regulated substantially affect interstate commerce or regulate a quintessentially economic activity.³⁴³

Any connection to interstate commerce likely would be strengthened if federal legislation addressed all damages due to terrorism, rather than individual instances. One reason is that having a permanent compensation system would help stabilize the insurance market by ensuring that the industry would not bear the full costs of terrorism, aiding, in turn, the free flow of interstate commerce.³⁴⁴ Some individual terrorist attacks could, by themselves, have strong interstate commerce implications, the attack on the World Trade Center, a center of interstate commerce, being a prime example. But generally, permanent legislation is likely to have a stronger basis under the Interstate

dissenting) (“[I]t is inconceivable that Congress intended to leave victims with no remedy at all.”); *United Constr. Workers v. Laburnum Constr. Co.*, 347 U.S. 656, 663–64 (1954) (declining to preempt state law tort claims in heavily regulated labor relations field because to do so would deprive plaintiff of property without recourse or compensation); *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988) (holding state regulation of vaccine manufacture not preempted by National Childhood Vaccine Injury Act of 1986).

I have argued elsewhere, moreover, that congressional power under the Court’s current interpretation of the Interstate Commerce Clause may not allow Congress to enact certain national tort reform legislation. See Grey, *supra* note 86, at 502.

342. See, e.g., *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that Congress did not have the power to prohibit the possession of guns near schools); *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (holding that civil remedy provision of the Violence Against Women Act was not a valid regulation of interstate commerce).

343. See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (holding that application of federal law criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users did not violate Commerce Clause); *id.* at 2208–09 (discussing rational basis for believing that activities sought to be regulated substantially affect interstate commerce); *id.* at 2211 (discussing regulation of a quintessentially economic activity).

344. Tillinghast-Towers Perrin, one of the largest global management consulting firms, estimated the September 11th attacks will ultimately cost the insurance industry between \$32 and \$56 billion; \$5 to \$20 billion of that is liability costs. Patricia Guinn, *Why Are Insurance Prices Going Up?*, 25 LEADERS 150 (2002), available at <http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2002/200204/2002051611.pdf>. As of July 2004, the Wharton Risk Center and the Insurance Information Institute have estimated total insurance losses from the September 11th attacks at \$32.4 billion. WHARTON, *supra* note 299, at 44. Insurance rates have risen in the aftermath of the attacks. Taking notice of the potential economic effects of this insurance crisis, Congress passed the Terrorism Risk Insurance Act of 2002. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322. See *supra* note 299; see also SHAPO, COMPENSATION, *supra* note 2, at 130–31.

Commerce Clause than legislation that is solely related to an individual incident of terrorism.

Assuming Congress has the power under the Interstate Commerce Clause to create a compensation system that displaces the common law tort system, the question remains whether such action would constitute a Due Process violation or a taking under the Fifth Amendment.³⁴⁵ To bring a Fifth Amendment claim, plaintiffs initially would need to show the abrogation of a vested right.³⁴⁶ Although it is unlikely that elimination of an unaccrued claim triggers a constitutional claim,³⁴⁷ it is more likely that legislation affecting a tort claim reduced to final judgment would trigger a stronger Fifth Amendment claim because the tort claim would be considered a vested right.³⁴⁸

345. The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

346. *See, e.g.,* *Coombes v. Getz*, 285 U.S. 434, 448 (1931) (repeal of statute creating rights in a corporate charter created vested property rights even though not reduced to final judgment); *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913) (state statute giving compensation for consequential damages caused by change of grades of streets creates a property right; to repeal such a statute violates Fourteenth Amendment); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 344 (1928) (rights vested in a patent); *Forbes Pioneer Boat Line v. Bd. of Comm'rs*, 258 U.S. 338, 340 (1922) (rights vested in a fixed sum of money); *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450, 456–58 (1864) (rights vested in a quasi-contract); *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257, 262 (2d Cir. 1948) (upholding the constitutionality of the Portal-to-Portal Act of 1947 while noting that the Act "left valid final judgments for portal-to-portal pay").

347. *See* *DuCharme v. Merrill-Nat'l Labs.*, 574 F.2d 1307, 1310 (5th Cir. 1978) (denying plaintiff's Due Process challenge to the Swine Flu Act on grounds that plaintiff's cause of action arose after passage of the Act and emphasizing that plaintiff had no "prior vested right in a cause of action" under state law). As the Supreme Court stated in another context, "[a] person has no property, no vested interest, in any rule of the common law." *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

348. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995):

"Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes."

See also *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) ("[A] pending tort claim does not constitute a vested right."); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (plaintiff does not have a vested right in a tort cause of action until there is a final, unreviewable judgment). *See also* *Richmond Screw Anchor Co.*, 275 U.S. 331 (1928) (holding Congress may not divest plaintiff of civil action when patent issued prior to enactment of the relevant legislation); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (holding statute's retroactive application is not unconstitutional be-

Even assuming that constitutional protection is triggered by a vested property right, several Supreme Court decisions suggest that removing a state common law cause of action is not unconstitutional as long as the affected parties are provided a “fair and reasonable substitute for the uncertain recovery of damages.”³⁴⁹ In *Duke Power Co. v. Carolina Environmental Study Group*,³⁵⁰ the Court addressed constitutional challenges to the Price-Anderson Act, which, as discussed earlier, imposed a \$560 million cap on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants and created a federal fund to indemnify defendants for this amount.³⁵¹ The Act was challenged on Due Process grounds because it allowed injuries to occur without assuring adequate compensation to the victims.³⁵² The Court held that the cap on damages was reasonable because of the small risk of an accident involving claims in excess of the statutory cap and the recognition that in the unlikely event of such an occurrence, Congress would likely meet the need with additional relief.³⁵³ With regard to the claim that the Act failed to provide victims with a satisfactory quid pro quo for the liability limitation, the Court found it did not need to reach the question:

[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate

cause a legal claim does not afford an enforceable property right until reduced to final judgment); *Carr v. United States*, 422 F.2d 1007, 1010–11 (4th Cir. 1970) (holding that Federal Drivers Act did not deprive federal employee of an “interest entitled to constitutional protection” with respect to accident which occurred four years after the Act’s enactment). *Cf. E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (holding Coal Industry Retiree Health Benefit Act unconstitutional for requiring former coal operator to fund health benefits for retired miners who had worked for operator before it left the coal industry).

Some courts have found that tort actions that are accrued but not reduced to final judgment may constitute a vested property right in certain circumstances wherein they cannot be taken away by retroactive legislation. *See, e.g., Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 500–01 (Kan. 1995) (holding that Kansas statute which retroactively extended law limiting liability of certain officers and directors of savings and loan associations, passed after RTC brought suit against such directors and officers for negligence and breach of fiduciary duty and made applicable to any action that had not yet been fully adjudicated when original statute took effect, was violation of due process).

349. *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 91 (1978). *See also Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 94 (1980) (Marshall, J., concurring) (“[Supreme Court] cases demonstrate that there are limits on governmental authority to abolish ‘core’ common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.”).

350. 438 U.S. at 91.

351. *See supra* note 161.

352. *Duke Power Co.*, 438 U.S. at 68.

353. *Id.* at 85.

the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.³⁵⁴

This was because the Act provided a “reasonable, prompt, and equitable mechanism” for compensation, “guarantee[d] a level of net compensation generally exceeding that recoverable in private litigation,” and contained an explicit congressional commitment to provide further aid if necessary.³⁵⁵ A similar theme of considering equal effectiveness in the substitution of remedies is found in the area of implied rights of action under the Constitution.³⁵⁶

Although these Supreme Court cases do not settle the question, they suggest that Congress may remove a right to sue with the expectation that a reasonable substitute will be provided at the same time.³⁵⁷

354. *Id.* at 87–88 (footnote omitted).

355. *Id.* at 93. See also *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917) (holding that the workers’ compensation system, which replaced remedies under the common law, was neither arbitrary nor unreasonable; avoiding the *quid pro quo* issue by finding that the Due Process Clause is not offended if workers who have lost the right to sue under state common law are provided “moderate compensation in all cases of injury, and [have] a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages.”).

356. See *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (holding that Congress did not preempt an implied cause of action through the 1974 amendments to the Federal Tort Claims Act because Congress neither explicitly declared the alternative remedy to be a substitute for the implied right of action nor viewed it as equally effective); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (suggesting that if Congress had enacted a legislative remedial scheme for illegal searches, “equally effective in the view of Congress,” it might have affected the Court’s decision to infer a damages remedy under the Fourth Amendment). See also *Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981) (upholding President’s power to suspend private legal claims against government of Iran, noting that the Claims Tribunal provided alternate forum capable of providing meaningful relief).

357. Despite these cases, some lower courts have suggested that a reasonable substitute is not required to satisfy a Due Process challenge. The District Court in *In re World Trade Center Disaster Site Litigation* examined a lawsuit brought against New York City and the Port Authority by workers involved in the rescue and cleanup activities related to the September 11th attacks, seeking damages for respiratory injuries allegedly caused by the failure to provide protective equipment. 270 F. Supp. 2d 357 (S.D.N.Y. 2003). Plaintiffs suggested that their constitutional rights may have been infringed because of the limitation placed on aggregate recoveries from the airlines under the statute, even though they were not eligible to apply to the September 11th Fund for injuries that did not occur in the “immediate aftermath” of the attacks. The court did not agree, finding that the Supreme Court has “rejected arguments requiring equivalence between administrative and common law remedies.” *Id.* at 376 n.13 (citing *Duke Power Co.*, 438 U.S. at 88). Similarly, in a challenge to the Swine Flu Act, which provided that a cause of action against the United States arising out of the administrative of the Swine Flu vaccine is exclusive, the Fifth Circuit held that the

Thus the likelihood of a compensation fund surviving a constitutional challenge would be enhanced if the creation of the fund were considered a reasonable substitute for a tort cause of action. If the federal statute abrogating the state law claims is written on a permanent rather than an ad hoc basis, as Congress did with the Vaccine Act and the Price-Anderson Act, it will address claims that have not yet vested and will not need to be concerned with the retroactive effect of the statute.³⁵⁸

B. Implementation of a Permanent Compensation System

The construction of a federal compensation statute involves two major components: the initial concept, which is dictated by the purposes, policies, and goals of the authorizing legislation; and the technical implementation of the statute, which is guided by experts such as economic consultants and government agencies and carried out through the creation of regulations and the case-by-case grant of awards. As discussed throughout this article, the hasty enactment and implementation of the September 11th Fund did not allow sufficient time for focus on either component, but a permanent compensation system should be implemented in a more deliberate manner. This section broadly sketches the parameters of such legislation.

exclusivity provision in the Act did not violate the Due Process Clause because the remedy provided was adequate, without addressing whether it was a reasonable substitute for the common law remedy. *See DuCharme v. Merrill-Nat'l Labs.*, 574 F.2d 1307, 1310 (5th Cir. 1978).

The issue of substitution of remedies has also arisen in the context of state legislative caps placed on common law medical malpractice claims. *See, e.g., Lucas v. United States*, 807 F.2d 414, 420–21 (5th Cir. 1986) (examining Texas legislative cap on medical damages and noting that law is not clear whether Due Process Clause requires a reasonable substitute remedy); *Keeton v. Mansfield Obstetrics & Gynecology Assocs., Inc.*, Civ. A. No. C80-1573A, 1981 WL 36207, at *12 (N.D. Ohio Mar. 5, 1981) (examining the Ohio legislative cap on medical claims and rejecting a reasonable substitute argument: “Since individuals do not possess vested rights in the common law, this Court finds that the Due Process Clause does not require that the legislature replace the abrogated common law system with a quid pro quo.”).

358. *See generally Ackerman, supra* note 2, at 183–91 (discussing why the September 11th Fund would be considered a “reasonably just substitute” for a common law tort action). *But see Hadfield, supra* note 2, at 15 (“reasonably just substitute” should include the “normative procedural aspect of litigation” that allows a citizen to use the power of the courts to “demand an accounting for allegations of wrongdoing”). *See also Holt, supra* note 338 at 541–43 (suggesting that ATSSSA may have been “arbitrary and unreasonable” means of protecting airlines and noting that “in *Duke Power*, the Court was counting on Congress to provide aid *in addition* to the liability maximums imposed on the nuclear power plants, not *instead of* any such recovery as is the case with the ATSSSA”).

During the creation of the legislation and regulations, political pressure will be exerted to protect the interests of various parties affected by the legislation—industries, individual victims and their families, and the public. As the September 11th Fund experience amply demonstrates, creating a compensation fund after the fact only increases the pressure, but even creating legislation *ex ante* inherently requires compromises among the interests of these groups. Legislators, therefore, must balance these interests in a way that implements appropriate public policy, in a systematic and informed manner. The special master or agency implementing the legislation should not, by default, be left responsible for making policy decisions, but instead should be guided sufficiently by the legislation in order to carry out its basic policies and goals. At the same time, the creation and implementation of regulations must be undertaken with appreciation of the inevitably inexact nature of the authorizing legislation.

The paramount concern in creating a permanent system is to ensure the overt recognition of the goals and purposes of the legislation. The type of fund established would differ depending on whether the overriding concern is to protect certain industries from litigation costs, to provide stability to the country, to compensate victims of certain private harms, to provide reparations for political targets, to process claims efficiently, to distribute compensation based on the principles of equity, equality, or need (or some combination thereof), or to create incentives to encourage behavior that lowers the risks of terrorism. Clarifying the goals and purposes of a permanent terrorist victims' compensation fund in the authorizing legislation will dictate whether the fund should be exclusive or optional. Such considerations will also influence how to fund the compensation scheme and determine eligibility for benefits.

1. Economic Protection of Industry

Choosing to protect certain industries from litigation costs is a classic congressional statutory goal for national compensation funds, as is demonstrated by the National Childhood Vaccination Act³⁵⁹ and the Price-Anderson Act.³⁶⁰ As discussed earlier, protecting national industries will serve as a stronger Commerce Clause argument than other statutory goals. In the case of terrorist attacks, however, protect-

359. See 42 U.S.C. § 300aa-1 (2000) (stating that protecting manufacturers by establishing the Vaccine Fund will increase disease prevention and decrease adverse reactions to vaccines).

360. See 42 U.S.C. § 2012(i) (2000) (stating that limiting the liability of the atomic energy industry will encourage its development).

ing industries from litigation costs *ex ante* will be difficult because the initial tortfeasors are inaccessible defendants to a lawsuit and the number of industries that may face the resulting litigation is large and unpredictable. Moreover, as the September 11th Fund indicates, protecting certain industries (such as airlines³⁶¹) and not protecting others (such as security companies) creates inequities that invite criticism. The most effective way to protect industry, with the strongest basis in Commerce Clause power, is to treat protection of the insurance industry as the primary goal of legislation that will also protect and encourage the preservation of the other industries involved. One way to accomplish this is to create an exclusive, non-opt out compensation scheme that removes liability for personal injury from terrorist attacks from all industries that are potential tort defendants. Although such a socialist approach is unusual in American society, it is not without precedent, as the workers' compensation system proves.³⁶² The swiftness with which Congress passed the Terrorism Risk Insurance Act of 2002,³⁶³ creating an incentive for insurance companies to continue to insure against losses due to terrorism, exhibits a strong congressional policy to protect all industries, but particularly the insurance industry, from the vagaries of terrorist attacks.³⁶⁴

Of course, if this is the sole congressional goal for legislation, then a federal compensation scheme may not be necessary; a secondary insurance program such as the Terrorism Risk Insurance Act of 2002 should achieve the same goal.³⁶⁵ Therefore, although protection of industry, particularly the insurance industry, would be a primary goal of a permanent compensation fund and the strongest basis for invoking Commerce Clause power, Congress would need to decide which other goals it seeks to promote in creating a terrorist victims' compensation fund.

2. *Compensation of Victims*

Compensation of victims alone is not a sufficient basis under the Commerce Clause for establishing a permanent fund. But as with the September 11th Fund, compensation of victims may serve as an important secondary objective. Most significantly, the government may

361. *See supra* notes 44 & 48 and accompanying text.

362. *See supra* Part III.C.

363. *See supra* note 299.

364. The Terrorism Risk Insurance Act was renewed at the end of 2005. *See supra* note 299. *See also* Edmund L. Andrews, *Who Bears the Risks of Terror?*, N.Y. TIMES, July 10, 2005, § 3, at 1.

365. *See supra* note 299.

assume responsibility as a matter of national unity, acknowledging the unique problem of terrorism with its relatively few victims as symbols and representatives of the whole.

The problem is determining the limiting principle for awarding compensation. Currently, the government has been arbitrary, picking and choosing among victims of misfortune. For example, the federal government initially did not provide direct aid to the victims of the Oklahoma City bombing;³⁶⁶ even with regard to the victims of the September 11th attacks, the September 11th Fund addresses only a subgroup of those victims, limiting the awards to victims “in the immediate aftermath” of the attacks.³⁶⁷

If the government decides to grant compensation to victims of terrorism, it needs to provide a satisfying limiting principle. At one end of the spectrum lies the premise of the Israeli scheme, which considers terrorism an act of war; at the other end is the premise of the British system, which equates terrorism with violent crime. The former approach will exclude from coverage those who suffer as a result of certain criminal activities, such as the victims of Eric Rudolph³⁶⁸ or the Washington, D.C. area snipers;³⁶⁹ the latter, on the other hand, may be overinclusive.³⁷⁰ A permanent compensation fund cannot—and should not—address every personal injury or harm. Compassion is an insufficient limiting principle. Instead, the justification for the

366. See *supra* note 11 and accompanying text.

367. See *supra* note 72 and accompanying text.

368. See Shaila Dewan, *Victims Have Say as Birmingham Bomber Is Sentenced*, N.Y. TIMES, July 19, 2005, at A14 (discussing the sentencing of Eric Rudolph); Jeffrey Gettleman & David M. Halbfinger, *Suspect in '96 Olympic Bombing and 3 Other Attacks Is Caught*, N.Y. TIMES, June 1, 2003, § 1, at 1 (describing the bombings, the investigations, and the arrest of Eric Rudolph).

369. See Blaine Harden & Tim Golden, *The Hunt for a Sniper: The Suspects; Suspects Spent Year Traveling, Nearly Destitute*, N.Y. TIMES, Oct. 25, 2002, at A1 (discussing the lives of John Allen Muhammad and John Lee Malvo); Sue Anne Pressley, *Earlier Sniper Victims Try to Heal*, WASHINGTON POST, Oct. 2, 2003, at A1 (describing some of the victims of D.C. sniper attacks).

370. Professor Goldscheid argues that compensation programs for victims of domestic and sexual violence should be equated with those for victims of terrorism, concluding that the current differences in program approach are not warranted by the differences in program purpose or victims' experience. Goldscheid, *supra* note 2. Even assuming that the experiences of the victims are sufficiently similar to warrant comparable compensation mechanisms, the intent of the program I propose is not to create strictly a social welfare program used to spread the costs of and risks of crime generally throughout society. Instead, the rationale is to counteract the effect of terrorism by providing a mechanism by which society—both individual citizens and businesses—can relatively quickly resume some normalcy. In this sense, terrorism attacks are *sui generis* and distinguishable from “ordinary” crime we experience in an open society. See Ackerman, *supra* note 2, at 158–159 (describing uniqueness of September 11th victims).

limiting principle should be more closely related to an act of war principle: to provide stability to a nation under siege and return it quickly to the status quo ante. This approach could provide compensation to all domestic terrorist victims, a more equitable approach than relying on ad hoc political responses to isolated incidents and individual industries. Such a premise would not only reduce the criticisms of inequity, but also increase the efficiency of distributing funds.

This raises the question of the type of claims to recognize within that class. The September 11th Fund extended eligibility to physical injury or wrongful death claims of individuals injured or relatives of someone killed “as a result of the terrorist-related aircraft crashes of September 11, 2001.”³⁷¹ Limiting eligibility in a permanent fund to physical injury or death is simply an exercise in legislative line-drawing and can be justified as facilitating the implementation of a compensation fund and preventing the system from becoming too adversarial and too costly. In this sense, compensation of terrorist victims would be closer to state and federal compensation programs for victims of crime.³⁷²

Providing compensation for future victims whose injuries have not yet manifested has proven to be one of the most difficult issues in mass torts, both in litigation and settlement settings.³⁷³ On the one hand, these claimants, who have been exposed to various toxins during clean-up procedures or otherwise, have legitimate claims, even if they are not fully manifested within a short term after the triggering event. On the other hand, these claims present intractable causation

371. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001).

372. See, e.g., 42 U.S.C. § 10601 (2000) (establishing Crime Victims Fund); 42 U.S.C. § 10602 (2000) (describing available methods of victim compensation); ARIZ. REV. STAT. ANN. § 11-538 (2003) (authorizing the establishment of a county attorney victim compensation fund); IND. CODE § 5-2-6.1-1 to -48 (2001) (providing compensation for victims of violent crimes); MASS. GEN. LAWS ANN. ch. 12, § 11K (West 2002) (establishing a division of victim compensation and assistance within the department of the attorney general).

373. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855–56 (1999) (finding class certification impermissible because of unfairness of distribution of funds between present and future claimants); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598, 622 (1997) (holding “sprawling” settlement class of asbestos litigants cannot get class certification when future claimants may lose altogether); Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 345 (1999) (describing unique problems of latent diseases and future claimants in mass tort litigation); Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 811–12 (1995) (introducing symposium on the unique procedural, constitutional, and ethical problems presented by litigation of claims involving currently injured plaintiffs and those who may have a claim in the future).

and compensation issues, determinations that have caused difficulty and sparked criticism of funds such as Price-Anderson and the workers' compensation system. One option, used in the September 11th Fund, is to draw a bright line and eliminate these claims altogether by limiting eligibility to those injured "in the immediate aftermath" of the attacks. This method has the appeal of avoiding difficult causation issues while still providing for a relatively quick return to the status quo ante. Because this approach does not recognize a myriad of valid personal injury claims that could stem from a terrorist attack,³⁷⁴ however, a better procedure would be to have the statute of limitations run from the date the injury is discovered and linked to the attack, thus allowing these claims to be brought when they arise. Unlike a temporary compensation program that expires, a permanent fund will be active and able to handle these claims at the appropriate time.

3. *Promoting Justice*

Related to the goal of compensation is the promotion of justice: aiding innocent victims who were harmed purely as symbolic representatives of a hated government or society. In this sense, the goal of the government is to provide reparations for its stand-ins or victims of war rather than compensation for someone who has merely suffered one of life's misfortunes. By establishing a government-sponsored scheme and redistributing the burden of the costs of the attacks to society as a whole, the September 11th Fund attempted to meet this goal. But "[t]he Fund was not designed to do complete justice."³⁷⁵ Its damages were limited to economic losses resulting directly from the harm and replacement income.³⁷⁶ Creating a permanent system would more effectively meet this goal of promoting justice by ensuring that all victims of terrorism receive some compensation and increasing the likelihood that they receive comparable awards.

The September 11th Fund is unique among no-fault compensation systems in that it relies so heavily on equity-based notions of distribution, especially in using wage loss as the main criterion for determining the amount of compensation. Most of the government aid did not go to the neediest.³⁷⁷ Professor Diller distinguishes the Sep-

374. See *supra* notes 72 & 96 and accompanying text.

375. Ackerman, *supra* note 2, at 225.

376. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 402(5), 115 Stat. 230, 237 (2001) (defining economic loss); *id.* § 405(b)(5), 115 Stat. at 239 (prohibiting awards for punitive damages).

377. Regarding claims for deceased victims, the breakdown of the total fund award is as follows: 3.22% was awarded to the 6.25% of claims involving income levels of \$24,999 or less; 40.34% to the 55.24% with incomes between \$25,000 and \$99,999;

tember 11th Fund from mass tort settlement in several important ways. These include the fact that the Special Master did not have to face the difficult problem of distributing a finite pool of funds, except to the extent that Feinberg imposed a limit on himself.³⁷⁸ Similarly, the September 11th Fund did not require a compromise in compensation levels or force the claimants to endure the trouble and expense of litigating a claim.³⁷⁹ But when creating a permanent compensation system Congress could—and should—take other approaches. Borrowing from the Vaccine Act, workers' compensation schemes, and the British model, Congress should direct that the implementing agency or special master create a schedule of damages,³⁸⁰ grounded more in social fairness and equality, by granting awards based solely on the injury that occurred rather than the background of the victim.³⁸¹ A scheduled award will lower the divisiveness that awards based on equity may create.³⁸² It also will operate more efficiently than a system required to calculate economic differences among families of victims.

24.30% to the 21.98% with incomes between \$100,000 and \$199,999; and 32.14% to the 16.53% with incomes in excess of \$200,000. FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 53.

378. See Diller, *supra* note 2, at 746–47.

379. *Id.* See also *supra* text accompanying note 53; SHAPO, COMPENSATION, *supra* note 2, at 84–85 (describing advantages of uniform awards system).

380. A standardized schedule of damages assigns payment for injuries without a particularized determination through an adversarial proceeding. “[G]reater efficiency may be gained by using a standardized schedule of damages to make determinations without any adversarial proceeding.” See Lin, *supra* note 292, at 1466.

381. Special Master Feinberg argues that if Congress decides to create another compensation fund for victims of terrorism, awards should be based on equality, not equity, principles. FEINBERG, *supra* note 1, at 183–84. As Professor Ackerman stated, “[h]aving abandoned fault as a basis for recovery, there was no theoretical basis for maintaining a corrective justice model for damages.” Ackerman, *supra* note 2, at 163. This would hew more closely to the mass tort class action settlement approach. See Diller, *supra* note 2, at 721.

382. FEINBERG, *supra* note 1, at 184 (“Instead of healing wounds and uniting the families, [the equitable awards of the September 11th Fund] fueled resentment and paranoia among them.”). The September 11th Fund is also unusual, although not unique, in allowing noneconomic damages for pain and suffering. See *supra* text accompanying note 76. Workers' compensation systems traditionally do not grant awards for pain and suffering. See *supra* text accompanying note 225. Other systems that do grant such compensation, such as the Vaccine Act, do so in the form of scheduled damages. See *supra* text accompanying note 182. Congress could justifiably choose to eliminate noneconomic damage awards for pain and suffering because they are extremely difficult to determine and hard to administer on a broad basis. It is also arguable that these damages are taken into account in the main schedule of damages. But if Congress chooses to explicitly recognize these damages, it would be appropriate to follow the precedent set by the September 11th Fund and create a schedule of noneconomic damages.

Related to the determination of how to deliver compensation is whether to consider collateral source payments, such as life insurance or pensions, in determining the awards made to victims. Traditionally, no mention could be made of collateral sources in tort cases and they would not be deducted from the plaintiff's award.³⁸³ However, many states, as part of the tort reform effort, now allow consideration of collateral sources.³⁸⁴ It is beyond the scope of this article to discuss the collateral source rule as related to a victims' compensation fund except to make two notes. First, the further away from the traditional tort goal of deterrence the legislation reaches, the weaker the justification for abiding by the rule, since it is based on a concern that allowing collateral sources to be deducted from a plaintiff's award would lower the defendant's incentive to behave carefully. On the other hand, under an equality-based compensation fund with the goal of returning the nation to the status quo ante, awards would not intend to make victims whole (as awards under the tort system do), but instead would symbolize that, to the U.S. government, all lives are "worth" the same; in order to appease those who may feel slighted by the equality-based approach, it may be wise to view fund awards as independent of other sources of compensation.

Although using a schedule of damages based on equality will be challenged on the ground that it is not a "reasonable substitute" to the common law system because awards may not compensate for lost income, it should be able to withstand this argument considering that it discounts for the risk involved in bringing a lawsuit in court.³⁸⁵ Other scheduled compensation systems, in particular the workers' compensation systems, have been upheld when faced with the same argument.³⁸⁶ Congress could approach the problem in another way, by modifying the state tort action available. For example, Congress could deny the availability of punitive damages and class action litigation to victims of terrorism, which should lower the amount of court-awarded damages. However, this is a less satisfying approach because it would be perceived of as singling out terrorist victims among all tort victims for receiving lower tort damages.

383. For a thorough discussion of the rule, *see generally* John Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966).

384. *See* FRANKLIN & RABIN, *supra* note 221, at 787.

385. *See generally* Ackerman, *supra* note 2, at 185–191 (discussing why it was rational for most claimants to file with September 11th Fund rather than seek relief in court).

386. *See* *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 201 (1917) (upholding New York State workers' compensation program in face of Due Process challenge).

Other arguments have been made for not following the precedent set by the September 11th Fund in determining compensation awards for future terrorist victims. Professor Sommer, drawing on his experience with the permanent compensation system in Israel, argues that the level of compensation set by the September 11th Fund is higher than it would have been without the additional goal of trying to protect the airline industry—that is, he argues that higher awards were needed to discourage suits against the airlines.³⁸⁷ He argues, therefore, that the compensation level used in the September 11th Fund is not optimally efficient and should not serve as precedent for future funds. It is true that economic efficiency is not directly relevant here since deterrence, in the sense of directing defendants to change their behavior with the threat of potential future lawsuits, is not addressed by the September 11th Fund. Preempting suits against the airlines was a primary goal of the Fund, and it successfully met that goal.³⁸⁸

The point is well taken, however, that a compensation fund created outside of an attack, rather than as an immediate reaction to one, will probably use compensation levels that more accurately reflect what the public generally perceives as appropriate, based on principles of equality and need rather than loss. A permanent fund devised without the raw emotion of a recent attack in a manner that alleviates inequalities in its application should be more acceptable to the populace. The Israeli system, which bases its compensation levels on those established for military personnel killed or injured in action, serves as one model for a permanent fund.

Furthermore, creating a schedule of damages reduces the amount of discretion a decision maker may exercise when determining compensation awards. A permanent schedule of damages, not based on the discretion of a special master, will seem less arbitrary to the public and victims.³⁸⁹ People also accept the allocation of resources more readily if they believe the procedures by which the resources are distributed are fair.³⁹⁰ The sense of fairness is even more important

387. Sommer, *supra* note 139, at 363. It is also significant that many of the claimants were represented by members of the bar pro bono, so that the usual reduction in the compensation award for attorneys' fees was waived. See Trial Lawyers Care, <http://911lawhelp.org/info/news/leotalk.htm> (last visited Sept. 10, 2005).

388. Some have suggested, though, that the high compensation levels of the September 11th Fund were not necessary to protect the industry from crippling litigation costs. See Ackerman, *supra* note 2, at 164 (“[I]t is unlikely that a dollar-for-dollar replication of traditional tort damages would have been necessary to deter speculative claims against airlines and security firms teetering on the edge of bankruptcy.”).

389. See, e.g., FEINBERG, *supra* note 1, at 44–47 (discussing the need for procedures, consistency, and transparency for claimants to feel comfortable with the fund).

390. Tyler & Thorisdottir, *supra* note 2, at 369–70, 378–79.

when an appropriate amount of compensation for a loss is difficult to determine, as it is with awards for pain and suffering, or when there are different perceptions of the value of a loss.³⁹¹ Special Master Feinberg tried to advance the perception of procedural fairness by giving every claimant the opportunity to state his or her case.³⁹² Still, the absence of guidelines in the legislation left him open to charges that he was, at times, biased, uncaring, unprincipled, and disrespectful.³⁹³ A permanent compensation fund, with clear standards and predictable results, could address some of these criticisms.

A schedule of damages also effectively creates a limit on liability; each victim will receive only the scheduled amount for his or her damages. Under a tort compensation system, there is no effective limit on liability except those imposed externally, such as legislation that imposes caps on damages.

4. *Exclusive vs. Hybrid System*

A critical question is whether the permanent fund should be an exclusive remedy or a hybrid system that affords the option of civil litigation. Workers' compensation systems are exclusive, as is the Price-Anderson Act, whereas the National Childhood Vaccine Compensation Program allows claimants to pursue a civil remedy after exhausting their claims through the compensation program.³⁹⁴ Israel allows its claimants to pursue remedies in court as well as through the government-sponsored compensation remedy, as does the British system.³⁹⁵

If the sole purpose of a compensation fund is to shield industry from litigation that would ensue after the attack, then an exclusive compensation program would offer the most protection. This would

391. *Id.* at 379. Professors Tom Tyler and Hulda Thorisdottir emphasize four aspects of procedural fairness: (1) whether the decision makers are seen as trustworthy, benevolent, and caring; (2) whether the decision makers are viewed as neutral, unbiased, honest, and principled in their decision-making; (3) whether the process allows people to have a voice in the procedure through an opportunity to state their case; and (4) whether the people involved are treated with dignity and respect. *Id.* at 380–82.

392. See FEINBERG, *supra* note 1, at 94 (“[A]pplicants were invited to explain what the numbers could never convey, the uniqueness of the husband, wife, daughter, son or parent.”). Applicants could also request an in-person meeting with Feinberg before or after receiving an award to influence the final award amount. *Id.* at 94–95.

393. See Kolbert *supra* note 2, at 42 (offering an in-depth look at Feinberg and the reactions of many victim families to him); Shapo, *Specialized Jurisprudence*, *supra* note 2, at 1250–51 (quoting victim who implies that Feinberg is uncaring because the offered compensation seems too low). See generally Belkin, *supra* note 2, at 92.

394. See discussion *supra* Part III.

395. See discussion *supra* Part IV.

allow industry to completely side-step the threat, and potentially threatening awards, of civil litigation.

An exclusive compensation system has several significant costs. The main cost would be the loss of deterrence promoted by civil litigation. An exclusive fund would not even attempt to achieve—as it could not—corrective justice, a traditional goal of tort law, except as a broad notion of distributive justice for a group as a whole.³⁹⁶ It would also fail to promote the value of deterrence or control of behavior, which is the paramount goal of traditional tort systems. Even when this goal is primary, as in traditional tort law, it is never met precisely, but an exclusively no-fault compensation falls even farther short of meeting this goal.³⁹⁷ With regard to the primary tortfeasors in terrorist activities, achieving deterrence is virtually impossible, since those actors are rarely available for suit under the tort system.³⁹⁸ But with regard to potential secondary tortfeasors, such as the airlines and security companies, an exclusive system would not provide the same incentive to take available safety measures or develop new ones to prevent terrorist attacks that a hybrid system would.

Related to deterrence, an exclusive system would not provide accountability. Professor Hadfield argues that the September 11th Fund provided a form of social insurance but, by forcing claimants to choose between the Fund and civil litigation and not allowing them to pursue both, it robbed citizens of the democratic function of civil litigation, namely the opportunity to use the power of the courts to seek accountability for the loss suffered by a plaintiff.³⁹⁹

396. See Hadfield, *supra* note 2, at 10–13 (arguing that the September 11th Fund failed to fulfill traditional goals of tort law since it was merely a means of compensating losses with no accountability).

397. “[G]iven the nature of terrorism, it is not clear how effective efforts [of holding terrorists accountable] by tort suits would be” SHAPO, COMPENSATION, *supra* note 2, at 255. See also FEINBERG, *supra* note 1, at 180 (arguing “[a] statutory no-fault program extended to a wide range of injuries would undermine personal responsibility,” and therefore fail to promote safer conduct).

398. Legislation exists that allows victims to sue governments that sponsor terrorism, which reaches closer to the goal of deterrence. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(5) (2000 & Supp. III 2003) (allowing damage actions “against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state” or its officials or employees).

Even this may be difficult, however. As part of a national terror compensation fund law, a right of subrogation by the United States could be created, which would be based on the assumption that the federal government could more successfully pursue litigation or other action against the terrorists and their state or organizational sponsors to collect reimbursement than individuals.

399. Hadfield, *supra* note 2, at 11–12, 16–17, 20–21.

Of course, to anticipate the loss of deterrence, the legislation creating an exclusive compensation fund could include provisions for more federal money or tougher regulations aimed at ensuring that necessary security provisions are taken. The problem is that it is unpredictable which specific industries will be affected by a terrorist attack. Thus, it is hard to assume that governmental regulation will suffice to ensure that sufficient safety measures will be taken by the industry at issue, unlike with the Vaccine Fund where it is clear that only one industry is to be monitored.

Because the government may be the entity that can most effectively take precautions against terrorism, it is arguable that a government-funded compensation system creates a deterrent incentive for the government itself: the system would make the government responsible for the losses created by its own actions.⁴⁰⁰ The assumption behind this argument, that the government is a rational decision maker, may not always hold true. Furthermore, the government would not insure against this loss, and any monies set aside would most likely be treated as fungible with other general revenues or viewed as a cost of homeland security. Thus, the government is not the classic decision maker for which deterrence would be most effective.

It is arguable that other processes could address the need for accountability and deterrence. The President appointed a special commission to investigate the September 11th attacks and determine whether the government or airline industry were negligent.⁴⁰¹ In addition, the United States' continued War on Terror and search for Osama Bin Laden will attempt to deter future terrorist attacks.⁴⁰² Yet, to many, these processes were unsatisfactory and even the Chairman of the September 11th Commission, Governor Kean, complained that the Commission's recommendations were not being implemented.⁴⁰³

The lack of deterrence and accountability afforded by an exclusive fund, as well as the constitutional need to provide a "reasonable substitute," argue in favor of creating a parallel compensation system, with the option of pursuing civil litigation, to maintain the important

400. See, e.g., Terrence Chorvat & Elizabeth Chorvat, *Income Tax as Implicit Insurance Against Losses from Terrorism*, 36 IND. L. REV. 425, 443 (2003) (arguing that the loss of revenue from special tax benefits for victims of terrorism would create incentives for government decision makers to take adequate steps to reduce likelihood and harmfulness of terrorist activities).

401. Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 601-02, 116 Stat. 2408 (2002). See generally THE 9/11 COMMISSION REPORT (2004).

402. See Ackerman, *supra* note 2, at 225-26.

403. See *supra* note 322.

element of choice. Implementing such a system would address some criticisms of the September 11th Fund. For instance, Professor Hadfield argues that the designers of the September 11th Fund could have avoided the problem of the loss of the democratic function of the courts by: (1) not requiring the claimants to forego their right to civil litigation by allowing limited litigation but restricting the damages amount or limiting damages to equitable relief; or (2) offering an alternative forum with a streamlined version of a civil lawsuit.⁴⁰⁴ Similarly, Professor Ackerman observes that allowing a parallel system to go forward serves as a constraint on the administrative scheme as a type of “market” competition.⁴⁰⁵

Creating a hybrid system, however, would limit the value of protecting industry from crippling litigation costs. Further, when victims have a choice whether to pursue their claims under tort law or under a no-fault system, whatever deterrence value is gained comes haphazardly and is applied unevenly, since it is uncertain how many claimants will choose the tort system over the compensation fund. To address this, the legislation creating the compensation scheme could place some kind of limit on the tort damage award available in court. This would lower the deterrence effect for secondary defendants, but not to the same extent as an exclusive compensation system would. It would also create a further incentive to pursue claims through the compensation system by limiting the difference between the two systems of the amount of potential awards, especially given the added cost of litigating a claim in court.⁴⁰⁶

Although claimants may not find a hybrid system sufficiently satisfying, a no-fault system more than compensates for its shortfalls in other respects: consistency, celerity, efficiency, and a larger proportion of victims who receive compensation, which will also afford more of the psychological benefits discussed earlier. Furthermore, under a hybrid no-fault/fault system, victims whose injuries do not fall under the schedule of damages may still be eligible for court relief. By al-

404. Hadfield, *supra* note 2, at 21–22.

405. Professor Ackerman argues that the “competition” offered by the option to pursue civil litigation under the September 11th Fund ensured that the Special Master would not be too arbitrary or parsimonious in his awards. Ackerman, *supra* note 2, at 213. Moreover, the parallel system could also serve as a form of judicial review, which was not provided by the ATSSSA. *Id.* at 212.

406. Tied to the effective implementation of a hybrid system is the amount of compensation offered the victims. See FINAL REPORT OF SPECIAL MASTER, *supra* note 1, at 83 (arguing that relatively small awards should not preclude victims from suing in court but relatively high amounts might be seen as a quid pro quo for limiting access to courts).

lowing victims excluded from compensation under the no-fault component another avenue through which to file claims, a hybrid system lends flexibility to a permanent fund that cannot possibly anticipate the full range of future needs when it is created.

Developing data based on the experience of the September 11th Fund would be useful to the creation of future legislation and implementing regulations. We have a great deal of anecdotal evidence about why potential claimants took so long to file claims, but it would be helpful to know more precisely why individuals hesitated to use the September 11th Fund. This knowledge would aid in determining the appropriate statute of limitations that would be associated with the permanent fund, help shape a program that would be more accessible to potential claimants, and inform the decision whether to create a hybrid fund. Similarly, data would be useful on why claimants ultimately decided to use the September 11th Fund rather than pursue a claim through the legal system. In particular, it would be important to know whether the decision to file a claim was a direct result of Feinberg's implementation of the September 11th Fund, a question of becoming accustomed to the delivery of compensation through a no-fault governmental system, a reaction to an imminent deadline, or simply a response to a need to move beyond the incident instead of becoming involved in protracted litigation. Similarly, studies on the effects of receiving expeditious compensation, especially among those who need it most, would help determine whether a quick delivery compensation system helps to alleviate psychological stress created by terrorism.⁴⁰⁷

Further data on the affected industries would also be useful, including an attempt to project how airlines and other protected industries would have fared without the September 11th Fund protection, as well as how industries unprotected from litigation have fared.

407. For example, the litigation involving the 1993 World Trade Center bombing, which is a consolidation of over 175 cases, is still pending. In January of 2004, the Port Authority's motion for summary judgment was denied and in December of 2004, the denial was affirmed on appeal. *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d 713, 739 (N.Y. Sup. Ct. 2004), *aff'd*, 784 N.Y.S.2d 869 (N.Y. App. Div. 2004). See also Hadfield, *supra* note 2, at 18–19 (describing the delays in the 1993 case and arguing that such delays pose “a tremendous problem” for the “compensation function of the law,” but “the democratic function of the case . . . has clearly not been rendered pointless” since the court has made preliminary findings concerning the “non-frivolous nature of the claim”).

VI.

RECOMMENDATIONS AND CONCLUSION

This article recommends that Congress adopt a permanent compensation fund for personal injury victims of domestic terrorism, funded by the federal government. Although many of the details would need further study, this article offers the following recommendations.

The regulations promulgated under the statute should create a schedule of damages, comparable to the schedule found in workers' compensation schemes and payments to injured military personnel.⁴⁰⁸ These would standardize payments for pain and suffering. The amounts of the awards would not be tied to traditional tort awards of replacement value. Instead, borrowing from the Israeli model, the amounts of awards would be tied more closely to standardized payments similar to those paid to military personnel who are killed in service.

The fund should be a hybrid one, with an option for pursuing compensation under the common law torts system, to maintain incentives for deterrence and accountability, while placing some kind of limit on court-ordered relief to create a further incentive to use the fund.

By providing clear guidelines and standards, a permanent fund would create a sense of fairness, making it easier for individuals to accept the distribution of compensation. Furthermore, the permanent compensation system should establish an appeals process—an important element that would help standardize decisions by setting precedents and allow victims who are denied compensation (or denied what they believe to be appropriate compensation) a chance to be heard.

The fund should not address all victims of terrorist attacks; it should not address those who suffered property damages, those subject to the indirect effects of the attack, or victims of terrorism abroad. Although these lines may seem arbitrary, which in some sense they are, they are based on several assumptions. First, property damage should be covered by the insurance industry, which has already been bolstered by the government-sponsored terrorism reinsurance program behind the Terrorism Risk Insurance Act of 2002.⁴⁰⁹ Second, in the event of a large-scale attack, a government promise to pay for prop-

408. Feinberg advises that a future program to compensate victims of terrorism should award all eligible claimants the same amount and recommends using workers' compensation statutes as a model. FEINBERG, *supra* note 1, at 184–85.

409. See *supra* note 299.

erty losses may not be realistic. Personal injury damages may be a higher priority, especially since increasingly fewer people are covered under a health insurance plan. Third, the vast majority of Americans who are victims of international terrorism are military personnel, who are covered under other compensation systems.⁴¹⁰

Any person who suffers personal injury as a result of a terrorist attack in the United States will be eligible to recover under the proposed statute.⁴¹¹ Key to the statute will be a definition of a terrorist event. Many definitions exist from which to borrow.⁴¹² The definition needs to be flexible enough to cover unanticipated situations and groups while narrow enough to curtail excessive litigation over the definition. A terrorist act, for these purposes, could be defined as a premeditated act of violence motivated by religious, political, or ideological reasons, against people for the purpose of intimidating, coercing, or destroying societies, regimes, or cultures.

If another terrorist attack occurred in the United States, it would be very difficult politically to avoid creating another compensation fund for the victims. Congress should recognize the precedent it has set and create a compensation fund that works in a more logical, equitable, and orderly fashion. This should help reduce the politics involved in deciding post hoc whom to compensate. Moreover, the psychological effect created by a permanent compensation system cannot be overestimated. It supplies a safety net and allows society to more quickly regain a sense of normalcy.

Terrorism is an international phenomenon of collective hatred, aimed at the destruction of regimes or cultures. As a result, it has become a national problem. Its victims merit a federal response through a publicly-funded, permanent compensation system.

410. See, e.g., *supra* note 142 and accompanying text.

411. Using the September 11th Fund as precedent, a "person" would include citizens and non-citizens. The determination of who should be able to recover on behalf of the victim should also follow the precedent set by the September 11th Fund and use the local law of the state where the injury occurred to ensure uniformity and predictability.

412. See discussion *supra* note 107.