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THE CASE FOR SPECIALLY COMPENSATING THE VICTIMS OF TERRORIST ACTS: AN ASSESSMENT

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I. INTRODUCTION

It is a bleak fact of life that the overriding political focal point of this still-young century has been terrorist activity. For the United States, of course, the defining moment was 9/11. In many parts of the third world, terrorist mayhem has become the salient feature of everyday life. The specter of it haunts this country, as well: How long will the current reprieve on the home front last? If terrorism on our soil is to recur, will it be a series of smaller acts or another catastrophic event? What additional measures should be taken to try to assure a quiescent domestic life, let alone turn the tide elsewhere? These questions raise profound issues of constraints on civil liberties, deployment of the armed forces, and diplomatic initiatives that are a staple of current political commentary.

As long-time participants in the policy debates over schemes for compensating personal injuries, we set our sights on a far narrower, but nonetheless critical, component of the effort to comprehend and deal wisely with the ramifications of a world roiled by the prospect of continuing terrorist activity. In light of the daunting possibility of terrorists striking again on the home front, what special measures, if any,

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should be taken to assure compensation to their unwitting victims? Our focus here is on those maimed or killed by terrorism and not on the property damage and business interruption that terrorism can also bring about.¹

The starting point for any discussion of the compensation of these victims (and their survivors), we believe, is an appreciation of the baseline arrangements our nation has in place for those killed or seriously injured, regardless of cause. First, there is tort law, which permits victims and their survivors to sue their assailants for money damages. Of course, in the usual case, an individual terrorist will either not be captured, or even if so, will have woefully insufficient assets to satisfy any tort judgment that might be awarded against him for his heinous act. Hence, claimants looking to sue will almost inevitably be searching for a second best, but deep-pocket, defendant. That is likely to be a large or well-insured corporation or branch of government, which arguably should have prevented the terrorist act.² After all, even if the terrorists themselves are most blameworthy, it is easy to see how victim survivors can become especially incensed if they conclude that “our people” should have kept this outrageous event from happening.

To be sure, actually succeeding through recourse to tort remedies is fraught with hurdles. Proving that a firm or agency of government was actually at fault and that safer conduct would have actually prevented the harm is far easier to plead than to prove. Moreover, government defendants generally enjoy immunity in tort from challenges to discretionary acts or policy choices that are claimed to have been unreasonable.³ Yet, sometimes this approach succeeds, as it did, for example, against Pan American Airways with respect to the terrorist

1. Some of our earlier work that is relevant to the ideas developed here includes Robert L. Rabin & Suzanne A. Bratis, *United States*, in *FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: A COMPARATIVE LEGAL APPROACH* 303 (Michael Faure & Ton Hartlief eds., 2006); Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 *MD. L. REV.* 699 (2005) [hereinafter Rabin, *The Renaissance*]; Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 *DEPAUL L. REV.* 769 (2003); Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 *CLEV. ST. L. REV.* 573 (2001); Stephen D. Sugarman, *Roles of Government in Compensating Disaster Victims*, *ISSUES IN LEGAL SCHOLARSHIP*, 2007, art. 1, <http://www.bepress.com/cgi/viewcontent.cgi?article=1093&context=ils>.

2. Financiers of the terrorists are also plausible defendants, but gaining access to assets of those who were part of the terrorist conspiracy can be difficult to achieve.

3. See *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (discussing the government’s immunity from tort liability under the Federal Tort Claims Act when the claim is “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government” (quoting 28 U.S.C. § 2680(a) (2000))).

bombing over Lockerbie Scotland, in which Pan Am was found to have been grossly negligent in allowing the explosives on board.⁴

In addition to tort liability, several other social welfare programs exist that are designed to deal with income replacement needs and the payment for necessary medical care when people are badly injured or killed. Most fundamentally, Social Security provides survivor benefits to dependents of anyone who, before death, had a sufficient work history to be considered “insured” under the program.⁵ As a result, sums related to the victims’ past wages will be paid to minor children, surviving spouses who care for them, as well as to elderly surviving spouses.⁶ Moreover, if the terrorist victim lives, but is fully disabled, Social Security will also pay wage-related disability benefits and Medicare will cover medical expenses, again provided that the victim had the requisite work history at the time of the terrorist attack.⁷

Beyond these mandatory government programs, many families voluntarily opt to purchase life insurance on the life of a family breadwinner and/or long-term disability insurance against the risk that a breadwinner will be fully disabled. Furthermore, when a victim is killed or harmed while in the course of employment (most easily illustrated for these purposes with regard to first-responders who are killed or badly injured while coming to the rescue of terrorist victims), workers’ compensation benefits will also be available. Finally, many states have so-called “victims of violent crimes” schemes that normally would be activated with respect to victims of terrorism. Yet it should be emphasized that these latter plans are often badly under-funded and only provide minimal benefits to eventually-successful claimants.

Hence, one policy option is to leave victims of terrorism to whatever they might obtain from these baseline, or default, systems. Or to put it differently, we ask on what basis, if any, should terrorist victims be singled out for different treatment? Is there something about being victims of terrorism that should entitle them and their survivors to be treated better than they would be by Social Security, victims of violent crimes schemes, and the like? Is there something about tort law’s

4. See *Pescatore v. Pan American World Airways, Inc.*, 887 F. Supp. 71, 72 (E.D.N.Y. 1995) (upholding a jury verdict awarding \$19,059,040 in damages on a wrongful death claim for Pan American Airways’ willful misconduct).

5. See 42 U.S.C. § 402(d)-(f) (2000) (providing benefits to surviving children, wives, and husbands).

6. *Id.*

7. See 42 U.S.C. § 423(a) (2000 & Supp. 2004) (providing benefits to individuals under “disability,” as defined by the Act); 42 U.S.C. § 426(b) (2000 & Supp. 2004) (providing hospital insurance benefits to qualified individuals).

application, or non-application to the terrorist setting, that makes a special compensation scheme appropriate for victims of terrorism?

In addressing these questions, it seems to us that there are two basic alternatives to the default solution. One would involve the creation, *ex ante*, of an ongoing victim compensation fund in anticipation of the occurrence of future terrorist acts. The other would involve the *ad hoc* creation of a fund established after the occurrence of a terrorist event to retrospectively provide compensation to victims. Israel and Northern Ireland are examples of countries with longstanding experience with terrorism, which have adopted legislative schemes of the first sort. In the United States, the 9/11 Victim Compensation Fund is an example of the *ad hoc* retrospective approach.

We will proceed by offering some comments on the 9/11 Fund itself, setting it in the context of other American compensation schemes that arose out of concerns about the appropriateness of having injury victims seek compensation through tort law. Next, we will consider, in turn, the *ex ante* and *ex post* options for addressing the claims of terrorist victims. Finally, we will return to the default systems described briefly above, raising the question of whether they offer in all—or most—circumstances the most sensible approach to dealing with future incidents of personal injury from terrorist acts.

II. A RETROSPECTIVE LOOK: WHAT MADE THE 9/11 FUND UNIQUE

Drawing on prior European experience, workers' compensation laws came into effect in the United States in the early years of the twentieth century at a time when tort claimants were having limited success following the death or serious injury of a worker arising from an on-the-job accident. Doctrinal hurdles, procedural burdens and more left many workers or their widows and children destitute. One of several employment-related legislative achievements of the Progressive Era, workers' compensation plans (adopted state-by-state rather than nationally) assured families at least some financial support in cases of injury or death from work accidents.

Today, these laws generally provide injured workers with income replacement of two-thirds of lost wages, up to a moderate monthly ceiling, plus the payment of related medical expenses. Unlike tort law, these schemes do not generally provide benefits for non-economic loss (pain and suffering).⁸ Beyond payments for injuries, workers'

8. Arguably, one exception arises from the fact that workers' compensation plans in many states treat specified permanently disabling injuries (like loss of an eye or loss of a leg) as very

compensation lump-sum benefits are paid to the survivors of a worker killed on the job, with the actual amounts provided varying considerably from state to state.

To be sure, workers' compensation benefits are considerably less generous than those provided to successful tort claimants. Yet, the awards come with important advantages: they are reasonably promptly provided and without the necessity of any showing of employer fault. Two further points about workers' compensation need additional emphasis here. Most strikingly, in the United States these benefits substitute for the right to claim in tort. By contrast, the typical European rule allows victims both to claim workers' compensation benefits and sue in tort, although they are not able to recover again in tort for the benefits they already obtained.⁹ Notably, as well, workers' compensation came into play in the United States before the now-existing Social Security system was enacted (in the 1930s) and before our current employer-based health insurance scheme was developed (largely in the 1940s and 50s).¹⁰ Nowadays, that often means that an injured or killed worker's family can access an overlapping set of benefits with the various plans having complex rules of coordination among them.

Starting in the 1960s, tort law's failings with respect to auto accidents became evident to many. Auto insurance seemed expensive, all the more so when it was revealed that more than half of the premium dollar was diverted to the payment of administrative costs—most importantly legal expenses. Many tort claims seemed to take forever to settle. Jury awards appeared to vary wildly for the same injury. More than a quarter of auto accident victims received nothing from the tort

rough proxies for specific periods of disability. The result of those schedules is to give some injured workers with a listed work injury more (or less) money than an individualized wage-replacement commitment would provide.

9. See, e.g., Laura Salvatori, Alessandro Santoni & Darren Michaels, *Asbestos: The Current Situation in Europe*, ASTIN, at 5, 2003, http://www.actuaries.org/ASTIN/Colloquia/Berlin/Salvatori_Santoni_Michaels.pdf (noting that "[i]n the Netherlands victims of occupational diseases are compensated through various health and disability insurance programmes where both work related and non work related claims are covered. In addition they can sue their employers. . . . In Italy it is [also] possible to claim workers' compensation and sue the employer.").

10. See W. Eugene Basanta, *Consumer-Driven Health Care: Legal and Policy Implications*, 28 J. LEGAL MED. 1, 2 (2007) (noting that the employer-based health insurance system was fashioned in the 1940s and 1950s); Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1101 (1997) (noting that "the Social Security system [was] enacted in 1935 and 1939"); Paul Raymond Gurtler, Comment, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 HAMLINE J. PUB. L. & POL'Y 285, 285 (1989) (noting that "most of our nation's compensation laws were passed by individual state legislatures between 1911 and 1920").

system because they were hurt in a single car accident or because no one was at fault. Others received nothing or sharply reduced compensation because the careless driver was uninsured or underinsured or because the victim was also at fault.

Auto no-fault compensation schemes were promoted as a cheaper and better alternative. In the 1970s, Quebec enacted a complete substitute for tort law for auto accidents, broadly analogous to workers' compensation but with more generous benefits both in terms of non-economic loss payments for seriously injured victims and higher wage replacement rates of a higher level of earnings.¹¹ But in the United States, no comparable scheme ever took hold. Some states adopted add-on plans that provided very modest benefits to victims and allowed those who were not satisfied to sue, as ever, in tort.¹² Somewhat more ambitious plans were adopted in Michigan and New York, most notably, where minor accident victims were precluded from recovering for pain and suffering in tort—and where more generous no-fault benefits were provided to cover income loss (again, with relatively modest monthly ceilings) and medical expenses.¹³ These “modified” plans had the effect of taking a large share of the small cases out of the tort system, but leaving the serious injury cases to tort law.

In the 1980s, product liability claims against vaccine drug makers threatened to leave America without a supply of what the public health community viewed as essential childhood vaccines. To deal with the concern that tort law was driving pharmaceutical companies from this business, Congress adopted a Childhood Vaccine Compensation Plan.¹⁴ Children who displayed certain serious harm symptoms shortly after being vaccinated for one of the designated diseases were presumed to have been harmed by the vaccination (even though at times that was not actually the case). Their families could seek no-fault benefits under the compensation plan, which was designed to cover the child's related medical care plus a moderate level of assumed lost income if the child was expected to survive beyond age eighteen, the presumed age at which

11. See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 395 (1994) (noting that “[a]uto no-fault in the Canadian province of Quebec . . . provides unlimited benefits for out-of-pocket losses, and entirely abrogates tort liability for personal injury”).

12. See Robert L. Rabin, *The Renaissance*, *supra* note 1 (“Add-on plans provide limited no-fault benefits as an alternative source of compensation without adopting thresholds on access to tort.”).

13. See *id.* (noting that “the New York plan replaced tort liability for the first \$50,000 in ‘basic economic loss,’ and excluded pain and suffering recovery as well”).

14. See 42 U.S.C. § 300aa-1 to -34 (2000 & Supp. 2004).

he/she otherwise would become a wage earner. In addition, the plan allowed for a payment of up to \$250,000 for non-economic loss. Unlike American workers' compensation schemes, this plan was not a compulsory substitute for tort claims. Claimant families could choose one claim route or the other; however, the tort route was narrowed by Congress, which imposed some doctrinal limits on tort claims that the most liberal states had not previously adopted.¹⁵

Against this background, the unique, as well as the especially generous nature of, the 9/11 Fund can be made clear. First, notice that the no-fault schemes already described are not "event-centered" single-incident plans. Rather, they are *ex ante* plans, designed in anticipation of a continuous future stream of injuries "arising out of" a given activity—such as, accidents in the workplace, in the use of a motor vehicle, or in the administration of a childhood vaccine. As such, they constitute a form of social insurance against statistically predictable risk, not unlike such social insurance schemes as unemployment compensation or Social Security itself. By contrast, 9/11 was the quintessential once-in-a-lifetime disaster. Coming out of nowhere, the compelling question from a compensation perspective was whether to enact an *ad hoc ex post* scheme.

Second, note that the other plans have stable bureaucratic arrangements for processing claims—either through private insurers as in workers' compensation and auto no-fault plans or through a federal agency and the Court of Claims in the vaccine-related injury plan. By contrast, considerations of timeliness cut in favor of creating a single-administrator type mechanism for the 9/11 plan that would promote efficiently getting regulations in place, benefits distributed, and the Fund dissolved with as much dispatch as possible. Hence, a Special Master was employed, a *czar* of sorts, with plenary authority over implementation of the scheme.

Third, the 9/11 Fund was *governmentally* funded rather than treated as a private cost of doing business (or engaging in a particular activity) as in the traditional schemes—for example funded by employers, motorists, or through a surcharge in the cost of childhood vaccines.

15. Other schemes might be added to this list. For example, the Black Lung program is, in effect, a federally adopted arrangement to assure workers' compensation-like benefits to coal miners suffering from certain occupational diseases. Somewhat different is the Price-Anderson Act (as amended), a federally-created advance arrangement set up to provide a fairly deep pocket of funding for victims of a serious nuclear accident (although the fund would not be nearly sufficient to pay for the harms that would occur were a Chernobyl-type accident to happen in the United States). The tort law limits of this scheme were thought necessary to get the electric power generating industry to embark on the building of nuclear power plants.

Moreover, funding of the 9/11 plan was open-ended so that the Special Master was not provided with any aggregate limit on the compensation that might be paid out to victims of the disaster.

Fourth, the degree of wage replacement provided for in the 9/11 plan was unprecedented. The statute itself implied complete wage replacement without a ceiling, including individualized prediction of future earning capacity—as contrasted, for example, with a two-thirds limit on a moderate level of wages which characterizes state workers' compensation laws.¹⁶ Similarly, the statutory version of the Fund provided for open-ended recovery of intangible loss, although the Special Master's regulations adopted specific limits on benefits for non-economic loss—\$250,000 for the survivors of every deceased victim, plus \$100,000 extra for every surviving spouse and minor child.

Fifth, on the other hand, by express provision of the enabling statute, the Special Master was required to reduce the award for wage replacement where the family had access to specific collateral sources—most importantly, to life insurance proceeds. This was something of an unprecedented cut-back. In workers' compensation, auto no-fault, and the childhood vaccine scheme, no reduction in benefits occurs because of private life insurance.¹⁷ The incongruity of this harsh set-off rule for collateral sources is particularly evident in light of the open-ended statutory provisions for individualized recovery of lost wages and intangible loss, just discussed. The set-off provision appears to promote a needs-based social welfare perspective while the economic and intangible loss provisions resonate with the individualized approach of tort damages.

Sixth, unlike American workers' compensation, but broadly like the childhood vaccine plan, the 9/11 Fund was not a mandatory substitute for tort claims. Instead, claimants had the choice—claim from the fund or sue in tort. Yet, for those who would elect to sue, the 9/11 plan (unlike the childhood vaccine plan) limited the liability of the most at-

16. The Special Master published detailed regulations specifying guidelines for determining the wage replacement that would be given to survivors of those who earned up to \$231,000 a year. For even higher earners, those in the top 2% nationally of annual earnings, he was not specific. The Special Master was sued by some survivors of high earners, but he defeated their claim when he made clear that there was not to be a hard cap on earnings beyond \$231,000. Although it has not been officially revealed how the families of those extremely high earners were treated, it appears that they probably received somewhat less than 100% wage replacement for amounts beyond that level.

17. This feature especially irritated some survivors of high earners who had high value life insurance. Some understandably complained that they would obtain much less from the Fund than would a parallel family whose breadwinner had elected to buy a fancy sports car rather than investing in life insurance to protect his/her family.

risk defendants (the two airlines whose planes were crashed) to the amount of their liability insurance policies at the time, which was \$1.5 billion per plane.¹⁸ In fact, ninety-seven percent of the families of those killed by the 9/11 terrorists decided not to sue and to take what the fund provided.¹⁹ Of the few who did sue, it is speculated that, although some were seeking “the truth” about what happened, others were families whose deceased loved one carried a great deal of life insurance.

Notwithstanding its peculiar treatment of collateral sources, the 9/11 plan’s virtually unrestricted obligation on the part of the federal government to make good for personal harm on a no-fault basis is without precedent. But then, of course, many would argue that the nature of the event itself was unprecedented. In this regard, several facts bear emphasizing. One is the feared collapse of the airline industry if 9/11 victims primarily pursued their tort claims. Second is the existence of so many victims (nearly 3000 fatalities and many badly injured) who might be regarded as stand-ins for the entire nation in the sense that America itself was seen to be under attack by the 9/11 terrorists. Third are the arguable security failures on the part of the nation’s intelligence services (although recriminations along these lines did not crystallize until after the plan was enacted). Viewed this way, perhaps the singular nature of both the event and the attendant compensation scheme converge.

Still, this does not mean that the plan’s terms, either as broadly established by Congress, or as specifically implemented by the Special Master, were necessarily the ideal ones. To be sure, the 9/11 Fund struck gold in obtaining the services of an extraordinarily able administrator, Kenneth Feinberg, who subsequent to promulgating the implementing regulations, conducted nearly 1,000 individual hearings, along with numerous informational sessions, while serving without pay for the three years that the Fund was in existence.²⁰ Nonetheless, the upshot is that claimants received both extraordinarily large awards and at the same time strikingly different sums: Death benefit awards averaged \$2.1 million, and ranged from \$250,000 to \$7.1 million.²¹

18. This limit applied to all tort claims, including property damages and business interruption claims that might be brought against defendants, not just claims for death and personal injury.

19. KENNETH R. FEINBERG ET AL., DEP’T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 1 (2004), available at http://www.usdoj.gov/final_report.pdf [hereinafter FEINBERG, FINAL REPORT].

20. His experiences in administering the Fund are recounted in KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005).

21. FEINBERG, FINAL REPORT, *supra* note 19, at 110.

As a basic compensation mechanism, the Fund's above-average awards dwarf other schemes. After all, investing \$2 million a year at 5% yields \$100,000 in annual income, which is roughly twice the average American household income level (to say nothing of the fact that a substantially higher annual yield could be achieved by turning \$2 million into an annuity for the expected remaining lives of the survivors). On the other hand, so long as Congress was unwilling to preclude recourse to tort, it is not at all clear how many would have elected to receive compensation from the Fund, rather than sue in tort, were its benefits far more modest.

This suggests to us that Feinberg was put in a position of pursuing three quite inconsistent goals. First, he was charged with being generous enough to seduce claimants away from the tort route—which he did by awarding full (or nearly full) wage replacement. Second, he was charged with acknowledging the equal dignity of the each life lost—which he did by awarding a fixed minimum of \$250,000 in intangible loss to the surviving family members of every decedent. Third, he was charged with assuring that every surviving family had its basic income needs provided for—which he pursued partly by reducing benefits for those who needed less when they had life insurance and partly through the perhaps plausible argument that those with higher fixed living costs needed more money.

But overall, it seems fair to say that to entice people away from court, Feinberg covered well more than their basic needs, and by rewarding families differently when their loved ones had very different earnings histories, he moved sharply away from a principle of treating each life as of equal value. Subsequently, Feinberg has said that he would rather have provided a similar lump sum to each surviving family, and yet, depending on how large that sum would be, the plan would have risked failing to serve his overriding objective of persuading the vast majority of claimants to avoid the uncertainty and anguish of protracted tort litigation.

III. POSSIBILITIES FOR THE FUTURE

A. *An Ongoing Fund for Victims of Terrorism*

Should the United States adopt an *ex ante* scheme to compensate future victims of terrorism? In designing such a legislative compensation scheme, one would have to begin with the question of defining the compensable event—that is, designating the class of beneficiaries

entitled to recover. This turns out to be a complex question. Should the entire range of potential incidents, from street corner explosions to catastrophic attacks, fall within the purview of the plan? Or should recovery be limited to victims of “mass” attacks, however that might be defined?

There is another dimension to this question, as well. As recent killing sprees illustrate, the conceptual boundaries of “terrorism” are far from self-evident. If there is to be a separate category of “terrorists” that is not to include all killers, surely the 9/11 perpetrators, who were politically motivated outsiders who attacked a democratic nation by deliberately taking the lives of innocent civilians, belong in that category. The same goes for those who blew up buses in London and the train station in Madrid. But is the American Unabomber, who, acting from very different motivations, undoubtedly “terrorized” people for years with his seemingly random acts of homicide, also properly labeled in this way? And what of other serial killers or schoolyard killers who gun down large numbers of fellow students? Are they “terrorists” for purposes of an ex ante compensation scheme?

There are foreign models that offer some insights into the purposes that might be served by compensation for terrorist victims. In Israel, those suffering fatal injuries in terrorist incidents of any sort are treated identically to soldiers killed in the line of battle.²² The surviving family receives a flat death benefit award and an array of supplementary economic benefits such as educational grants for surviving children—but no recovery for intangible loss. The underlying premise is that any victim of terrorism, under the conditions of life in Israel, is tantamount to a fallen soldier in war. This may have special resonance in Israel where mandatory military service itself is a strong feature of citizenship (at least among Israeli Jews). More broadly, however, just as soldiers receive what are, in effect, special forms of benefits for injuries and death suffered in the course of military service (their job), so, too, civilian victims are awarded these forms of benefits in recognition of the hazards of life in that society.

In Northern Ireland, victims of terrorism are compensated through a more general compensation scheme for victims of violent crimes.²³ More generous than comparable American plans, the Northern Ireland scheme (as in Israel) provides a workers’ compensation type of scheduled benefits plus a modest level of additional recovery, in the Irish case for

22. See Rabin, *The September 11th Victim Compensation Fund*, *supra* note 1, at 793-94.

23. *Id.* at 794-95.

intangible loss. The premise of the plan is that terrorist acts are one important instance of criminal violence to which citizens are more generally at risk in that society.

Neither of these analogies seems altogether apt for the United States however. First, the United States, fortunately, is not suffering from the routine terrorism experienced in those other two nations. Second, most Americans never serve in the military and victims like those killed on 9/11 (or in the Oklahoma City federal building bombing) just do not culturally feel like soldiers to us. They do feel like victims of criminal acts, but as already noted, other Americans who are victims of heinous crimes are far more meagerly compensated, if at all—and by state plans not a national scheme.

To be sure, one could well argue that the state owes its citizens general protection from violent acts—either through preventive measures or, if they fail, through compensation for basic needs. As a moral proposition, this principle may have considerable appeal, although it opens the door to a wide array of vexing questions, ranging from whether the victim's level of need should be taken into account in determining eligibility, to whether an expectation of reasonable self-protective conduct should serve as a threshold for entitlement to benefits. But as a practical matter, in American society, where violent crime is pervasive, an expansive obligation at the national level to compensate for need-based injuries from violent activity—compensating victims of terrorism, in other words, as a subset of this more broadly-conceived government obligation—is probably not a realistic option.

B. An Ad Hoc Fund

If an *ex ante* plan is not in the cards for America, what about the desirability of *ex post* adoption of further *ad hoc* compensation schemes if new tragedies like 9/11 were to occur? At the outset, one can predict that short of truly enormous catastrophes like 9/11, any such Congressional response is highly unlikely: Efforts to secure *ad hoc* legislative compensation schemes for recent instances of mass victimization, ranging from Oklahoma City to asbestos exposures, have all fallen flat.

But what if there is another event on the scale of 9/11? Suppose terrorists contaminate the water supply in a city and kill thousands or do the same by exploding a small-scale “dirty” atomic bomb? While an analogy to 9/11 could of course be drawn, there is, as well, the awkwardness of the analogy to the aftermath of Hurricane Katrina.

There, more than 1000 people were killed, and yet nothing special whatsoever has been provided to acknowledge the dignity of the victims, or to assure basic compensation to their survivors. Perhaps this is explained by the fact that people knew they lived in an area at risk for hurricanes (and yet what is one to make of the knowledge New Yorkers had of the previous attack on the World Trade Center?). Perhaps, the indifference to Katrina victims is realistically explained by the predominant racial and socioeconomic status of the victims, but this is too odious to accept as a matter of principle. Or, perhaps the indifference is explained by the absence of a perceived need to insulate a vital industry like the airlines from liability in the case of Katrina.²⁴

In the end, we are left with the point that the 9/11 Fund emerged from a catastrophe that touched the collective conscience of the nation as no other since Pearl Harbor. This does not seem a solid foundation for the future, offering nothing by way of principle. It implies only that we can do little more than hold open the prospect of limited recourse to ad hoc compensation, recognizing that any such recourse should turn on terrorist acts of a magnitude that rends the fabric of a communal sense of security.

Alas, from that vantage point, even in the case of a catastrophic event of personal harm, an ad hoc fund by its very nature runs a substantial risk of being myopic in design—fixated with excessive particularity on the event at hand. In this regard, the 9/11 Fund provides a cautionary note. The enactment tried to be all things to all stakeholders, and the result was a fund with deep internal contradictions: A hybrid mix of tort-type and social welfare provisions. Congress reacted spontaneously with no sense of “distance” from the event. While we would not dismiss out of hand the symbolic importance, let alone the need-based claims, for a government response to truly catastrophic human loss, an ad hoc strategy seems inapt for addressing terrorism-related incidents—other than the most catastrophic—that might arise in the future.

IV. CONCLUSION

We return to the question implicit in our earlier survey of default systems—tort and social welfare—for addressing victims of accidental

24. This way of distinguishing 9/11 from Katrina implies that pressure to governmentally compensate victims of, say, a “dirty” bomb or contaminated water supply, would depend on what sort of defendants might otherwise be sued and not merely that such an attack is another example of mass death from terrorism.

harm across-the-board: Why single out terrorism victims, however defined, for special treatment? It is a difficult matter, perhaps ultimately only a question of realpolitik, to distinguish between 9/11 victims and Oklahoma City victims.

Indeed, as we have suggested, it is no less difficult to make the case for special treatment of victims of terrorism when compared to victims of a natural disaster like Hurricane Katrina.

Victims of a natural disaster, whether flood, earthquake or tornado, may be in a better position to self-insure through first-party insurance for property damage or commercial loss than victims of terrorism.²⁵ But there is no basis for expecting these potential victims of natural disaster to have greater first party coverage against *personal injury or death*—in particular, life insurance, private health insurance, or wage replacement insurance—than victims of terrorism.

Similarly, under most circumstances, victims of natural disasters are likely to find inadequate redress in tort. The Act of God doctrine is, of course, a longstanding recognition of this compensation gap. To be sure, on occasion there may be collateral tort claims of inadequate protective measures by federal or state governmental entities—the failure to adequately maintain a dam or inspect a building. But this is equally the case in terrorism scenarios; there, the claim against government might be inadequate intelligence estimates or substandard policing activities. In either domain, the collateral claims, even if colorable, run up against formidable governmental defenses of discretionary acts.

Beyond the continuing traumatic reverberations of 9/11, life goes on, including the random acts of nature and venal individuals that pose a low-probability risk to all of us. In our view, this suggests that a better political response to the compensation needs of terrorist victims would be a more robust government commitment to a richer default scheme. We have in mind a mixed strategy of creating private incentives to self-insurance and affording greater baseline social welfare protection to injury victims, whatever the source of personal harm. As we see it, that would go a long way towards eliminating any need to design a plan specifically for victims of terrorism along the lines of the 9/11 Fund.²⁶

25. In this respect notice that the United States government is now involved in assuring financially feasible property insurance against terrorism risks just as it for decades has subsidized property insurance against flood risks.

26. We would not want to be taken as suggesting that earlier, or future, legislative no-fault systems are unwise as a matter of general principle. On the contrary, in the conduct of enterprise, where some activities generate statistically predictable risk, there is, at times, a substantial case for

And should truly catastrophic terrorist harm occur, leading Congress to conclude that an ad hoc compensation plan should be created, our instinct is that such a plan should track the singular occasion for its adoption—that is, an assault on our collective sense of community. Accordingly, such a plan would premise compensation on the traditional legislative no-fault model of recognizing basic needs, rather than the hybrid tort/social welfare model of 9/11.

Moreover, if this limited occasion for an ad hoc fund were to arise, it is our view that recovery under the plan should be exclusive, precluding any right of recovery—other than against the terrorists themselves—under tort law. In this way, the plan's benefits need not be made extra-generous solely for the purpose of inducing individuals to give up their tort claims. Besides, one must be mindful that, if there were a large catastrophic terrorist event for which some American deep-pocket defendants were being held liable in tort, their pockets are likely not going to be deep enough, with the result that the firm(s) would likely be forced into bankruptcy and victim claimants would be left with considerably lower recovery than their tort claims nominally were worth. In such settings, a forced shift to a non-fault based, prompt-paying, scheme that attends to basic needs could, in the end, be at least as beneficial for most victim families. Finally, were one concerned about the tort-preclusive effect of immunizing egregiously at-fault deep-pocket defendants, the ad hoc fund could be given a right of reimbursement against a wrongdoer, the end-effect of which would also probably drive any such firm into bankruptcy.

But this may be drawing us into details that should await another day. For now it may be best to conclude by thinking about our soldiers now being killed by suicide bombings in Iraq. Many of them were trained by our military to acquire skills that would have enabled them, had they lived, to go on to reasonably well-paid technical jobs in the private sector. Yet, the military survival benefits actually provided to their families fail to acknowledge their lost future income potential. This suggests yet one final reason, from a fairness perspective, for avoiding in any future catastrophic loss scenario the mandate of the 9/11 Fund to individualize benefits, and instead argues for adhering to a basic needs approach.

no-fault compensation, which constitutes an insurance system that can be funded by the risk-generators.