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THE SEPTEMBER 11TH VICTIM COMPENSATION FUND: A CIRCUMSCRIBED RESPONSE OR AN AUSPICIOUS MODEL?

*Robert L. Rabin**

INTRODUCTION

This Article will pursue an exercise in speculative thinking. What are the implications for the future, if any, of the September 11th Victim Compensation Fund of 2001 (the Fund)? Although the tort option was not foreclosed for the victims of September 11th, Congress made a serious effort to provide incentives that would channel claims into the no-fault compensation scheme established by the Air Transportation Safety and System Stabilization Act (the Act).¹ Having done so, it nonetheless seems safe to say that Congress, acting little over a week after the event and subject to great pressure both to salvage the airline industry and offer solace to a community of victims, was not thinking broadly about the relationship between the Fund and future generations of prospective tort claimants. At this distance from the event, however, there is every reason to reflect on whether the Fund, established in the turmoil following the most riveting single-event mass disaster in the nation's history, should be regarded as a singular response or as a window for thinking about redress of future victims of terrorist activity—or even, perhaps, victims of criminal violence more generally.

I will begin by offering a set of building blocks: three scenarios of terrorist activity considered from the vantage point of recovery in tort. Initially, I will briefly revisit the scenario arising out of the events of September 11th. Then, I will vary the circumstances to consider the consequences of an incident involving fatalities and serious injuries from destruction of a major site such as a sports arena or tourist attraction. And finally, I will discuss “localized,” or small-scale, acts of

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1. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(2), 115 Stat. 230, 238 (2001) (codified as amended at 49 U.S.C.S. § 40101 (West 2003), [hereinafter Air Transportation Safety Act]).

terror with destructive consequences. I will look at all of this from a tort perspective.

Next, I will shift ground to no-fault as an option for addressing these various types of claims, grounding my discussion in a brief recapitulation of the September 11th scheme. The critical point here at the threshold, however, is recognition that the Fund is not really one model, but three: 1) the model that can be gleaned from the statute enacted by Congress in the immediate aftermath of the events, 2) the model that emerges from the regulatory gloss provided by the Special Master, and 3) the model in action as it emerges from the pattern of reparations actually provided by the Special Master in the implementation of the scheme. I will limit myself to the first two models because it remains too early to assess and generalize about the third.

But it would be unduly narrow to remain within the confines of the Fund model, or models, in thinking about the no-fault option for terrorist-type incidents. So, I will offer some context by discussing briefly a limited number of alternative no-fault strategies that have been employed in offering redress to the victims of terrorist acts, and more broadly, to victims of criminal violence. This broader look will not only offer more in the way of contrasting options to tort, but should reflect on the underlying inquiry of the Article as well; that is, whether the Fund approach offers a sensible alternative to tort for victims of terrorism or other acts of violence.

Finally, I will move from the proverbial vantage point of the trees to that of the forest. For the most part, the discussion to this point will have focused on the comparative claims for addressing terrorist and similar violence-provoked harms from perspectives of tort and no-fault. But this has ignored a more fundamental question: Can a satisfying principle be articulated for treating those suffering injuries from terrorist acts as a distinct category of beneficiaries? Once again, the question needs to be broken down into sub-inquiries. Mass terrorist activities such as occurred on September 11th, on the one hand, and localized incidents, on the other, do not necessarily present equally compelling cases for supplanting tort as a remedial scheme. In the end, I will contend, fairness considerations suggest less the normative superiority of tort for addressing every manner of personal injury, than the problematic nature of affording special status to victims of terrorism as no-fault claimants, whether in mass calamities or in isolated incidents.

II. INJURIES FROM TERRORIST ACTS: THREE SCENARIOS IN TORT

A. *Reprise on September 11th*

Consider the tragic events of September 11th in the absence of the subsequent enactment of the Fund—from the perspective of tort, in other words. At the outset, it is striking that insolvency emerges as the threshold issue rather than the prospects for successfully establishing liability. Indeed, more than any other single factor, insolvency concerns explain the alacrity with which Congress acted to set up the Fund and limit liability in tort to the insurance coverage of the principal potential defendants.²

Although striking, the threshold consideration of insolvency is not particularly surprising. In this era of mass tort-provoked bankruptcies, most notably perhaps in the asbestos industry, insolvency concerns are frequently far more salient than doctrinal liability issues in evaluating the capacity of tort to respond, from either a fairness or an efficiency perspective, to claims for redress. In short, if the sheer prospect of tort liability for some 3,000 deaths and many additional serious injuries—leaving aside the staggering property loss claims—could have sufficed to throw major players in the airline industry into bankruptcy, triggering a serious shortfall in compensation to victims, as well as all of the attendant economic dislocations that would have ensued for the nation's economy, the tort system could well be viewed as inadequate to the task of handling the aggregate personal injury toll of September 11th.³

If, however, solvency considerations are put aside, and one assumes that the airline industry (and other potential defendants) stayed the course—doggedly contesting all claims in tort, along the model of the tobacco industry—what might the consequences have been? Once again, the major consideration arguably turns out to be other than a liability question. The liability issues, as I will indicate immediately below, are contestable. But that is precisely the point. A long and bitter contest over liability, stretching out over a period of years, in which families of September 11th victims had nothing beyond recriminations, bitterness, and frustrations with “the system,” almost certainly would have been regarded as intolerable to the national community.

2. Note the title of the Act itself, the Air Transportation Safety and System Stabilization Act. See Air Transportation Safety Act, *supra* note 1, § 408(a); Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201(b)(2), 115 Stat. 597, 645-46 (2001).

3. For a discussion of how this problem has affected asbestos litigation, see Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise; Court: Recent Jury Awards Underscore Commercial Disaster's Continuing Toll*, L.A. TIMES, Dec. 17, 2001, at A1.

By contrast, the ordinary frustrations over delay and uncertainty engendered by the tort system are atomized into case-by-case contests over product defects, premises liability, professional malpractice, or negligence on the road, rather than concentrated into a community of grievance over a single horrific event. These claims are settled for the most part because the stakes do not warrant protracted litigation costs. And most strikingly, they do not have the emotional resonance and empathy engendered nationwide for the victims of September 11th. Again, these considerations were reflected in the Fund, which not only provided for no-fault recovery to avoid extended arguments about responsibility, but also created a fast-track system that put a premium on resolving claims with a reasonable degree of speed.⁴

The two prominent secondary effects of tort discussed so far—potentially catastrophic financial consequences to a critical industry and heightened emotional resonance of a singular victim group—are considerations to which I will return in the discussion of alternatives to tort liability, such as the Fund. For the present, I simply note that the former consideration (potentially catastrophic financial consequences) is not unprecedented. For example, statutory schemes limiting liability in tort for the nuclear power industry and vaccine manufacturers were enacted in response to just such liability concerns.⁵ On the other hand, the nationwide identification with the distress of the September 11th survivors was arguably without precedent. Contrast, on that score, the far more abstract sympathy for asbestos and auto rollover victims. These latter types of injury victims are obviously the subject of public sympathy and regret. But the reaction of the public to the daily reporting of isolated tragic events is fleeting; to a certain extent, we are inured to the everyday background risks of life, even when they come to fruition. The question, as we encounter other violence-inspired scenarios and reparation systems in the discussion that fol-

4. See Air Transportation Safety Act, *supra* note 1, §§ 405(b)(3), 406(a).

5. See Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 955 (1993) (commenting that Congress passed the Price-Anderson Act, which provided coverage for nuclear energy-related accidents, "with the express intent of encouraging investment in nuclear energy research and operations by a private sector daunted by the prospect of multimillion dollar claims and a constrained insurance market"); *id.* at 958 (explaining that Congress passed the National Childhood Vaccine Injury Act of 1986 "in response to concerns of the vaccine manufacturers, who had threatened to withdraw from the market because of anxieties about the possibility of crushing liability resulting from the infrequent but unavoidable injuries from exposure to vaccines"); see also National Swine Flu Immunization Program of 1976, as amended, 42 U.S.C. § 247b(k) (1976) (amending the Federal Tort Claims Act to allow those injured by the swine flu vaccine to bring suit against the federal government rather than manufacturers or distributors of the vaccine).

lows, will be how far the distinctive reaction to September 11th carries over.

Turning to liability issues for the events of September 11th, the prospects for recovery would have been uncertain.⁶ Viewed from the context of a similar event in the future, the most prominent feature of the September 11th attack—and indeed of tort liability for terrorist-initiated events generally—is the proximate cause dimension of the cases: that the terrorists, not the defendants, were the immediate perpetrators of the harm.⁷ But, of course, this is not a conclusive defense for third-party “enablers”: premises owners are often responsible for the violent acts of criminal intervenors, as are those who set the stage for reckless road accidents by absentmindedly leaving keys in the ignition of their unlocked cars, to name just two of many third-party responsibility scenarios.⁸

Foreseeability, a highly flexible concept, is often the byword here. In the case of the airlines, there is certainly a respectable argument for negligence liability to passengers for an inadequately secured flight deck that allowed the terrorists to gain control of the plane.⁹ Even though that hazard has now been addressed through retrofitting and design change, there is undoubtedly the future prospect that, viewed from hindsight in a tort action, some shortfall of precautionary conduct—perhaps by flight attendants on board, or in a failure of screening machinery, if evidence were available—might establish a sufficient case to get beyond summary dismissal to a presumably sympathetic jury.¹⁰

In short, there is no doctrinal block in tort law—either in the context of September 11th or a similar future event—if the terrorist activity in downing the airplanes, with mass loss of life, is dissociated from the 2,500 additional deaths resulting from the destruction of the World

6. One cannot simply look at the resolution of opt-out tort claims under the Fund to assess how tort would have operated *in the absence of* the Fund. First, the opt-out claims will be a highly selective sub-set of all potential tort claims in the absence of the Act. Second, the claims will be litigated under the constraints imposed by the Act; in particular, the caps on aggregate recovery.

7. Recently enacted federal antiterrorism legislation has led to growing litigation against terrorist organizations and their supporters; *see, e.g.*, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003); *Smith ex rel. Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003).

8. *See generally* Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

9. Along the same lines, a plausible case could be made on a design defect theory against the airline manufacturers.

10. In the event, there might also have been responsibility for the airport screeners, although in formal doctrinal terms they were independent contractors, rather than employees. But this pathway to airline liability is now closed because airport security has been taken over by the federal government. 49 U.S.C.A. § 44901(a)-(b) (West 2003).

Trade Center and damage at the Pentagon. Tragically, commercial airline crashes occur on occasion, and the tort system deals with the resulting passenger fatalities in a reasonably efficient fashion that has withstood any serious effort to replace tort with no-fault recovery. Unless airline terrorism turned into a nightmare scenario of recurrent tragedy, there is no reason to conclude that tort law would be inadequate to the task of addressing these claims, either from the perspective of financial consequences to the industry or because of some doctrinal shortcoming.

The missing piece in the portrait of September 11th, of course, is the human devastation suffered in the World Trade Center and the Pentagon, in addition to the loss of life on the airlines. For the survivors of those who perished in the buildings, the prospects for recovery in tort would be somewhat more attenuated. With respect to the airlines, foreseeability is perhaps stretched beyond its limit. Even from a hindsight view, it is one thing to charge the airlines with knowledge that a hijacking accomplished through inadequate security measures might result in fatalities to passengers on the plane. In this regard, the requisite foreseeability does not even require that terrorists necessarily be anticipated as the intervenors; the mere prospect of aggrieved or mal-adjusted passengers who might "foreseeably" attempt to take over the plane would suffice for purposes of defeating the claim of no proximate cause. It is quite another matter to require anticipation that the hijackers would deliberately crash the plane into a building causing death and serious injury to the occupants.¹¹

In fact, the building occupants' claims explore a supplementary route as well—claims against the building owners.¹² Once again, the criminal intervention suggests a proximate cause defense: the building owner could argue that there was no reason to anticipate that airline hijackers would crash planes into the buildings. Focusing only on the specifics of the World Trade Center scenario itself, however, earlier terrorist action had been targeted at the structure, and a limited number of fatalities had resulted.¹³ So a counter to the proximate cause defense would be that there was reason to foresee an attack on the building complex, even if the specifics of an airline hijacking could not be conjured up as the medium.

11. In the initial stage of the litigation, motions to dismiss claims brought by survivors and property owners against the airlines, airport security companies, owners and operators of the World Trade Center, and aircraft manufacturers, were denied. See *In re September 11 Litigation*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003).

12. The building owners are co-defendants, as noted, in the ongoing litigation. *Id.*

13. See Ralph Blumenthal, *Core Group in Bombing Plot Identified, Authorities Report*, N.Y. TIMES, Mar. 26, 1993, at A1.

From this posture, however, the critical issue becomes one of building structural risks, and the focal point in tort changes to cause-in-fact rather than proximate cause. The issue is whether any reasonably available structural or design measures might have been taken that would have withstood the impact of the terrorist-initiated airline crashes. Studies have, in fact, been undertaken to determine whether the World Trade Center could and should have been designed or retrofitted at reasonable cost to withstand the attack of September 11th.¹⁴ From a plaintiff's perspective, this tort pathway is a costly, protracted, and indeterminate affair at best.¹⁵

This brief expedition into doctrinal territory can only take us so far. As it happens, it does not tell the whole story. The scenic backdrop is missing—the nationwide psychological response to September 11th. To be concrete, suppose, not implausibly, that the airline victims were able to make out sufficiently strong claims to avoid dismissal on the merits, but that the building occupants were not able to make out colorable claims, whether on proximate cause or cause-in-fact grounds, that might proceed to trial. Without the emotional overlay of September 11th, this is a set of circumstances—disparate treatment of somewhat similarly situated classes of victims—that ordinarily in tort leads to line-drawing in the name of minding the “floodgates of litigation.”

By way of illustration, consider *Strauss v. Belle Realty Co.*,¹⁶ a landmark New York Court of Appeals decision in a case arising out of the 1977 New York City blackout that left the city in the dark for an extended period of time and contributed to a wide array of personal injuries, property losses, and strains on municipal services.¹⁷ In *Strauss*, the New York court held that a plaintiff, injured by a fall in the dark, was owed no duty of due care by Con Edison, the errant electric power provider, because he was not in privity of contract with the defendant—rather, it was his landlord who paid the electric bill.¹⁸ By contrast, those in privity who were injured as a consequence of the defendant's established gross negligence were allowed to recover.¹⁹

14. James Glanz, *Towers Untested for Major Fire, Inquiry Suggests: Victims Relatives Angry*, N.Y. TIMES, May 8, 2003, at A1.

15. Firefighters and rescue workers could face additional legal barriers because of the traditional bar on tort suits resulting from negligence under the firefighters' rule. Although New York has partially abrogated the rule by statute, recovery still appears to be premised on an injury related to a statutory violation by the defendant. See *Guiffrida v. Citibank Corp.*, 790 N.E.2d 772 (N.Y. 2003).

16. 482 N.E.2d 34 (N.Y. 1985).

17. *Id.* at 38.

18. *Id.*

19. See, e.g., *Food Pageant, Inc. v. Consol. Edison Co.*, 429 N.E.2d 738 (N.Y. 1981).

I make reference to *Strauss* not as an admirable instance of judicial line-drawing, but rather as an illustration of “sorting” similarly-situated victims of a single calamitous event that is typically undertaken by the courts without note in the outside community. My larger point is to contrast September 11th and to suggest that if tort were to have led down this path in responding to September 11th claims, parsing victims into sub-classes of deserving and non-deserving, it would have seriously undermined the legitimacy of the system.

In this regard, we come full circle back to the special character of September 11th. While Julius Strauss was a victim in common with others, the New York City blackout did not create the public perception of a community of victims. The tort system’s particularized manner of viewing each claim in a sequentially-related series of harms—sorting cases in relational plaintiff-defendant terms—leads to arguably intolerable outcomes in the case of September 11th fatalities: airplane passengers might recover but building occupants might not because of causation refinements intrinsic to tort doctrine. Perhaps, in fact, Pentagon victims and those in the World Trade Center sort out differently for liability purposes once structural design questions are resolved.

To recapitulate then, the tort system—had it been imposed upon September 11th victims as the only game in town, rather than offered as an option to no-fault recovery in the Act that victims were free to take or leave—can be regarded as wanting on three distinct grounds, none of which is an indictment of the doctrinal framework of tort liability rules in itself.²⁰ First, the very real prospect of insolvency means that the system would have promised far more than it could deliver, particularly when the corresponding claims for property damage were added to the aggregate mix. Second, the intrinsic character of the tort process for resolving complex factual and legal issues might well have led to protracted litigation that would have imposed financial and emotional stress on a community of victims whose vulnerabilities were of unparalleled concern to the public. And third, the systemic character of victim sorting in tort might have led to perceptions of arbitrariness because of the character of September 11th victims—distinct from most tort victim classes—as a community with a special identity demanding similar treatment for liability purposes. I will next discuss whether these considerations spill beyond the bounds of a September 11th-type event, or whether still other factors suggest a problematic response from tort.

20. As a background consideration, it is not entirely accurate to treat tort as “the only game in town.” For those victims who were killed or injured in the course of their employment, presumably workers’ compensation benefits would be available.

B. Targeting Heavily Populated Sites

Based on the searing experience of September 11th, a terrorist attack on a heavily populated site or event—a stadium sports activity, holiday parade, major tourist attraction, or transport area where large crowds congregate—might well raise similar pressures to replace tort law with no-fault compensation. This is particularly so in light of the expectations that may be a consequence of the establishment of the Fund itself.²¹ But then again, there might not be a parallel response; historically, there has been strong political resistance to adopting (or extending) ad hoc no-fault schemes.²²

Even apart from September 11th, however, the popular reaction to a Bhopal-type disaster is sharply different from the accidental gas leak that claims a handful of victims. Perhaps in part because of the wider publicity of a mass disaster, and also partially because of the shock-effect of large numbers of victims, the demand for some systemic response to mass injury is sharper. The imprint of terrorism on the national psyche may only serve to enhance this reaction. In the absence of a legislative compensation scheme, would the default system of tort satisfy what may very well be a strong impulse to afford compensation?

It may be useful to distinguish here between public and private spheres of responsibility for safeguarding against acts of terrorism. Many of the sites that have raised heightened concerns in the ongoing series of terrorist alerts—airports and urban subway stations, bridges and nuclear power plants—are dominantly policed and patrolled by public safety agencies.²³ To the extent that any security failure arose

21. As a thought experiment, suppose the Oklahoma City bombing had occurred just after September 11th. It is certainly plausible to think that Congress would have extended benefits to victims comparable to the Fund scheme. Nonetheless, with the passage of time, even if September 11th maintains some resonance as a precedent for compensating victims of a mass act of terrorism, the particular design features of the Fund, discussed *infra* at notes 34-50, become less compelling.

22. See generally Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13 (1988). Although federal no-fault schemes for asbestos have been proposed in the past, no such proposal has ever been enacted. Asbestos no-fault legislation currently under consideration by Congress may end this trend. Congress has also recently acted to provide compensation for health care workers and emergency personnel injured or killed by smallpox vaccinations. See Smallpox Emergency Personnel Protection Act of 2003, Pub. L. No. 108-20, §§ 1-3, 117 Stat. 638, 639-49.

23. For a discussion of the concerns relating to nuclear power plants as the potential targets of terrorist attacks, see Glen Martin, *Diablo Canyon Power Plant a Prime Terror Target; Attack on Spent Fuel Rods Could Lead to Huge Radiation Release*, S.F. CHRON., Mar. 17, 2003, at A1. This article describes how terrorist attacks against nuclear power plants could cause devastating damage resulting from the release of huge amounts of radiation. Spent nuclear fuel storage pools could present particularly attractive targets. At the Diablo Canyon power plant in California,

out of an alleged inadequate provision of policing resources, the claims almost certainly would fail under tort law. Similarly, allegations of an intelligence failure on the part of public agencies—familiar allegations to observers of the unfolding post-event investigative accounts of the circumstances leading up to September 11th²⁴—would undoubtedly be regarded as outside the domain of judicial review through tort law. Although public agencies can no longer claim blanket immunity from tort liability, highly discretionary functions, such as allocating personnel resources to crime prevention and engaging in intelligence-gathering activities, remain shielded from tort responsibility on the overlapping grounds of separation of powers and institutional competence.²⁵

But what of a terrorist attack at a major sports or entertainment event, where large crowds are in attendance, or at a visible and possibly symbolic site (particularly to foreign terrorists) like Disneyland? At these sites, managed under private auspices, security is a mix of public and private. Perhaps not surprisingly, private enterprise activity has never been afforded broad discretionary immunity, parallel to public policing agencies. A baseball club that failed to safeguard visiting team fans from home team supporters' exuberance that spilled over into violent personal attacks would not escape liability for inade-

for example, the forty-foot-deep spent-fuel storage pools contain more radiation than the two active reactor cores but are not protected by the same kind of containment structure as the reactors. If a terrorist attack caused the water in the pools to drain away, the exposed spent fuel assemblies would catch fire and send massive amounts of radiation into the air, rendering an area the size of New Jersey uninhabitable. Methods of attack could include commercial and private aircraft, commando assaults, truck bombs, and anti-aircraft missiles. Guards at Diablo Canyon are armed with semi-automatic rifles and 9mm pistols. Since September 11th, 2001, the California Highway Patrol has also been providing additional twenty-four hour security at Diablo Canyon. *Id.*

Claims resulting from nuclear accidents would be covered by the federal Price-Anderson Act, which was originally passed in 1957 to promote private investment in nuclear power by capping the amount nuclear plant owners would have to pay if a nuclear accident occurred. The coverage provided by Price-Anderson includes incidents caused intentionally by theft or sabotage. See U.S. Nuclear Regulatory Comm'n, *Fact Sheet on Nuclear Insurance and Disaster Relief Funds*, available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/funds.html> (last visited Sept. 4, 2003).

24. See, e.g., David Johnston, *Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A1. See also Douglas Jehl, *The Struggle for Iraq; Intelligence, Senate Panel Demands C.I.A. Data Leading Up to Iraq War by Friday Noon*, N.Y. TIMES, Oct. 30, 2003, at A14.

25. See, e.g., *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987) (reiterating from prior case law the need for a "special relationship" to establish a duty of police protection, and articulating limiting factors for the test of whether such a relationship exists). At the national level, the Federal Tort Claims Act contains a special exception for discretionary functions from the general waiver of U.S. governmental immunity for negligent acts. See *Berkovitz v. United States*, 486 U.S. 531, 535-40 (1988).

quate supervision of the situation by claiming, on resource allocation grounds, that its business decision to hire a limited number of private security guards was shielded from second-guessing in tort suits.

Rather, if the ball club were to prevail, it would be on the case-specific grounds that it had exercised due care under the circumstances. But the foreseeability of case-specific terrorist attacks in almost any given arena of public entertainment will always remain virtually nil. As a consequence, even without blanket immunity, private liability would probably be the exceptional case. Even from a hindsight perspective, foreseeability would be difficult to establish under most realistic scenarios.

Thus, once again, in this roughly-defined category of cases, clustered together largely because of their potential mass injury component, tort as a default system seems unreliable at best if there is a perceived need to afford compensation to victims of terrorist attacks. Far more than the preceding September 11th scenario, however, doctrinal considerations predominate here (rather than secondary consequences such as insolvency) and create major obstacles to tort liability. In part, as just mentioned, this is because much of the responsibility for public safety is in the hands of public agencies, and review of their performance is cloaked in considerations of judicial deference.

But on closer inspection, it is also possible to tease out an additional factor. In the context of September 11th, tort responsibility focused upon particularized failures in product design (the security of the airplane flight deck, the structural adequacy of the buildings) or heedlessness in passenger inspection—familiar-sounding allegations of inadequate investment in safety mechanisms or careless oversight, grounding liability in tort. By contrast, a failure to attend to public safety at sites where large crowds typically are present or entire communities are put at risk, constitutes an indictment of overall security planning that may be an unhappy hallmark of an emerging era, but remains at this juncture an unfamiliar and daunting task for judicial administration through tort law.²⁶

26. Of course, the claims of injury victims in these settings would always be framed in terms of specific failures to exercise reasonable care, such as inadequate screening at gates of entry, rather than in global allegations of inadequate security planning. But the limitation to *reasonable* precautions in controlling large crowds, in tandem with foreseeability limitations, pose fairly daunting obstacles to recovery under this scenario.

C. *Localized Acts of Terror*

For the present, one must look elsewhere, to foreign states under siege, to identify realistic scenarios in this third category. For example, car bombings in Northern Ireland and suicide missions on buses and in cafes throughout Israel. Clearly, the conceptual lines are blurred: Is a terrorist suicide bombing in a Jerusalem marketplace (or café) an instance of mass terrorism or a localized event? Is it simply a question of how many fatalities occur? Yet, it would be unfortunate, in my view, to lump together all potential terrorist acts for purposes of comprehensively thinking through the policy implications of the impulse to assure a forum for compensation.

Consider, in this regard, that immediately after the February 2003 Rhode Island nightclub fire claimed the lives of 100 victims, the president of the state bar association, among others, called for consideration of a September 11th-type no-fault scheme for the surviving families.²⁷ By contrast, it is inconceivable that an isolated case of residential arson that extinguished the lives of a single innocent family would have raised a similar expression of need for a compensation plan. Similarly, for all the anxieties it provoked, the first World Trade Center bombing failed to initiate a dialogue over government intervention to provide assured compensation to the victims' survivors. Sense of scale can, in short, lead to divergent pressures for a political response.²⁸

As a background consideration, the question once again is how such victims would fare under the tort system. To a certain extent, the *character* of localized acts of terror offers the outline of an answer. Localized acts—the seemingly random bombings in the midst of mundane everyday activities—are aimed at making a statement in a somewhat different sense than an attack on a site with symbolic overtones, such as the World Trade Center, Golden Gate Bridge, or Disneyland. Through their very randomness, localized acts are aimed at creating an atmosphere of anxiety and insecurity. No one knows when or where the next shock wave will occur. And that, in turn, provides the key to assessing the place of tort in default of assured compensation.

27. Marcella Bombardieri, *Tragedy in Rhode Island; Insurance Unlikely To Cover All Claims*, BOSTON GLOBE, Feb. 26, 2003, at A1.

28. At some point, the common denominator of terrorist-inspired incidents could eradicate the line between attacks on the many and the few, between the public space and the corner business enterprise. Such has been the case in Israel where, as will be discussed in the next section, *all* terrorist attacks are compensable events. See *infra* notes 80-87 and accompanying text. But it is not an inevitable development.

Perhaps the unhappy day will come when every proprietor of a sidewalk café or shopping center outlet, as well as the municipal operators of bus systems, will be required as a matter of ordinary care to be on heightened alert for sudden violence—with requisite costs of providing private, police-like security. But in the near future, at least, it seems more likely that the closest tort analogue will be the obligations presently imposed in the sub-category of premises liability cases dealing with acts of criminal violence in residential buildings and on commercial property.²⁹

Essentially, the courts take three distinct positions in these cases, none of which suggests that tort, as a general proposition, would offer a promising pathway to compensation for victims of random localized terrorist attacks.³⁰ The narrowest position utilizes a “prior similar incidents” test, which would require similar past terrorist acts at the site as the touchstone to liability for failure to provide adequate security at the time of an incident leading to serious personal harm. Obviously, there is a poor fit between the nature of randomized violent acts of terrorism and the requisites of this standard.

In contrast, a widely-adopted liability standard in premises violence cases is the so-called “totality of the circumstances” test. Under this approach, as the name suggests, an array of factors are taken into account in assessing responsibility, including, most critically, the amount of criminal activity in the surrounding community. On occasion, courts adopting this test have been willing to see a rash of prior minor, property-related crimes as a sufficient precursor to a more violent instance of armed assault or sexual attack. In the same way, the setting of a high-crime area might serve as a linking circumstance to a terrorist incident at a neighborhood establishment. Nonetheless, the requisite of past criminal activity in the nearby surroundings surely is a limiting factor, especially because terrorists are frequently drawn to more upscale areas for a variety of reasons. And of course, the perpetration of terrorist violence through stealth and subterfuge would further bolster a defense that no *reasonable* measures to safeguard against a foreseeable incident had been ignored.

Finally, many courts rely on a “balancing” test, which if it differs from the totality of the circumstances approach in any meaningful way, does so only through placing greater emphasis on the financial

29. For municipal activities, such as bus safety, or “localized” incidents occurring outside private premises in public space (e.g., a street market), my earlier discussion of limited governmental liability carries over to this category of cases, as well.

30. On the three positions discussed in the text, see *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762 (La. 1999).

burden of investing in particular security measures as a counterweight to the likelihood of criminal activity. In a sense, this latter factor goes to the heart of the matter. So long as terrorist incidents rely on stealth and surprise—exploiting the unexpected—tort conceptions of responsibility, which require no more than reasonable measures addressing foreseeable risks, are likely to offer little to the victims of random violence. From a compensation perspective, tort turns out to be largely unavailing.³¹

III. INJURIES FROM TERRORIST ACTS: THE NO-FAULT OPTION

The previous section has sketched the reasons why tort liability is uncertain at best and, realistically, probably unavailable in most situations as a source of compensation for the victims of terrorist acts. Once the premise of *assured* compensation for victims of terrorism is adopted—which will be questioned in the next section—the natural turn is to a no-fault system. This shift in focus is foundational: tort is grounded in the dual conception of a deserving plaintiff and a wrongdoing defendant, irrespective of whether the philosophical underpinning for liability is corrective justice or efficient allocation of resources.³² By contrast, no-fault is grounded in a social welfare perspective that defines deserving claimants exclusively in terms of harm associated with a designated risk-generating activity. It is, however, a major step from designating a category of “deserving claimants” to deciding on the nature of benefits that should be available to eligible sub-categories of recipients. The approach taken in defining benefits is at the core of assessing the goals that a particular no-fault system is designed to promote. It will be the central inquiry in this section.

In the immediate aftermath of September 11th, a no-fault compensation plan was enacted that closely reflected the anxieties and emotions stirred up by that fateful day. This nexus between a singular event and an almost reflexive political reaction, as I will briefly describe, suggests both the qualifications with which one must view the Fund as a blueprint for the future and the need to examine alternative approaches to providing compensation to victims of terrorism.

31. From a deterrence perspective, which is not a central theme of this Article, tort is largely irrelevant. This is most clearly the case in the aftermath of September 11th, which triggered a host of heightened security measures entirely apart from any tort-related incentives. More generally, to the extent that terrorist threats are a salient public concern, regulatory and policing initiatives are likely to largely supplant the deterrence role of tort.

32. Strictly speaking, it is not essential from an economic efficiency perspective that the victim in fact be compensated; the focus is on optimal deterrence, and this goal can be achieved without compensation going to the plaintiff, however “deserving” he or she may be.

A. *The September 11th Victim Compensation Fund:
Statutory Model*

Within limits, the Fund was meant to create baseline assurance that victims of physical injury and their survivors would receive benefits.³³ More precisely, the Fund established eligibility for individuals “present at [any of the three crash sites] at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes,”³⁴ and who “suffered physical harm or death as a result of” the crashes.³⁵ For this circumscribed class, the Fund provides benefits for both economic and noneconomic losses on a no-fault basis.³⁶

In spelling out those benefits, however, the Fund appears to do a dramatic about-face from its foregoing rejection of tort precepts. Economic loss is defined to include not just medical expenses and loss of present earnings, but “loss of business or employment opportunities”—presumably future lost income—“to the extent recovery for such loss is allowed under applicable State law.”³⁷ And noneconomic loss is broadly defined to include “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.”³⁸ Interestingly, no parallel to the economic loss definition that referenced “[as] allowed under applicable State law” is included in this latter definition of noneconomic loss.³⁹ Nonetheless, the pervasive influence of the tort perspective of doing individualized justice—disparaged by critics of the tort system, trumpeted by its advocates—is apparent on the face of the provision.

But there is one substantial qualification to this apparent generosity of spirit. Another bane of the existence of tort system critics is the collateral source rule, which allows for the recovery in tort of out-of-pocket expenses even if they have been reimbursed by “collateral” sources such as health and disability insurance. Under the Fund, there

33. The description of the Fund and regulations that follow draws in part on an earlier treatment; see Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573 (2001).

34. Air Transportation Safety Act, *supra* note 1, § 405(c)(2)(A)(i).

35. See *id.* § 405(c)(2)(A)(ii).

36. See *id.* § 402(5),(7).

37. See *id.* § 402(5).

38. See *id.* § 402(7).

39. See *id.* § 402(5).

is no recovery for these items.⁴⁰ Indeed, the restriction on “double recovery,” as tort critics would put it, is written in exceedingly broad terms to cover “all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes”⁴¹

So, the Fund steers a somewhat uncertain course between collective principles that would emphasize timely compensation and filling the gaps of unmet need, on the one hand, and individualized recovery that would pull in the direction of the tort model, on the other. Before examining this tension in somewhat more detail, however, consider the escape hatch provided in the Act: the prospect of lodging a tort claim instead of proceeding under the Fund.

One can only speculate about why a statutory tort cause of action for claimants was established in the Fund legislation; perhaps in recognition of the fact that some victims with substantial collateral source recoveries—most notably, victims with major life insurance holdings, accrued pension benefits, or accidental death coverage—might well have anticipated no recoverable benefits under the Fund.⁴² Or realistically, Congress may have simply recognized that substantial categories of September 11th victims—most clearly, those suffering property damage and psychological harm without accompanying physical injury—were simply not covered by the Fund.⁴³ Of course, tort, as the default system, would have been available for addressing these claims—how successfully is another matter—without the need for establishing a federal cause of action in the Act. But this would arguably have created the appearance of treating Fund beneficiaries as second-class citizens if they were offered no tort option.

Whatever the case, Congress’s ambivalent embrace of tort is highlighted by the title of § 408, which created the federal cause of action: “*Limitation on Air Carrier Liability*.”⁴⁴ If Congress was determined to leave tort as an option, it was equally determined to constrain tort along lines familiar to observers of late twentieth century tort reform.

40. Nor is it possible to recover punitive damages under the Fund. See Air Transportation Safety Act, *supra* note 1, § 405(b)(5).

41. See *id.* § 402(4). In treating life insurance and pension funds as “primary,” the Fund departs from the parameters of other no-fault schemes.

42. See *supra* notes 40-41 and accompanying text. Note, however, that the Special Master softened the offset provision in the Final Rule. See *infra* note 63 and accompanying text.

43. See the statute’s provision identifying a claimant as an individual who has “suffered physical harm or death.” Air Transportation Safety Act, *supra* note 1, § 405(c)(2)(A)(ii). In addition, the Special Master’s decisions were made final, with no recourse to judicial review. See *id.* § 405(b)(3).

44. See *id.* § 408 (emphasis added).

The Act established a ceiling on tort liability of the air carriers, providing that liability “shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”⁴⁵ In subsequent legislation, this protective cap on liability, linking it to the limits of insurance coverage, was carried over to aircraft manufacturers, property owners in the World Trade Center, airport owners, and governmental entities.⁴⁶

Ceilings aside, exclusive jurisdiction to hear “all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes” was located in the United States District Court for the Southern District of New York.⁴⁷ But no federal common law was created; rather, the court is to apply the substantive law of the state in which the crash occurred.⁴⁸ Finally, just to leave no doubt about it, § 408(b)(1) declares that the federal cause of action is to be “the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.”⁴⁹

Thus, claimants eligible under the Fund are put to a choice—they must elect either to claim benefits under the Fund or to waive their rights and pursue a tort claim.⁵⁰ At the same time, for those falling outside the eligibility limits of the Fund, tort, as circumscribed in the Act, remains available.

This, then, is the basic structure of the Fund and the tort option. One is left with a fundamental question: Is the Fund, on the one hand, grounded in a collective model emphasizing needs-based benefits for a community of victims? Or, is it grounded in an individual entitlements model of compensating for harm on a case-by-case basis (a

45. *See id.* § 408(a). The amount of insurance coverage was reported to be \$1.5 billion per plane. *See Jim VandeHei & Milo Geyelin, Economic Impact: Bush Seeks To Limit Liability of Companies Sued as Result of Attacks*, WALL ST. J., Oct. 25, 2001, at A6.

46. *See Aviation and Transportation Security Act*, Pub. L. No. 107-71, § 201(b)(2), 115 Stat. 645 (2001). It is noteworthy, however, that the same Act refused to limit the liability of companies supplying airport security: “Nothing in this section shall in any way limit any liability of any person who is engaged in the business of providing air transportation security and who is not an airline or airport sponsor or director, officer, or employee of an airline or airport sponsor.” *See id.* § 201(b)(2)(a)(3). This provision was in turn subsequently modified to limit the liability of some airport screening companies. *See Homeland Security Act of 2002*, Pub. L. No. 107-296, § 890, 116 Stat. 2135, 2251 (2002).

47. *Air Transportation Safety Act*, *supra* note 1, § 408(b)(3).

48. *See id.* § 408(b)(2).

49. *See id.* § 408(b)(1).

50. *See id.* § 405(c)(3)(B). In the Final Rule, the Special Master included a provision offering claimants an opportunity to request a rough calculation of benefits under the Fund before deciding between options. *Warily Circling the September 11th Fund*, N.Y. TIMES, June 5, 2002, at A26.

somewhat paler version of tort)? As the previous discussion indicates, there is evidence pointing in both directions.⁵¹

In support of a needs-based model, there is initially the choice of no-fault, in and of itself. Although no-fault schemes are not narrowly needs-based, they are premised on the notion that compensation for basic economic harm suffered is the first order of business, and that considerations of defendant misconduct and plaintiff contributory carelessness (fault and comparative fault) are largely irrelevant—that injury arising out of a given activity or event is, in itself, a sufficient condition to warrant redress.⁵² This does seem to square with the underlying premise of the Fund, disavowing “fault” as a prerequisite for recovery. In addition, the treatment of collateral sources—the striking set-off provision for “*all* collateral source compensation, *including* life insurance, pension funds [and other government benefit schemes]”—further supports this horizontal equity/needs-based reading of the Fund objectives.⁵³ Finally, there is the retention of the tort option. If a true option in the strong sense, tort might well have been regarded as an individual rights pathway for those choosing to forgo the contrasting collectively-based welfare scheme.

51. It should be noted that there is virtually no legislative history to serve as guidance on the provisions of the Fund.

52. On the irrelevance of fault considerations, and the activity-based nexus for claims, see generally ORIN KRAMER & RICHARD BRIFFAULT, *WORKERS' COMPENSATION: STRENGTHENING THE SOCIAL COMPACT* 13 (1991). The high priority given to basic economic harm is illustrated in the auto no-fault context by the New York no-fault statute, among the most generous, which explicitly allows recovery only for “basic economic need” (up to \$50,000). See N.Y. INS. LAW § 5102(a), art. 51 (McKinney 1995). In the workers' compensation context, the focus on basic economic loss is demonstrated by the caps on recovery for lost wages at modest levels in death and serious injury cases, as well as the exclusion of noneconomic loss from compensable harm. See *infra* note 66; 5 LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 93.01 (2000). Under the black lung statute, miners who are totally disabled are entitled to very modest benefits of 37.5% of the monthly pay rate for low-level federal employees in grade GS-2, step 1. 30 U.S.C. § 922(a)(1) (2000).

Indeed, the Smallpox Emergency Personnel Act of 2003, enacted in the aftermath of September 11th as part of the continuing response to the threat of terrorism, in striking contrast to the Fund, provides standard no-fault type benefits: 66% of wages to eligible individuals permanently disabled by complications from the vaccine, 75% if the victim has a spouse or dependents, with a ceiling of \$50,000 per year; in cases of death, a lump sum of \$262,000 or at the election of the beneficiary, annual payments of 75% of the decedent's salary until the youngest child turns 18. See CQ Today Legal Affairs, April 11, 2003, at <http://www.cq.com/aggregatedocs.do> (last visited Jan. 5, 2004).

53. September 11th Victim Compensation Fund of 2001, Interim Final Rule, § 104.47, 66 Fed. Reg. 66,274, 66,287 (Dec. 21, 2001) (codified at 28 C.F.R. § 104 (2003)) (emphasis added). Indeed, the italicized terms underscore the possibility of reading the provision to offset *private* charitable contributions, as well. This possibility raised a sufficient outcry to trigger an early assurance from the Special Master that such private contributions would not be taken into account in determining awards. See *Putting a Price on a Life*, CHI. TRIB., Feb. 10, 2002, § 2, at 8.

On the other hand, the Fund provisions offer clear support for an individual entitlements model reading. To begin with, the scheme defines “economic loss” to include future lost earnings as interpreted in applicable state law. This interpretive approach presumably anticipates case-by-case projections of the future earning power of the particular claimant. In the same vein, the definition of “noneconomic loss” to include unlimited pain and suffering, loss of consortium, and “all other [intangible loss] of any kind” is a straightforward invitation to assess harm case-by-case. Indeed, the notion of subjectively redressing noneconomic loss is inherently at odds with the collective, insurance-based principles underlying no-fault.⁵⁴ And finally, the overall cap on liability in tort at insurance limits, combined with the likely prospect that non-Fund based tort claims (especially for property damage) might seriously limit recovery for personal harm in tort, could be taken as indirect evidence that a measure of complementary individualization was anticipated in the no-fault scheme.⁵⁵ In other words, if claimants were to be coerced into no-fault by circumstances beyond their control, they should get some approximation of what tort would ordinarily have to offer.

The threshold argument for relying on this conflicted model in the future—that future victims of terrorism ought not to be treated differently from September 11th victims—falls out immediately because, as we will see, the Special Master’s implementation of the Fund provisions is grounded in interpretive regulations that radically depart from a literal reading of the statute.⁵⁶

On the merits, in my view, there would be no satisfying rationale for establishing an ongoing no-fault plan for compensating victims of terrorism that mimicked the tort system by providing unconstrained and individualized recovery for economic and noneconomic loss. In every case, across the entire spectrum of no-fault programs, from work-related to crime-related compensation and from injuries associated with military service to the unfortunate victims of vaccine-related mishaps, there is not a single program that grants recovery for wage loss reflecting the tort system’s total disregard for considerations of horizontal

54. Although, however, no-fault schemes that replace tort in its entirety sometimes retain scheduled pain and suffering. See Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404 (2000) (examining New Zealand’s experience with a comprehensive no-fault accident compensation scheme).

55. See Geraldine Baum & Josh Meyer, *Final Rules on September 11th Fund Give Families More Money*, L.A. TIMES, Mar. 8, 2002, at A1.

56. This alternative model, as I have called it, triggered unsuccessful litigation by claimants arguing that the Special Master’s implementing regulations were inconsistent with the statutory framework. See *Colaio v. Feinberg*, 262 F. Supp. 2d 273 (S.D.N.Y. 2003).

equity and need-based considerations. Nor is there a single instance in which no-fault programs provide for unconstrained case-by-case determinations of noneconomic loss.

At the same time, the collateral offset recognized by the Fund is similarly beyond the pale of the traditional offsets for redundant benefit payments in other no-fault systems. In fact, read literally, the Fund offset provision could plausibly have been extended to offsetting private charitable contributions: the Fund provides that “all” collateral sources “including” life insurance, pensions, and public welfare schemes are to be deducted from benefits received.⁵⁷ Moreover, under any reading of the Fund provisions, as the immediately preceding language makes clear, benefits are to be reduced in the sum of realizable life insurance and pension proceeds—once again, a design feature unprecedented in view of other no-fault programs. Here, too, one can ask why considerations of fairness and equity would warrant treating victims of terrorism differently from other categories of no-fault recipients by looking beyond medical and wage replacement systems to private arrangements triggered by premature death.

These singular aspects of the Fund were not lost on the Special Master, looking not to future possible victims of terrorism but facing the immediate task of developing a concrete program for determining benefit awards for victims of September 11th. I turn next to his efforts, which, I have suggested, offer an alternative vision of how one might design a no-fault model for future victims of terrorism.

B. The September 11th Victim Compensation Fund: Regulatory Guidelines Model

When the Special Master, Kenneth Feinberg, was appointed on November 26, 2001, his initial task was to promulgate regulations resolving the principal tensions in the Act and filling in some important blanks.⁵⁸ He tested the waters, so to speak, by issuing a set of draft regulations (Interim Final Rule) for commentary on December 21, 2001.⁵⁹ Subsequently, on March 8, 2002, he issued final regulations (Final Rule), spelling out his interpretations of Fund provisions.⁶⁰

57. The Special Master rejected this reading in his Interim Final Rule. September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. § 104 (2003)).

58. See Diana B. Henriques & David Barstow, *A Nation Challenged: The Special Master; Mediator Named to Run September 11th Fund*, N.Y. TIMES, Nov. 27, 2001, at B1.

59. September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. at 66,274.

60. September 11th Victim Compensation Fund of 2001, Final Rule, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. § 104 (2003)).

Feinberg's reading of the main provisions of the Fund reveals an interesting effort to strike a balance between understanding the Act in traditional no-fault terms that would have emphasized meeting scheduled basic loss of victims, and interpreting the Act in an open-ended fashion that essentially would have offered tort-type, individualized compensation in a no-fault setting. His manner of resolving this tension is evident in the approach taken to the three key substantive benefit provisions that I have already discussed: collateral source offset, economic loss, and noneconomic loss.

1. *Collateral Source Offset*

As mentioned earlier, the Act explicitly called for the offset of life insurance and pension benefits. These provisions raised a firestorm of criticism from victims' families (in particular, the well-endowed), concerned that they were likely to receive nothing in Fund benefits because of the foresight of the deceased, who it was argued, had earned or set aside funds for just such a contingency as occurred.⁶¹ These protests were sharpened to a fine point by prospective claimants observing that unconstrained tort—the absence of a fund—would be a superior option, because life insurance and pension benefits traditionally are not offset under the tort system.⁶²

The Special Master responded to these criticisms in the Final Rule by interpreting the Act to allow reduction of the offset to the extent of victims' self-contributions.⁶³ More generally, Feinberg announced that it would be "very rare" for *any* eligible claimant to receive less than \$250,000.⁶⁴ It should be noted that neither of these interpretive moves is grounded in the language of the Act.

Rather, the Special Master's actions reflected a fundamental philosophical difference buried in the esoteric legal language of collateral offset. On the one hand, a need-based approach to compensation would point to full offset of all collateral sources, as the Act appeared to require, because these outside benefits do contribute to meeting basic needs. On the other hand, under an individual claimant-focused, tort-type inquiry as to the "deserving" status of the victim, offsets arguably would be ignored entirely. In the end, the Special Master arrived at something of a compromise, liberalizing the statute from the victims' perspective by reducing the offset through recognition of vic-

61. See Diana B. Henriques, *A Nation Challenged: The Federal Fund; Official Vows All Families of Victims Will Get Aid*, N.Y. TIMES, Dec. 28, 2001, at B7.

62. This assumes, of course, that liability would have been possible to establish in tort.

63. September 11th Victim Compensation Fund of 2001, Final Rule, 67 Fed. Reg. 11,233.

64. See *id.* at 11,234 (statement by the Special Master).

tims' contributions and entirely ignoring outside private charity received by Fund-eligible claimants, while establishing a quite substantial presumptive minimum recovery.

2. *Economic Loss*

As I have indicated, in addressing economic loss, the Act appears to be at cross-purposes with the literal terms of the collateral source offset provision, in referring to recovery of "loss of business or employment opportunities" as defined in state tort law.⁶⁵ On its face, this would seem to suggest an individualized inquiry in every case into the lifetime earnings prospects of each deceased victim, which is entirely at odds with the traditional approach of scheduled benefits.⁶⁶

In the Final Rule, the Special Master again crafted a compromise. Although there is no mention of scheduling in the statute, Feinberg established a grid applicable to the range of potential claimants—a "presumed economic loss" schedule—based on age, size of family, and recent past earnings, along with a presumptive cap applicable to the upper two percent of income earners.⁶⁷ In devising this strategy, he provided for awards that recognized very considerable future earnings disparities, an announced range of \$250,000 to between \$3 and \$4 million.⁶⁸ But at the same time, he rejected an approach that would

65. Air Transportation Safety Act, *supra* note 1, § 402(5).

66. Death benefits are typically calculated as a fixed percentage of the decedent's average weekly wage, which is capped at a level that varies from state to state, but generally approximates the average weekly wage in the state. See U.S. Dep't of Labor, State Workers' Compensation Laws 2001, available at <http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables - pdf/table-12.pdf> (last visited Sept. 4, 2003); see also AFL-CIO, Workers' Compensation Comparisons 2001, available at <http://www.aflcio.org/yourjobeconomy/safety/wc/upload/comptable.pdf> (last visited Sept. 4, 2003). See generally 5 LARSON, *supra* note 52, § 93.01 ("The beginning point in calculating the amount of benefits is the 'average weekly wage.' This, when the fixed statutory percentage of roughly between one-half and two-thirds has been applied to it, becomes the unit of benefit by which practically all compensation . . . is measured, subject to maximum and minimum limits."). In many states, including New York, the surviving spouse continues to receive the weekly benefit during the entire period of widow/widowerhood, which continues until the surviving spouse remarries or dies. Some states, however, impose limits on the duration (e.g., 500 weeks in Michigan) or the total dollar amount (e.g., \$160,000 in California) of the death benefits. 5 *id.* § 98.03[1]; 10 *id.* app. B-16; N.Y. WORKERS' COMP. LAW § 16 (McKinney 2002); CAL. LAB. CODE § 4702 (West 2002). For the New York schedule of benefits for serious injuries (permanent partial disability), see N.Y. WORKERS' COMP. LAW § 15 (McKinney 2002).

67. September 11th Victim Compensation Fund of 2001, Final Rule, 67 Fed. Reg. at 11,237. In the case claiming that Feinberg had ventured beyond the framework created by the statute, the Special Master's presumptive cap was the subject of special attack, but to no avail. See Colaio v. Feinberg, 262 F. Supp. 273, 289-93 (S.D.N.Y. 2003).

68. The final rule indicates that awards less than \$250,000 "will be very rare" and "awards in excess of \$3 or \$4 million will be rare." September 11th Victim Compensation Fund of 2001, Final Rule, 67 Fed. Reg. at 11,234 (statement by the Special Master).

have recognized entirely open-ended, case-by-case speculation about future earnings prospects.⁶⁹

3. Noneconomic Loss

Although there are exceptions, no-fault schemes typically do not provide for pain and suffering loss, apart from optional or supplemental recourse to tort.⁷⁰ In fact, tort law itself, as encapsulated in wrongful death statutes, did not traditionally provide any pain and suffering loss for survivors—that is, loss of companionship.⁷¹ Indeed, many states still do not recognize nonpecuniary loss as compensable to survivors in tort, limiting recovery to economic loss.⁷² And some other states, such as California, refuse to recognize pain and suffering of the deceased *victim* prior to death as recoverable in tort.⁷³

Nonetheless, the Special Master provided for *scheduled* noneconomic benefit awards under the Fund for each victim and every surviving eligible family member. In the Interim Final Rule, \$250,000 was to be awarded for each victim;⁷⁴ a figure that remained unchanged in the Final Rule.⁷⁵ With respect to survivors, the Interim Final Rule provided \$50,000 for the spouse and each dependent, a figure that was increased to \$100,000 each in the Final Rule.⁷⁶ Thus, a surviving spouse with two children would receive benefits of \$550,000 for noneconomic loss in a claim under the Fund.

4. Resolving Tensions: A Hybrid Model

The game plan for implementation that emerges from the Fund and its subsequent interpretation in the Final Rule can be seen as a hybrid model: one foot in no-fault precepts and the other in tort principles. Neither the Fund provisions nor the implementing regulations can be read, however, apart from the long shadow cast by three related considerations: 1) the constraints on the tort action provided as an op-

69. See *Putting a Value on Lives*, N.Y. TIMES, Jan. 24, 2002, at A26.

70. See, e.g., 1 LARSON, *supra* note 52, § 1.03[4] (“There is no place in [workers’] compensation law for damages on account of pain or suffering, however dreadful they may be.”).

71. See, e.g., *Liff v. Schildkrout*, 404 N.E.2d 1288 (N.Y. 1980).

72. See DAN B. DOBBS, *THE LAW OF TORTS* § 297 (2001).

73. See *Williamson v. Plant Insulation Co.*, 28 Cal. Rptr. 2d 751 (Ct. App. 1994); CAL. CIV. PROC. CODE § 377.34 (West 2003).

74. September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,274, 66,279 (Dec. 21, 2001).

75. September 11th Victim Compensation Fund of 2001, Final Rule, 67 Fed. Reg. 11,233, 11,239 (Mar. 13, 2002) (codified at 28 C.F.R. § 104 (2003)).

76. See *id.* at 11,246; September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. at 66,279.

tional remedy, 2) the fundamental structure of common law tort rules, and 3) the September 11th events themselves.

Consider, initially, the constraints on the tort remedy enacted along with the Fund. As mentioned earlier, this statutory tort action, replacing common law tort rights (albeit adopting common law *substantive* tort principles), capped tort at insurance limits against virtually all potential defendants.⁷⁷ As a practical matter, this was taken to mean that recovery under the tort option, if it were exercised, might be severely limited after all the outside property damage claims (which of necessity would be brought in tort) were aggregated with personal injury claims: \$1.5 billion per air carrier, it was thought, would soon be exceeded.⁷⁸ To the extent that this perception was accurate, it created pressure for a no-fault option sufficiently robust to avoid coercing claimants into substantially diminished recoveries in tort.

Related to this point, tort was by no means clearly an available option. As discussed earlier, the applicable common law rules required a considerable stretch to provide a remedy to victims in the buildings; and, as far as passengers on the flights were concerned, negligence of the carriers and baggage inspectors—let alone more attenuated defendants—was not a foregone conclusion.

Finally, the event itself cast a long shadow. As I have suggested, no one would rest easily with coercing the surviving families into a long, drawn-out pursuit of recovery in tort, given the special sympathy for their plight.

In view of these factors, the Special Master's strategy emerges and becomes apparent: edge up closely enough to the range of tort compensation to make no-fault benefits under the Fund an offer that could not be refused by most eligible parties.⁷⁹ Note that this is a very different set of motivations than one ordinarily finds underlying no-fault systems. Workers' compensation, auto no-fault, black lung benefits for coal miners, and virtually every other system of no-fault, unapologetically provide a form of social insurance against risk; they

77. See *supra* text accompanying notes 45-46. Subsequent legislation also capped the liability of the airport screeners, for the most part. See *supra* note 46.

78. See Lizette Alvarez & Stephen Labaton, *A Nation Challenged: The Bailout; An Airline Bailout*, N.Y. TIMES, Sept. 22, 2001, at A1; Mary Jacoby, *Lawyers Say Suits May Benefit Clients*, ST. PETERSBURG TIMES, Nov. 15, 2001, at 1A; Bob Van Voris, *Lawyers Take Over Ground Zero Litigation To Follow Compensation Regs*, 24 NAT'L L.J., Mar. 11th, 2002, at A1; David W. Chen, *Suits by 950 Families Allege Safety Lapses at the Towers*, N.Y. TIMES, Sept. 14, 2002, at B3.

79. Feinberg's strategy appears to have been a success. At the filing deadline, December 22, 2003, 97% of eligible relatives had filed claims under the Fund. See David W. Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, with Reservations*, N.Y. TIMES, Jan. 1, 2004, at C10.

are not fraught with the symbolic significance associated with heroism and patriotic feelings.

Perhaps, however, victims of terrorism are in fact different. Staying with this supposition for the moment, the Special Master's hybrid model nonetheless retains distinct elements of tort-type recovery that are difficult to reconcile with a social welfare perspective. On this score, it will be useful to consider briefly some contrasting foreign models.

C. *Contrasting Foreign Models: A Brief Note*

Israel, of course, has been plagued by terrorism in recent years; most notably the first intafada, during the early 1980s, and the recent wave of sustained violence, the second intafada, beginning in fall 2000. Interestingly, Israel acted much earlier, in 1970, to establish a special benefits scheme for the victims of enemy action, the Compensation for Those Injured by Hostilities Act.⁸⁰ The Act provides benefits to *all* victims of terrorist activities and their families.⁸¹ To receive compensation, the beneficiary obtains certification from the Defense Ministry that the injury or death was due to an "enemy-inflicted injury."⁸² Once certification is received, an eligible beneficiary who has suffered a disabling injury is entitled to medical expenses and an allowance for other economic loss (but not noneconomic loss). If the victim is less than twenty percent disabled, there is a lump sum payment; if twenty percent or greater, a monthly allowance that includes wage loss linked to another statute, the Handicapped People (Allowances and Rehabilitation) Act, which refers to the "controlling salary" (i.e., a cap) as an Israeli-average payment criterion.⁸³ In addition, eligible recipients are provided a package of supplementary benefits, such as vocational rehabilitation and assistance in purchasing an apartment. But there is no provision for pain and suffering-type loss.⁸⁴

80. Victims of Hostile Action (Pensions) Law, 24 L.S.I. 131 (1969-1970).

81. Moreover, it includes coverage of foreign tourists, as well, and Israelis working outside the country.

82. Victims of Hostile Action (Pensions) Law, 24 L.S.I. 131, 134. For a more detailed description of the Israeli benefit scheme, see Hillel Sommer, *Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience*, 36 IND. L. REV. 335 (2003).

83. See Sommer, *supra* note 82, at 344-46. I am indebted to Professor Alex Stein, Hebrew University of Jerusalem, Faculty of Law, for additional information presented here.

84. More generally, the Israeli tort system recognizes a far more modest conception of pain and suffering than is reflected in American tort damage awards.

In the case of death from a terrorist act, survival benefits are identical to those of the families of soldiers killed in the line of duty.⁸⁵ Survivors are entitled to monthly benefit payments expressed as a percentage of the average salary of a low-level government employee, as well as an array of supplementary economic benefits for education, psychological assistance, and living expenses.⁸⁶ Again, however, there is no payment category reflecting intangible harm, such such as loss of companionship.⁸⁷

The Israeli approach clearly reflects a conception of victimization that would have rung hollow in this country before September 11th. The most telling feature is the linkage of reparation for death to soldiers killed in action, reflecting the conviction that domestic terrorism in Israel is just one of the tragic consequences of a continuing state of war. Whatever the political salience in this country of “war on terrorism” imagery evoked after September 11th, it remains an open question whether every victim of terrorism in this country will be viewed as tantamount to a fallen soldier. However this question is answered, it is interesting to note the sharp contrast between the strong individualistic norm that remains even in the hybrid September 11th model devised by the Special Master—a schedule of “presumed loss” that, even presumptively capped at the high end, tracks the wide disparities in earnings in the U.S. economy—and the communal norm underlying the Israeli adherence to horizontal equity in compensating for economic loss.⁸⁸

Northern Ireland offers another example of a country that has long endured the consequences of a protracted reign of terrorist acts. There, too, the unfortunate victims can turn to a no-fault scheme that provides benefits in cases of personal harm, the Northern Ireland Criminal Injuries Compensation Scheme 2002 (superseding an earlier act).⁸⁹ But, the approach is strikingly different from either the Fund or the Israeli system. Under the Compensation Scheme, not only victims of terrorism, but those suffering injury or death from violent

85. The referenced statute is The Allowance (Families of Soldiers Fallen in Combat) Act, 4 L.S.I. 115 (1950). See also Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92.

86. Sommer, *supra* note 82, at 348-51.

87. *Id.*

88. In sharp contrast to death benefit awards under the Fund, survivors of members of the United States military killed while on active duty are entitled to receive a “death gratuity” of \$6,000. 10 U.S.C. § 1478(a) (2000). Military personnel can also choose to purchase up to \$250,000 in armed service-provided group life insurance.

89. The Criminal Injuries Compensation (Northern Ireland) Order 2002, STAT. R. & O.N. IR. No. 796 (2002), available at <http://www.nio.gov.uk/pdf/cipo.pdf> (last visited Sept. 4, 2003).

crimes other than terrorism, can recover.⁹⁰ Indeed, coverage is exceedingly wide, ranging from sexual abuse (by nonfamily members) to specified intentional acts, such as poisoning, arson, and deliberately instigated attacks by animals. Obviously, this wide array of covered acts suggests a quite different rationale for granting no-fault recovery, most succinctly stated in the published guide to compensation under the scheme as “an expression of public sympathy and support for innocent victims.”⁹¹ Thus, if Israel regards victims of terrorism figuratively as fallen soldiers in a war with a foreign enemy, Northern Ireland, by contrast, treats terrorism as one particular manifestation of intentional wrongdoing—a phenomenon that in its very randomness warrants a public expression of support for the unfortunate, innocent victims.

Recovery under the Northern Ireland scheme is referenced to a very detailed workers’ compensation-type tariff of scheduled benefits, providing specified flat sum recovery for loss associated with designated body parts or sustained mental disability.⁹² These benefits, in the nature of a fixed award for pain and suffering, may be supplemented by long-term wage loss as well.⁹³ In cases of accidental death, benefit payments to survivors under the tariff are rather modest, £12,000; but the schedule of benefits for injuries runs up to £255,000 in cases of quadriplegia.⁹⁴ In addition, the Northern Ireland scheme takes a strikingly liberal stance on coverage in allowing recovery of modest sums to close relatives of victims of criminal violence for their mental distress.⁹⁵

The Northern Ireland scheme, with its broader conception of victimization, serves as a good point of reference for turning to a potentially more inclusive domestic model of compensation for terrorist

90. Compensation for property damage resulting from terrorist activities is available under the Terrorism Act, 2000, c. 11th (Eng.), available at <http://www.hmso.gov.uk/acts/acts2000/20000011.htm> (last visited Sept. 4, 2003).

91. COMP. AGENCY, FOR N. IR., A GUIDE TO THE NORTHERN IRELAND CRIMINAL INJURIES COMPENSATION SCHEME 2002 16, available at http://www.compensationni.gov.uk/pdf/complete_guide.pdf (last visited Sept. 5, 2003).

92. *Id.* at 30-47.

93. The claimant receives no benefits for the first twenty-eight weeks of wage loss. See Northern Ireland Criminal Injuries Compensation Scheme ¶ 30 (2002), available at <http://www.compensationni.gov.uk/pdf/nicics02.pdf> (last visited Sept. 5, 2003). Moreover, recovery is capped: “Any rate of net loss of earnings or earning capacity . . . which is to be taken into account in calculating any compensations payable . . . must not exceed one and half times the gross average industrial earnings in Northern Ireland at the time of assessment” *Id.* ¶ 34.

94. *Id.* ¶ 34.

95. *Id.* ¶ 10.

victims that has been adopted throughout the United States, the state crime victim compensation acts.

D. State Crime Victim Compensation Programs

California created the first state crime victim compensation program in 1965, and other states quickly followed suit.⁹⁶ Five more states created programs in the next three years, and twenty-eight states had adopted programs by 1980.⁹⁷ The federal government began supporting efforts in this area in 1974, providing \$50 million to victim service programs through the Law Enforcement Assistance Administration (LEAA) of the Department of Justice.⁹⁸ The LEAA was terminated in the early 1980s, but the 1982 Report of the President's Task Force on Victims of Crime found that federal funding would encourage the development of state victim assistance programs.⁹⁹ Subsequently, Congress passed the Victims of Crime Act (VOCA) in 1984, providing matching funds to states with victim compensation programs.¹⁰⁰

Following the enactment of VOCA, which currently matches sixty percent of state expenditures on crime victim compensation programs (with a five percent cap on the amount of federal funds that can be used for administrative expenses), every state has now adopted a crime victim compensation scheme.¹⁰¹ The details of these programs vary from state to state, but, to qualify for federal funding, state programs have to comply with certain requirements. Victims of violent crimes suffering injury and homicide victims' survivors must be eligible to receive compensation.¹⁰² Funds may be used to pay for a wide range of crime-related expenses including medical and dental, mental health, funeral and burial, lost wages or lost support, and even crime scene clean-up costs.¹⁰³

96. NAT'L ASS'N. OF CRIME VICTIM COMP. BDS. (NACVCB), CRIME VICTIM COMPENSATION; AN OVERVIEW, available at http://www.nacvcb.org/articles/Overview_prn.html (last visited Sept. 5, 2003) [hereinafter NACVCB OVERVIEW].

97. *Id.*

98. See generally LISA NEWMARK ET AL., URBAN INST., THE NATIONAL EVALUATION OF STATE VICTIMS OF CRIME ACT COMPENSATION AND ASSISTANCE PROGRAMS: FINDINGS AND RECOMMENDATIONS FROM A NATIONAL SURVEY OF STATE ADMINISTRATORS (2001), available at http://www.urban.org/uploadedPDF/410142_rs_091401.pdf (last visited Oct. 21, 2003).

99. *Id.*

100. Victims of Crime Act, Pub. L. No. 98-473, 98 Stat. 2170 (1984).

101. NEWMARK ET AL., *supra* note 98.

102. *Id.*

103. Programs must compensate victims of federal crimes and must also cover state residents who are victims of terrorism while traveling outside the United States. NEWMARK ET AL., *supra* note 98, at 4.

State crime victim compensation programs collectively spent more than \$350 million and approved more than 140,000 claims for compensation in 2001. Medical and dental costs accounted for forty-five percent of these expenditures, lost wages and loss of support payments accounted for another twenty percent of the funds, and mental health costs were the third largest category of expenditures at fifteen percent. Compensation for assault-related harms claimed more than three times as much of total expenditures (fifty-two percent) as the second-largest category, homicides (sixteen percent).¹⁰⁴

Apart from the federal grants, funding for the state programs comes from two principal sources. In more than eighty percent of states, fines and fees paid by criminal offenders provide the bulk of the funding for the criminal compensation programs.¹⁰⁵ Similarly, federal funding under VOCA comes from fines, penalty assessments, and forfeitures in federal criminal cases.¹⁰⁶ Thus, in contrast to the no-fault models discussed earlier, most of the crime victim compensation programs do not draw on general revenues, and in a limited sense, seek to internalize the costs of violent crime.

State compensation programs limit the amount of compensation that victims can receive in at least three ways. Caps on maximum awards range from a low of \$7,500 in Maine to a high of \$50,000 in Nevada, with an average state maximum of roughly \$25,000.¹⁰⁷ A handful of states limit the amount that can be recovered by category of compensation rather than imposing an overall cap. In 2001, the nationwide average award was roughly \$2,500.¹⁰⁸ Payments are also reduced by collateral offset rules in every state.¹⁰⁹ Victim compensation programs will only pay expenses that are not covered by medical or auto insurance, Social Security, or other collateral sources.¹¹⁰ Conviction or apprehension of the person responsible for committing the crime, however, is not a prerequisite for a victim to receive compensation.¹¹¹

104. U.S. DEP'T OF JUSTICE NATION WIDE ANALYSIS VICTIMS OF CRIME ACT, 2001 VICTIMS OF CRIME ACT OF 1984 PERFORMANCE REPORT STATE COMPENSATION PROGRAM, available at http://www.ojp.usdoj.gov/ovc/fund/vocanpr_vc01.html (last visited Sept. 5, 2003) (updated periodically) [hereinafter U.S. DEP'T OF JUSTICE ANALYSIS].

105. NACVCB OVERVIEW, *supra* note 96. In the remaining states, general revenue appropriations by the legislature provide the primary source of funding.

106. NEWMARK ET AL., *supra* note 98, at 1.

107. *Id.* at 6.

108. U.S. DEP'T OF JUSTICE ANALYSIS, *supra* note 104.

109. NACVCB OVERVIEW, *supra* note 96.

110. *Id.*

111. *Id.*

Finally, the programs reveal a prominent moralistic strand. State schemes do not typically provide compensation to persons injured while committing crimes or whose own misconduct contributed to their injuries. At least five states go so far as to authorize denial of compensation to victims who have previously engaged in criminal conduct completely unrelated to the incident for which they are currently seeking compensation.¹¹²

This brief sketch—in particular, the low ceilings on maximum recovery—makes clear the modest scope of these programs. The schemes are designed primarily to address the immediate basic needs of crime victims associated with the violence itself. In this regard, they offer something of a safety net to crime victims, rather than aspiring to restore benefit recipients to a semblance of their previous station in life—as all of the no-fault plans described earlier do, in varying degree.

E. An Afterword

In this array of no-fault models, the Fund appears notably generous from a need-based, let alone a restorative, perspective, even under the constrained interpretation of the Special Master. Once again, it is critical to focus on the basic, contrasting premises of tort law. In particular, I have in mind the point of intersection of deterrence and corrective justice theories: that a “responsible” defendant ought to be charged with losses reflecting what is required to make a “deserving” plaintiff whole.¹¹³ These considerations are foreign to the no-fault model, which is premised on a collective notion that basic needs recovery ought to be the norm for categories of beneficiaries afforded special recognition from a social welfare perspective—not necessarily an absolute limitation to basic needs, but in every case a recognition of *some* horizontal equity constraints. I remain unconvinced that any future special recognition of victims of terrorism outside tort would, or should, depart from this latter norm.

In an important sense, though, the Fund’s comparative merits raise second-order considerations. I have saved for last the more fundamental question in assessing its longer-term viability: whether *any* compensation scheme designed specially to benefit victims of terrorism, or more broadly violent crime, rests on a satisfying justificatory principle.

112. *Id.*

113. This assumes no shared responsibility—an assumption that holds for present purposes (victims of terrorism and criminal violence).

IV. SOME THOUGHTS ON RECOGNIZING DISCRETE CATEGORIES OF VICTIMS FOR COMPENSATION

Almost a century ago, in a classic article, *Sequel to Workmen's Compensation*,¹¹⁴ Jeremiah Smith reacted with dismay to the initial wave of no-fault reform:

If the fundamental general principle of the modern common law of torts (that fault is requisite to liability) is intrinsically right or expedient, is there sufficient reason why the legislature should make the workmen's case an exception to this general principle? On the other hand, if this statutory rule as to workmen is intrinsically just or expedient, is there sufficient reason for . . . refusing to make this statutory rule the test of the right of recovery on the part of persons other than workmen when they suffer hurt without the fault of either party?¹¹⁵

This is not the place to reconsider the case for now long-established categories of no-fault claimants. But every proposal to adopt or expand a new category of beneficiaries raises the basic issue of justification in principle that troubled Smith in earlier times.

The Fund, and various alternative models for superseding the default system of tort, make claims for special treatment on behalf of victims of terrorist incidents. But what precisely is the premise on which these claims rest? The Fund itself can be narrowly construed as a special case: terrorism as manifested in a singularly horrific sequence of events was tantamount to an act of war. So characterized, however, it is of limited interest as a precedent for future consideration; it was simply the occasion for an ad hoc political response. On further reflection, however, a similar conception of victims as martyrs of attacks on the nation can be associated with the Israeli no-fault scheme for compensating victims of terrorism—and the Israeli scheme is, of course, ongoing in coverage rather than tied to the casualties of a single incident.

Whatever one makes of the rhetoric of a “war on terrorism” in the context of our current national state of affairs, linking a compensation scheme to alien enemy attacks establishes an uneasy limiting principle. Is there good reason to opt for a no-fault scheme that would distinguish between events with the strong commonalities of September 11th and Oklahoma City, on the grounds that Timothy McVeigh was an American citizen rather than a foreign operative? At the same time, the “war” rhetoric is placed under considerable strain if victims

114. Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1913).

115. *Id.* at 251.

of McVeigh are afforded similar treatment to September 11th victims. The logical consequence would be that the nation has been “at war” with various benighted predecessors to McVeigh, from assorted motley white Aryan survivalists to Ted Kaczynski, the Unabomber—all of whom have claimed multiple innocent victims out of a sense of rage against the social order, as they viewed it.

In fact, the more closely one focuses on terrorism as the linchpin for a no-fault plan, the more unstable the foundation becomes. Cut loose from the war rhetoric, there remains a necessity to ground the establishment of a scheme in some special sense of indebtedness to the unfortunate victims of terrorist activity; some basis for expressing a special sense of national gratitude or bereavement.¹¹⁶ Of course, there is nothing illegitimate about these sentiments. But they seem to miss the mark in the context of the Unabomber’s victims, or those who fell before the brief reign of terror of the Washington-area snipers, John Muhammad and Lee Malvo, in October 2002. To discriminate among this multitude of victims, *all* of whom were, in the common vernacular, victims of terrorism, seems at odds with a basic sense of fairness—that is, treating like cases in like fashion. Yet none of the justifications offered above seems to satisfy a claim for *uniform* treatment of these disparate incidents of terrorism.

Under a broader conception focusing on victims of criminal violence, as in Northern Ireland or the state victim compensation programs, there would be no call for these refined distinctions among terrorist activities in creating a beneficiary class. Still, the search for a satisfying justificatory principle remains problematic. The highly respected English scholar, Patrick Atiyah, has been one of the most outspoken critics of the English Crime Injuries Compensation Scheme, adopted in 1964, which played a formative role in triggering California’s pioneering adoption of a similar program one year later in this country.¹¹⁷ Atiyah levels a general attack on the Scheme reminiscent of Jeremiah Smith almost a century ago:

116. Another argument would be the failure of the state to meet an implicit obligation to provide public security. But there is a striking disjuncture between this rationale and the judicial resistance in tort to recognizing a general obligation on the part of the police to prevent criminal acts that result in personal injury. *See, e.g., Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987). More generally, the rationale of failure to provide adequate security offers no satisfactory stopping point from a no-fault perspective short of a blanket assurance that *anyone* injured by a random act of violence in a public place will receive state compensation. Interestingly, however, this argument may have special force in the context of September 11th, in view of the documentation of security lapses prior to the events of that day. *See supra* note 24.

117. *See* 1965 Cal. Stat. 1549.

The [Home Office working party] committee never really came to grips with the crucial issue, which is not whether victims of criminal violence ought to be compensated by the State, but whether there are any grounds for giving such victims financial support over and above social security benefits available to others. The committee did point out that the welfare state did nothing for the victims of crimes of violence 'as such.' But why should this matter, provided it does something for them? The working party perhaps thought that social security benefits were too low. If this is so, the right solution is to increase benefits across the board, not to provide extra benefits for particular groups of needy people at the expense of the generality.¹¹⁸

To highlight the concern, consider in somewhat greater detail the Rhode Island nightclub fire, referred to earlier.¹¹⁹ On the evening of February 20, 2003, a rock band, Great White, staged a concert in an overcrowded nightclub, The Station, in West Warwick, Rhode Island, using pyrotechnics as part of their act that ignited foam insulation on the walls of the club. The ensuing fire turned the club into a raging inferno and led to 100 deaths and almost 200 injuries, many of which were very serious burn cases.¹²⁰ Early estimates of the total prospective claims in tort ranged in the area of one billion dollars.¹²¹

Tort defendants were not hard to identify. The foam insulation appeared to be highly flammable, which suggested the possibility of suits against the owners of the nightclub, as well as the company that supplied the foam and its manufacturer.¹²² The foam had been in place for nearly three years, and yet the municipal fire inspector had certified the club as recently as two months before the fire¹²³—strongly suggesting viable claims against the municipality. The band itself, of course, and its manager, were certain defendants. And in the search for deep pockets, Clear Channel, the largest operator of radio stations in the country, which had promoted the concert on its local affiliate

118. See PETER CANE, *ATYIAH'S ACCIDENTS, COMPENSATION AND THE LAW* 253 (6th ed. 1999).

119. Bombardieri, *supra* note 27.

120. See Stephen Smith, *10 Weeks After R.I. Fire, 100th Victim Dies*, BOSTON GLOBE, May 6, 2003, at B1.

121. See Christopher Rowland & Jonathan Saltzman, *Suit Filed in Fire as R.I. Mulls Aid Fund Liability Claims Seen Topping \$1b*, BOSTON GLOBE, Mar. 5, 2003, at A1. See also Stephanie Ebbert, *Liability Coverage in R.I. Fire Put at \$10M*, BOSTON GLOBE, May 2, 2003, at B2.

122. Apparently, the supplier's salesman was a neighbor of the owners who allegedly suggested the product when informed about noise complaints from other neighbors. Jonathan Saltzman, *Purchase of Foam at Club Is Traced*, BOSTON GLOBE, Mar. 6, 2003, at B5.

123. Sarah Schweitzer & John McElhenny, *2 Say They Didn't Know of Foam at Club*, BOSTON GLOBE, Mar. 2, 2003, at B1.

and whose disc jockey introduced the band, was named in early filings.¹²⁴

As in the case of September 11th, however, it is one thing to identify defendants and another to recover compensatory damages in tort. In the West Warwick case, too, the prospect of insolvency casts a pall on tort litigation: the owners, band members, and those in the supply chain of the foam insulation materials all appear to be marginally solvent defendants with limited insurance coverage that might, in fact, be unavailable in any event if criminal charges are filed. The town's liability, even if established, is limited by state statute to \$100,000 per plaintiff.¹²⁵ It seems unlikely that even by recourse to joinder of defendants, anywhere near the out-of-pocket loss would be recoverable, let alone claims for intangible loss—consider, once again, the serious burn cases, along with the prospect of 100 wrongful death claims. And in the absence of settlement, a protracted litigation process would almost certainly ensue, during which the plaintiffs would be left to their own resources, with serious liability issues in doubt against some defendants, particularly the radio station and foam manufacturer.

I discuss the West Warwick case in some detail as a stand-in for the kinds of catastrophic events—put aside natural disasters—that occur, seemingly at random, in the course of everyday life. Indeed, a not entirely dissimilar nightclub disaster had occurred in Chicago, with a substantial number of fatalities, less than a month earlier.¹²⁶ The West Warwick victims were innocent parties who, like the victim class in terrorist-related incidents or instances of violent crime, are highly unlikely to realize anywhere near full recovery in the tort system. But they are not victims of criminal violence, let alone terrorist activities. Should it matter? Should it matter if they were the innocent victims of a runaway car plowing through an outdoor street market?¹²⁷

Bereavement will not serve as an adequate discriminating principle. Presumably, communal sympathy extends to the West Warwick fire victims in full measure, as it does to victims of violent crimes. Nor will bereavement provide an inclusive principle that stops at the victims of human error once one considers the innocent and destitute victims of personal injury from a natural disaster.

124. See Jonathan Saltzman, *R.I. Fire Victims' Lawyers Eye Firm Suits Expected To Name Radio Station's Owner*, BOSTON GLOBE, Mar. 8, 2003, at B1.

125. Rowland & Saltzman, *supra* note 121.

126. *Stampede at E2; Fiction and Fact*, CHI. TRIB., Mar. 5, 2003, at C26.

127. See Joel Rubin et al., *Car Plows Through Crowd in Santa Monica, Killing 9*, L.A. TIMES, July 17, 2003, at 1 (Another victim died the next day and more than fifty were injured in this incident.).

In the end, I am not seeking to raise the neglected banner of Jeremiah Smith and propose either a rollback of all no-fault schemes or an extension to create a New Zealand-type comprehensive no-fault system.¹²⁸ But I do think that normative reservations—that is, the difficulty in finding a conceptually satisfying rationale for incremental extensions of benefit recipients beyond September 11th victims—merge with realpolitik considerations to explain why it is so difficult to displace or radically diminish the role of tort as our default system, inadequate as it may sometimes be, in addressing every manner of personal injury from accidental or intended harm.

128. On the New Zealand system, see Todd, *supra* note 54.

