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## COMMENT

# IN CASE TERROR STRIKES AMERICA AGAIN: CONSIDERING A PERMANENT FUND FOR VICTIMS OF TERRORISM

ROBYN K. BROWN\*

### INTRODUCTION

Eleven years ago, two crashing towers shattered the American illusion of security. What began as a normal day at work ended in smoke, rubble, and thousands of families changed forever. The entire nation, once confident in its indestructibility, suddenly recognized the extent of its vulnerability. No longer did terrorism occur “over there,” but right at home.

Over time, the American people would learn that 2,977 victims lost their lives due to the September 11, 2001, attacks (“9/11”),<sup>1</sup> and thousands more were injured.<sup>2</sup> But these numbers represent only a fraction of those who were affected. Children were orphaned, spouses were widowed, and shock and grief reverberated throughout society. In the face of such a profound national tragedy, the American public expressed unprecedented sympathy for the victims and their families by showing solidarity through numerous prayer vigils, memorial altars, ribbons of remembrance, financial donations, and the ubiquitous display of the American flag. Yet, the American people also expected leadership from their government in discerning how to respond and move forward.

The government replied, and swiftly. One aspect of its multifaceted response was the creation of the 9/11 Victim Compensation Fund

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\* Robyn Brown is a 2012 graduate of the University of St. Thomas School of Law. She thanks her tremendously supportive family, friends, and professors (especially Hank Shea) for their consistent encouragement and guidance. She notes with appreciation the hardworking Law Journal staff, whose editorial suggestions enhanced this Comment.

1. NAT'L SEPTEMBER 11 MEM'L & MUSEUM AT THE WORLD TRADE CENTER FOUND., *FAQ about 9/11*, 9/11 MEMORIAL, <http://www.911memorial.org/node/780891> (last visited Mar. 14, 2013).

2. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 180–81 (2005) [hereinafter Ackerman, *Effective Response*].

(“Fund”).<sup>3</sup> Among the multiple purposes of the Fund were protecting the airline industry from collapse, providing financial assistance to victims and their families, and building public trust in the government. The Fund was widely hailed as a compassionate response, although it took some criticism.<sup>4</sup> The nation stands eleven years later, seemingly stronger—but also aware of its fragility. Terrorist attacks continue throughout the world, and the September 11, 2012, attack on the Benghazi consulate<sup>5</sup> was a stark reminder of the United States’ continued vulnerability. In light of this reality and lessons learned from the administration of the Fund,<sup>6</sup> the federal government should create a permanent fund for victims of terror that will stand ready to expeditiously address victim needs in the event of a future attack.

This Comment will explore the historical development, administration, and rationales underlying the Fund. Next, it will examine what can be learned from other compensation programs. It will then set forth some considerations for policymakers and suggest features of a future permanent American fund for victims of terror. Part I will describe the federal government’s compensation for victims of terrorist acts prior to 9/11. Part II will walk through the creation of the Fund, examine its administration, assess its effectiveness, and describe updates to the Fund since its creation. Part III will give an overview of other (non-9/11) compensation programs, including federal and state funds in America, international compensation programs established by the United Nations, and Israel’s permanent fund for victims of hostile acts. Part IV will examine several justifications for compensating victims, and Part V will suggest practical considerations for policymakers. Finally, Part VI will make specific recommendations regarding the creation and administration of a permanent fund.

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3. September 11th Victim Compensation Fund of 2001, as part of Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42 §§ 401–09, 115 Stat. 230, 237–41 (codified as amended in scattered sections of 49 U.S.C.) (2001).

4. See Ackerman, *Effective Response*, *supra* note 2, at 157–61; accord Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Attacks*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 663, 673 n.50 (2006).

5. Ambassador Chris Stevens and three American personnel were killed in an attack on the U.S. diplomatic mission in Libya. Hillary Rodham Clinton, *Statements on the Deaths of American Personnel in Benghazi, Libya* (Sept. 13, 2012), U.S. DEP’T OF STATE, <http://www.state.gov/secretary/rm/2012/09/197820.htm>. The attack was later deemed a terrorist attack. Helene Cooper, *Libya Envoy’s Killing was a Terrorist Attack, the White House Says*, N.Y. TIMES, Sept. 20, 2012, <http://www.nytimes.com/2012/09/21/world/middleeast/assault-on-consulate-in-libya-a-terrorist-attack-white-house-says.html>.

6. See KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004) at 78–84, *available at* [http://www.justice.gov/final\\_report.pdf](http://www.justice.gov/final_report.pdf) [hereinafter FEINBERG ET AL.]; see also KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005) (speaking on his personal experience as Special Master).

## I. PRE-9/11 RESPONSES TO TERRORISM

Prior to 9/11, the federal government had some experience compensating victims of hostile acts. After the War of 1812, Congress passed a statute providing relief to victims who had property lost, taken, or destroyed due to the war.<sup>7</sup> A single commissioner was appointed to establish rules and processes for distributing the funds, though the statute did not provide for any judicial review of his broad discretion.<sup>8</sup> The public was upset by the commissioner's "excessive generosity," and in response, Congress amended the statute to add bureaucratic oversight.<sup>9</sup> As a result of this change, many victims received either disproportionate awards or no awards.<sup>10</sup>

In more recent years, the World Trade Center attack in 1993<sup>11</sup> and Oklahoma City bombing in 1995<sup>12</sup> led to enactment of the Antiterrorism and Effective Death Penalty Act of 1996.<sup>13</sup> This law amended the Victims of Crime Act<sup>14</sup> by adding 42 U.S.C. § 19693(b), giving the Office for Victims of Crime (OVC)<sup>15</sup> access to the emergency reserve fund in domestic and international terrorist incidents by authorizing the OVC director to supplement state crime victim compensation programs.<sup>16</sup> Since then, OVC has provided supplemental grants to assist victims of the bombing of Pan Am Flight 103 (1988), the Oklahoma City bombing, the Khobar Towers military barracks bombing (1996), the bombing of the American embassies in

7. Act of Apr. 9, 1816, ch. 40, 3 Stat. 261 (1816).

8. Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 16–17 (2006).

9. *Id.* at 17–18.

10. *Id.* at 18.

11. See generally U.S. FIRE ADMIN., THE WORLD TRADE CENTER BOMBING: REPORT AND ANALYSIS 1, 20, USFA-TR-076 (Feb. 1993), available at <http://www.usfa.fema.gov/downloads/pdf/publications/tr-076.pdf> (explaining a bomb composed of nitrourea—a white, crystalline, highly explosive powder—and hydrogen was detonated in the parking garage of the North Tower, killing six people and injuring 1,042).

12. See generally U.S. DEP'T OF JUSTICE, RESPONDING TO TERRORISM VICTIMS: OKLAHOMA CITY AND BEYOND, NCJ 183949, 1 (Oct. 2000), available at <http://www.ojp.usdoj.gov/ovc/pdfxt/NCJ183949.pdf> (explaining the Oklahoma City bombing was an attack on the Alfred P. Murrah Federal Building that killed 167 people and injured hundreds more) [hereinafter "DOJ"].

13. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

14. See Victims of Crime Act of 1984 ("VOCA"), 42 U.S.C. § 10601 (2006).

15. U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, *About OVC*, <http://www.ojp.usdoj.gov/ovc/about/index.html> (last visited Nov. 13, 2011) ("Established in 1988 through an amendment to the Victims of Crime Act (VOCA) of 1984, the OVC is charged by Congress with administering the Crime Victims Fund (the Fund). Through OVC, the Fund supports a broad array of programs and services that focus on helping victims in the immediate aftermath of crime and continuing to support them as they rebuild their lives.")

16. DOJ, *supra* note 12, at 23; Grey, *supra* note 4, at 666 n.11 (2006); see U.S. DEP'T OF JUSTICE, ANTITERRORISM EMERGENCY ASSISTANCE PROGRAM, available at [http://www.ojp.usdoj.gov/ovc/pdfxt/AEAP\\_Brochure.pdf](http://www.ojp.usdoj.gov/ovc/pdfxt/AEAP_Brochure.pdf).

Kenya and Tanzania (1998), and the Columbine High School massacre (1999).<sup>17</sup>

After these incidents, in 2000, the U.S. Department of Justice issued a publication entitled *Responding to Terrorism Victims: Oklahoma City and Beyond*, exploring lessons learned and offering recommendations for future victim services in the case of future acts of terrorism or mass violence.<sup>18</sup> No one, however, could have predicted the enormity of 9/11, or how it would set in motion an unprecedented generous approach to victim compensation.

## II. THE 9/11 FUND

The magnitude of 9/11, and what seemed to be a forthcoming disastrous collapse of the airline industry, propelled Congress to act quickly. The airlines' liability insurance would not be able to handle the onslaught of expected litigation,<sup>19</sup> so Congress stepped in to pass emergency legislation. The Air Transportation Safety and System Stabilization Act (ATSSSA)<sup>20</sup> was signed into law with minimal congressional debate, on September 22, 2001, just eleven days after it was introduced in the House of Representatives.<sup>21</sup>

The ATSSSA gave the airline industry federal loan guarantees of up to ten billion dollars, compensation of up to five million dollars for direct losses incurred due to a federal ground stop order, compensation for "incremental losses," reimbursements for increased insurance costs, and deferral of depositing excise taxes.<sup>22</sup> Further, in response to calls from the airlines and the American Trial Lawyers Association (ATLA) for a compensation program that would shield airlines from liability, Congress created an alternative compensation program for victims.<sup>23</sup> Title IV of the ATSSSA instituted the Fund,<sup>24</sup> which was added to the bill in just one day as a "congressional afterthought."<sup>25</sup> The ATSSSA also discouraged lawsuits by giving the federal court in the Southern District of New York exclusive

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17. DOJ, *supra* note 12, at 23, 27–28.

18. *See* DOJ, *supra* note 12, at ch. VIII.

19. *See* Berkowitz, *supra* note 8, at 24–25 (explaining the airlines had approximately six billion dollars of insurance coverage, but the financial damage from 9/11 was estimated to be at least \$35 billion).

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

21. Ackerman, *Effective Response*, *supra* note 2, at 146; *accord* FEINBERG, *supra* note 6, at XV; *accord* Berkowitz, *supra* note 8, at 5.

22. Berkowitz, *supra* note 8, at 5.

23. Grey, *supra* note 4, at 671–73; *see* Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1867 (2002).

24. Julia Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 197 (2004).

25. FEINBERG, *supra* note 6, at 16.

jurisdiction over claims arising out of 9/11, and by capping airline liability at the maximum of its liability insurance.<sup>26</sup>

#### A. Administration of the Fund

Title IV of the ATSSSA provided for a Special Master to be appointed by the Attorney General to administer the Fund.<sup>27</sup> The term “special master” came from common law, referring to someone who assists the court in a specific way.<sup>28</sup> However, in the case of the Fund, the position was not a judicial officer or agency administrator, but rather an unprecedented position not subject to judicial review.<sup>29</sup> Attorney General John Ashcroft appointed Kenneth Feinberg to the position.<sup>30</sup>

Feinberg had an extensive legal background that uniquely prepared him for the position, including serving as a special master to mediate a settlement in Agent Orange litigation and as a mediator and settlement administrator for Fortune 500 companies.<sup>31</sup> He wanted to become Special Master of the Fund so he could use his broad experience in dispute resolution skills to serve the 9/11 victims and their families.<sup>32</sup> He offered to do all of his work for the Fund pro bono.<sup>33</sup>

The job requirements were daunting. Title IV gave the Special Master broad discretion over administering the new Fund but failed to provide any judicial oversight or much guidance.<sup>34</sup> Looking back on his time as Special Master, Feinberg remarked that determining awards from the Fund “called for the wisdom of Solomon, the technical skill of H&R Block, and the insight of a mystic with a crystal ball.”<sup>35</sup> He described serving as the only rule-maker, judge, and jury for the Fund: “Thus began the most harrowing experience of my professional life. In the end, it was also the most rewarding.”<sup>36</sup>

Though Feinberg was the ultimate administrator of the Fund, he hired a large legal and accounting staff to help with verifying eligibility of claimants, answering questions, and making initial award calculations for re-

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26. *Id.* at 18–19; see Rabin, *supra* note 23, at 1841,1853–58.

27. ATSSSA, Pub. L. No. 107-42 §§ 404, 407, 115 Stat. 230, 237–40 (2006).

28. FEINBERG, *supra* note 6, at 10.

29. See George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 528, 531 (2003); see also Berkowitz, *supra* note 8, at 9.

30. FEINBERG, *supra* note 6, at XV–XVI, 27.

31. *Id.* at 2–14.

32. *Id.* at 24.

33. Ackerman, *Effective Response*, *supra* note 2, at 148; see generally FEINBERG, *supra* note 6, at 25–26 (explaining his decision to offer services pro bono was partially because it seemed inappropriate to seek compensation during such a far-reaching disaster, and partially because he wanted to avoid criticism from the public for being paid).

34. Berkowitz, *supra* note 8, at 9.

35. FEINBERG, *supra* note 6, at 87.

36. *Id.* at XVI.

view.<sup>37</sup> The overwhelming amount of paperwork kept Feinberg and the staff working many long hours.<sup>38</sup>

The first important task involved establishing regulations for administering the Fund. First, potential claimants needed to know if they were eligible for an award. Section 405 of the ATSSSA defined “claimant” as:

(A) an individual who—(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and (ii) suffered physical harm or death as a result of such an air crash; (B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175 [with exclusions for those deemed to be participants in the attacks]; or (C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.<sup>39</sup>

However, these vague provisions left many unanswered questions for the Special Master. While victims of terrorist attacks prior to 9/11 were clearly not covered,<sup>40</sup> the statute did not specify what “the immediate aftermath” of the 9/11 incidents entailed, nor did it specify how wide of an area could be included at each site. Feinberg thus determined the “ambit of risk” by talking with police and firefighters.<sup>41</sup>

He also narrowed the class of eligible claimants to those who sought medical treatment within seventy-two hours.<sup>42</sup> The Fund would not grant awards for latent injuries caused by exposure to toxins in the aftermath of the attacks,<sup>43</sup> though this was later changed.<sup>44</sup> Property loss and psychological harm would also not be compensated due to the statute’s limitation of awards for “physical harm or death.”<sup>45</sup> The interim regulations specified that eligible claimants must have sustained “physical injury inflicted by the terrorists in the immediate vicinity of the World Trade Center or Pentagon and subsequent contemporary medical treatment.”<sup>46</sup>

Feinberg faced other difficult decisions concerning the class of eligible claimants. He determined that foreign applicants, including undocumented

37. *Id.* at 31–34 (PricewaterhouseCoopers won a bid to administer the Fund).

38. *Id.* at 38–39.

39. ATSSSA, Pub. L. No. 107-42 § 405, 115 Stat. 230, 239 (2006).

40. FEINBERG, *supra* note 6, at 21, 67.

41. *Id.* at 43.

42. *Id.*

43. *Id.* at 42; *see* Rabin, *supra* note 23, at 1843–44.

44. *See infra* Part II.C.

45. ATSSSA, Pub. L. No. 107-42 § 405, 115 Stat. 230, 239 (2006); *see* Rabin, *supra* note 23, at 1840–42.

46. FEINBERG, *supra* note 6, at 43.

immigrants in America, were eligible for awards.<sup>47</sup> Moreover, he guaranteed claimants the information on their applications would not be shared with other government agencies for immigration enforcement purposes.<sup>48</sup> For questions about who had priority in a claim and the eligibility of fiancées, same-sex domestic partners, and estranged parents, the statute provided no guidance.<sup>49</sup> Religious books and clergy could not offer Feinberg clear direction on these questions.<sup>50</sup> He thus looked primarily to the state or foreign laws of the decedent's domicile and worked to mediate between potential claimants when necessary.<sup>51</sup>

The Special Master also exercised discretion in determining the monetary amount of awards. The skeletal provisions of Title IV provided a three-part formula for these calculations: (1) economic loss (the financial circumstances of each victim), (2) noneconomic loss (pain and suffering), and (3) offsetting the awards by funds recoverable from collateral sources such as life insurance and death benefits.<sup>52</sup> Feinberg was also guided by three public policy considerations: (1) consistency for victims of similar career positions, (2) transparency through public outreach and accessible information, and (3) narrowing the gap between high and low awards.<sup>53</sup>

The ATSSSA did not specify a maximum award claimants could receive, so regardless of how much Feinberg awarded one person, it would not diminish another person's award.<sup>54</sup> However, he charged himself with the responsibility of "social engineering" to ensure the disparity between economic loss awards was not too great.<sup>55</sup> For noneconomic loss, Feinberg found that he was unable to quantify and compare the pain and suffering of each claimant or deceased victim, so he awarded each the same amount. Feinberg looked to the death benefits given to public safety officers killed in the line of duty as a starting point<sup>56</sup> and determined an award of \$250,000 for the noneconomic loss of each deceased 9/11 victim.<sup>57</sup> Despite many compelling stories of victims' heroism, he decided the award would not change; rather, "[h]eroism by all was presumed."<sup>58</sup> On the issue of col-

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47. FEINBERG ET AL., *supra* note 6, at 29–30.

48. *Id.*

49. FEINBERG, *supra* note 6, at XI, 68–69.

50. *Id.* at XVI–XVII, 90–91.

51. *Id.* at 39–40 (state laws); *id.* at 69–70 (foreign laws); see also Sally F. Goldfarb, *Disasters, Families, and the Law*, 28 WOMEN'S RTS. L. REP., Winter 2007, at 35, 41 (noting that Feinberg's efforts to resolve conflicts were not always successful).

52. FEINBERG, *supra* note 6, at 34–36; ATSSSA, Pub. L. No. 107-42 §§ 402, 405(b), 115 Stat. 230, 237–38 (2006).

53. FEINBERG, *supra* note 6, at 46–47.

54. *Id.* at 157.

55. *Id.* at 156.

56. See generally Public Safety Officers Death Benefits, 42 U.S.C. § 3796 (2006).

57. FEINBERG, *supra* note 6, at 39, 76; see also Ackerman, *Effective Response*, *supra* note 2, at 154 (discussing that presumed non-economic losses for those killed in the attacks of 9/11 would be in the amount of \$250,000).

58. FEINBERG, *supra* note 6, at 125.



lateral sources, Feinberg decided not to deduct charitable awards the claimants received in order to encourage the public to continue contributing.<sup>59</sup>

Not only did eligibility criteria and the amount of awards have to be determined, but also an application and award process needed to be put in place. What was intended to be a simple process ended up including an application containing thirty-one pages.<sup>60</sup> Claimants were given an option between two different tracks. Track A would give the claimant an award determination within forty-five days of the application's submission, then the claimant could accept the award or request an individualized hearing. Claimants choosing Track B would proceed directly to a hearing after their eligibility was established.<sup>61</sup>

The opportunities for claimants to be heard were part of Feinberg's design for due process.<sup>62</sup> He oversaw 931 of the hearings.<sup>63</sup> At the hearings, claimants could be represented by counsel, submit evidence, and call witnesses. There were no written records of the hearings, but the Fund was required to notify the claimant of the award in writing within 120 days.<sup>64</sup> ATLA offered free legal assistance.<sup>65</sup> Claimants were given until December 22, 2003, to file their claims.<sup>66</sup>

For quick turnaround of claims, Feinberg developed a streamlined procedure using a presumptive award formula based on key variables of annual salary, the age of the victim, and number of the victim's dependents.<sup>67</sup> The charts helped families communicate with the Fund and decide whether to apply. Feinberg also gave family members the opportunity to meet with him before filing an award to get a "guesstimate" range if they were uncertain about applying.<sup>68</sup> This guesstimate was important because claimants were required to waive their right to sue once they filed applications with the Fund.<sup>69</sup> The process was designed to give claimants more certainty about their awards and eliminate the uncertainty and lengthy tort litigation process.<sup>70</sup> In addition, claimants could request emergency funds for an advance on benefits that would later be deducted from their awards.<sup>71</sup>

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59. *See id.* at 71.

60. *Id.* at 44–45 (explaining this was necessary to collect information needed for accurate awards and to minimize fraud).

61. Ackerman, *Effective Response*, *supra* note 2, at 155–56.

62. FEINBERG, *supra* note 6, at 44.

63. *Id.* at 98.

64. *See* Ackerman, *Effective Response*, *supra* note 2, at 155–56.

65. *Id.* at 156. ATLA established a non-profit organization called Trial Lawyers Care to provide legal assistance to victims of 9/11.

66. FEINBERG, *supra* note 6, at 21.

67. *See id.* at 45–46; *see also* FEINBERG ET AL., *supra* note 6, at 7.

68. FEINBERG, *supra* note 6, at 78–79.

69. *See* FEINBERG ET AL., *supra* note 6, at 11.

70. Goldscheid, *supra* note 24, at 198.

71. FEINBERG, *supra* note 6, at 45 (only 236 claimants took advantage of the emergency award option).

Once the interim final rules were proposed on December 21, 2001, the public was given an opportunity to comment on them.<sup>72</sup> Feinberg lived out of a suitcase for a year, conducting over one hundred town hall meetings regarding the interim regulations and draft application.<sup>73</sup> During the comment period, 2,687 comments were received.<sup>74</sup> Several groups—including personal injury lawyers, victims' groups, organized representatives of rescue workers, and politicians—voiced concerns over aspects of the Fund.<sup>75</sup> One common concern was that the presumptive award tables stopped at an income level of \$231,000, but many of the victims had higher salaries.<sup>76</sup> Other criticisms included the failure to articulate a coherent theory of justice,<sup>77</sup> failure to understand victims' real needs,<sup>78</sup> and the failure to provide a review mechanism to the Special Master's discretion.<sup>79</sup> Some found the cap on airline liability for tort suits to be arbitrary or irrational.<sup>80</sup> In addition, many found the Fund too narrow because it only awarded victims of the 9/11 attacks rather than victims of all terrorist incidents or other crimes or accidents.<sup>81</sup>

### B. *Assessment of the Fund*

The public had high expectations for the Fund. While it was not expected to replace lost lives, it was expected to recognize the loss and the income the deceased and injured would have otherwise provided to their dependents.<sup>82</sup> Yet, Feinberg faced a difficult struggle in helping families understand he was not placing a price tag on the moral worth of those who perished or were injured as a result of the attacks.<sup>83</sup>

Indeed, some claimants criticized the Fund for treating people as statistics rather than humans, and some saw the formulas as unfairly valuing one life more than another, when all had suffered a common disaster.<sup>84</sup> Some wanted a simpler award of the same amount for each victim, and many lamented the complex application process. Moreover, the Fund could not

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72. See Ackerman, *Effective Response*, *supra* note 2, at 148–49; FEINBERG ET AL., *supra* note 6, at 5.

73. FEINBERG, *supra* note 6, at 49–50.

74. See FEINBERG ET AL., *supra* note 6, at 5.

75. Rabin, *supra* note 23, at 1868.

76. See Ackerman, *Effective Response*, *supra* note 2, at 152. Feinberg's reasoning for this decision was that 98% of earners in America earned less than that amount, and income above that mark tended to be highly variable each year. FEINBERG, *supra* note 6, at 73.

77. See Goldscheid, *supra* note 24, at 174; see also Ackerman, *Effective Response*, *supra* note 2, at 138–39.

78. See Goldscheid, *supra* note 24, at 174.

79. See Ackerman, *Effective Response*, *supra* note 2, at 138–39.

80. See Berkowitz, *supra* note 8, at 34.

81. See Grey, *supra* note 4, at 679.

82. See Ackerman, *Effective Response*, *supra* note 2, at 224–27.

83. See FEINBERG, *supra* note 6, at 154.

84. See Grey, *supra* note 4, at 678–81.

provide the kind of healing many victims and families sought, and the claim process even exacerbated some family conflicts.<sup>85</sup>

Despite these shortcomings, the Fund was hailed as a success in the end. It met its goal of preventing airlines from collapsing under litigation, as 97% of claimants filed with the Fund and waived their right to sue.<sup>86</sup> The administrative costs were very low considering the number of employees involved in administering the Fund.<sup>87</sup> Perhaps most importantly, it provided victims and their families with a tangible sense of closure and the ability to begin moving on with their lives.<sup>88</sup> Pointing to these successes, Feinberg claimed, “I believe [the Fund] can fairly be considered the valedictorian of all compensation programs, public or private.”<sup>89</sup>

There are several reasons for this success. In his book, Feinberg points to the extraordinary efforts enabling this success: giving families detailed information about their likely recoveries, taking proactive steps to ensure claimants would receive their maximum award, giving each claimant the opportunity for a hearing, and providing claimants with a way to avoid the uncertainties of litigation.<sup>90</sup> The generous pro bono efforts of many attorneys who assisted claimants also contributed extensively.<sup>91</sup> Feinberg also acknowledged the full support of Attorney General Ashcroft, along with pressure he placed on himself, as influential factors.<sup>92</sup> Finally, the unprecedented generosity of the American people in granting “over \$7 billion in tax-free compensation” to claimants was vital.<sup>93</sup>

While even some critics acknowledged the success of the Fund,<sup>94</sup> this type of generosity is not a sustainable precedent for the future.<sup>95</sup> Moreover, it is difficult to determine which type of attacks or disasters should receive

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85. See FEINBERG, *supra* note 6, at 141–43.

86. See Ackerman, *Effective Response*, *supra* note 2, at 180–88; FEINBERG, *supra* note 6, at 164.

87. FEINBERG, *supra* note 6, at 164–65 (noting that despite hiring approximately 450 employees, administrative costs were only 1.2% of the total awards disbursed).

88. See Ackerman, *Effective Response*, *supra* note 2, at 227–28; FEINBERG, *supra* note 6, at 175.

89. FEINBERG, *supra* note 6, at 164.

90. See FEINBERG, *supra* note 6, at 165–67.

91. FEINBERG ET AL., *supra* note 6, at 71.

92. FEINBERG, *supra* note 6, at 169.

93. *Id.* Recipients were not required to pay taxes on the awards. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002).

94. See Editorial, *9/11 Fund Closes Its Doors*, N.Y. TIMES, June 18, 2004, <http://www.nytimes.com/2004/06/18/opinion/9-11-fund-closes-its-doors.html> (asserting the Fund met its dual purposes of protecting the airlines and providing a compassionate response to the attacks); see Grey, *supra* note 4, at 680–81 (discussing criticisms but acknowledging the Fund “successfully fulfilled its purpose”); see Ackerman, *Effective Response*, *supra* note 2, at 227 (calling the Fund “[f]or the most part . . . a success”). See also FEINBERG, *supra* note 6, at 163 (highlighting the supportive response from the American public and the media).

95. Even Feinberg himself stated, “I would not use the fund as a model in the event of future attacks.” FEINBERG, *supra* note 6, at 178.

compensation and which should not.<sup>96</sup> Feinberg noted that the massive impact on the airline industry was an exceptional situation that required a creative and bold response, but the civil justice system has adequate alternatives that promote responsibility and safety in many other situations.<sup>97</sup>

### C. *Expansion of the Fund*

Legislation enacted since the creation of the Fund has expanded its benefits. The Victims of Terrorism Tax Relief Act of 2001 provided tax benefits to victims of 9/11.<sup>98</sup> And Congress passed the James Zadroga 9/11 Health and Compensation Act of 2010 (“Zadroga Act”) to expand eligibility to persons harmed by exposure to toxins in the aftermath of 9/11. Though these victims were excluded under the original rules if they did not discover their injuries or receive treatment by the filing deadline, the Zadroga Act opened the Fund to them.<sup>99</sup> The final rule was issued August 31, 2011, amending and reactivating the Fund to include those who were injured or killed as a result of “the debris removal efforts that took place in the immediate aftermath of [9/11] crashes.”<sup>100</sup> The final rule further expanded the geographic zone recognized as the “9/11 crash site”<sup>101</sup> and added other acceptable forms of proof for establishing eligibility.<sup>102</sup>

## III. OTHER COMPENSATION PROGRAMS

While the scope and process of the ad hoc Fund were unique in American history, the nation has enacted several other compensation programs in the past to shield industries from liability. Additionally, individual states have established and continue to administer workers’ compensation programs and crime victim compensation programs. Beyond the United States, other nations and the broader international community have created and implemented compensation programs for victims of crime. These programs

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96. See FEINBERG ET AL., *supra* note 6, at 79–80.

97. See FEINBERG, *supra* note 6, at 178–80.

98. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002). It also provided these tax benefits to victims of the Oklahoma City bombing and the anthrax incidents following 9/11. *Id.*

99. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, Title II (2011) [hereinafter “Zadroga Act”].

100. Final Rule, James Zadroga, 9/11 Health and Compensation Act of 2010, 76 Fed. Reg. 54112, 54119 (Aug. 31, 2011) (to be codified at 28 C.F.R. pt. 104) [hereinafter “Final Rule, Zadroga Act”].

101. Title II of the Zadroga Act expands the “9/11 crash site” to include the crash sites, routes of debris removal, and contiguous areas where the Special Master determines there was risk of harm. Final Rule, Zadroga Act, 76 Fed. Reg., *supra* note 100, at 54113–14; Raymond Hernandez, *Zone for 9/11 Compensation in Lower Manhattan Is Expanded*, N.Y. TIMES, Aug. 30, 2011, <http://www.nytimes.com/2011/08/31/nyregion/zone-for-911-compensation-fund-is-expanded-in-manhattan.html>.

102. Final Rule, Zadroga Act, 76 Fed. Reg., *supra* note 100, at 54112.

are worth examining because they offer valuable insight into the purpose, rationale, and administration of compensation funds. If America establishes a permanent fund for victims of terrorism, it need not start from scratch. It can examine best practices from the Fund and other programs, then consider them in the unique context of terrorist threats to America.

#### A. American Federal Compensation Programs

Besides the Fund, prior federal compensation legislation includes the Price-Anderson Act of 1957, the National Swine Flu Act of 1976, and the National Childhood Vaccine Injury Act of 1986. Each of these programs were enacted to limit the liability of certain private industries in which the government had an interest, to provide a more certain outcome, and to distribute compensation quickly to claimants. These programs are worth noting because a permanent fund for victims of terrorism would have similar goals.

The Price-Anderson Act was enacted to ease the entry of private industries into the nuclear energy field by guaranteeing federal compensation in the event of a nuclear accident.<sup>103</sup> In exchange for purchasing private liability insurance and donating \$10 million per year to the compensation fund, the Act imposed a cap on nuclear power industry liability and established exclusive federal jurisdiction so the industry would not be subject to state tort claims.<sup>104</sup> Though the compensation program was rarely used, it encouraged growth of nuclear power plants. However, it was criticized by some for promoting “unbalanced and uncontrolled growth of the nuclear power industry, allowing the industry to deteriorate.”<sup>105</sup>

Two decades later, the National Swine Flu Act established a compensation program for victims who died or were injured from government-mandated swine flu vaccines.<sup>106</sup> The federal government took on vicarious liability for all participating manufacturers, shielding the manufacturers from liability.<sup>107</sup> In another effort to limit the liability of vaccine makers, ensure enough vaccines, and stabilize vaccine costs, the National Childhood Vaccine Injury Act was enacted to compensate the pain and suffering of a child’s injury or death from a required vaccine.<sup>108</sup> This act created the Vac-

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103. 42 U.S.C. § 2210 (1957) (amended multiple times 1958–2005); Berkowitz, *supra* note 8, at 32.

104. Berkowitz, *supra* note 8, at 32. The compensation program was challenged in court because it retroactively revoked litigation rights from claimants, but the Supreme Court affirmed its constitutionality because it offered a “reasonably just substitute for the common-law or state tort law it replace[d].” *Duke Power Co. v. Carolina Env’tl. Study Grp.*, 438 U.S. 59, 88 (1978).

105. Grey, *supra* note 4, at 697.

106. Berkowitz, *supra* note 8, at 31.

107. *Id.*

108. Pub. L. No. 99-660, 100 Stat. 3755, 3758 (1986); Grey, *supra* note 4, at 699. *See also* Berkowitz, *supra* note 8, at 30 (explaining the purpose and operation of the National Childhood Vaccine Injury Act).

cine Injury Compensation Fund from a tax on certain vaccine sales, and it is administered by the Department of Health and Human Services.<sup>109</sup> Claimants can accept the Special Master's decision and waive their right to sue, or they can reject and file suit.<sup>110</sup> The Special Master's decisions are subject to judicial review by the Court of Claims and, if needed, the Federal Circuit.<sup>111</sup>

### B. State Compensation Programs

Besides these specialized federal compensation programs, states established workers' compensation programs in the early twentieth century.<sup>112</sup> While the programs vary from state to state, they generally are the only remedy for injured workers, they exclude damages for pain and suffering, and they preclude tort claims.<sup>113</sup> Some claimants criticize these programs, saying the awards are insufficient to cover their needs.<sup>114</sup> Fraudulent claims and complicated interactions with other federal laws also plague these programs.<sup>115</sup>

In the mid-1960s, states also began to develop compensation programs to provide short-term emergency help to victims of violent crimes.<sup>116</sup> Today, all fifty states have crime victim compensation programs.<sup>117</sup> Each state has different rules, but most programs are primarily funded by fines and fees collected from convicted criminals.<sup>118</sup> By instituting the use of these fines instead of public funds, states were able to avoid clarifying the justification for the programs.<sup>119</sup> These programs are important to consider because they cumulatively present a picture of the rationale, structure, and range of compensation Americans deem as reasonable for victims of crime. These compensation programs generally have underlying rationales of deterrence and corrective justice (because offenders pay), and distributive justice (by addressing the relationship between offenders and the community).<sup>120</sup>

Observations from the federal and state compensation schemes reveal common themes including (1) trading individualized corrective justice so more people receive compensation, (2) limiting judicial review of discretion in exchange for distributing benefits more quickly, (3) protecting certain

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109. Berkowitz, *supra* note 8, at 30.

110. Grey, *supra* note 4, at 700.

111. Berkowitz, *supra* note 8, at 30.

112. Grey, *supra* note 4, at 704.

113. *Id.* at 706–07.

114. *Id.* at 708.

115. *Id.*

116. Goldscheid, *supra* note 24, at 182–83.

117. *Id.*

118. *Id.* at 172.

119. *Id.* at 175.

120. *Id.* at 176, 218–19.

industries through general tariffs on the industries, and (4) establishing incentives for claimants to stay within the system.<sup>121</sup>

### C. *International Compensation Programs*

The international community has established three compensation funds for victims of crime and oppressive acts, two of which are administered by the United Nations (UN). The UN Voluntary Fund for Victims of Torture distributes funds to non-governmental organizations that provide humanitarian aid to victims of torture and their family members.<sup>122</sup> The UN Voluntary Trust Fund on Contemporary Forms of Slavery extends humanitarian, legal, and financial assistance through established channels to individuals who have suffered violations of human rights due to slavery.<sup>123</sup>

The Rome Statute provided for the creation of the third fund, the Trust Fund for Victims (TFV), which operates quasi-independently from the International Criminal Court.<sup>124</sup> The TFV was the first compensation program in international criminal justice.<sup>125</sup> In addition to paving the way for victim compensation in international criminal justice, the Rome Statute also provided for the principle of victim participation at every stage where their interests are implicated.<sup>126</sup>

According to some scholars, the foundation underlying international compensation funds is solidarity<sup>127</sup> and the idea that “international crime is a consequence of international coexistence.”<sup>128</sup> This reasoning provides justification for all sectors of society—including governments, NGOs, inter-governmental organizations, private businesses, and individuals—to

121. Grey, *supra* note 4, at 709–10.

122. U.N. Voluntary Fund for Victims of Torture, G.A. Res. 36/151.P 1(a), U.N. Doc. A/RES/36/151 (Dec. 16, 1981); Frederic Megret, *Justifying Compensation by the International Criminal Court’s Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 BROOK. J. INT’L L. 123, 132–33 (2010).

123. G.A. Res. 46/122, U.N. Doc. A/RES/46/122 (Dec. 17, 1991); Megret, *supra* note 122, at 132–33.

124. Rome Statute of the International Criminal Court, art. 79, para. 1 *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. See also Megret, *supra* note 122, at 125–26 (stating that the TFV operates as a para-judicial administrative agency to the International Criminal Court but also has autonomy in some aspects due to its voluntary funding source contributed by governments, non-governmental organizations, corporations, and individuals). See generally Victims Trust Fund Campaign, *Questions and Answers: The Victims Trust Fund of the ICC*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/documents/FS-VTFC-FAQ.pdf> (last visited Dec. 28, 2011) (giving additional information on the Victims Trust Fund).

125. Megret, *supra* note 122, at 139.

126. Rome Statute, *supra* note 124, at art. 68, para. 3. See also Megret, *supra* note 122, at 139 (noting how the Rome Statute provided for victim participation of this kind for the first time in history).

127. See M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 206 (2006).

128. Megret, *supra* note 122, at 198. Various “causes” of international crime include colonialism, economic disparity, global indifference, and supporting criminal regimes. *Id.*

contribute to the funds.<sup>129</sup> While such compensation may be criticized as “governmental paternalism,” victims in the international realm are often very limited in what individual steps they can take to protect themselves.<sup>130</sup>

#### D. *Israel’s Permanent Compensation Fund for Victims of Hostile Acts*

Because Israel has had a permanent fund for victims of terrorism for over forty years that has grown and been refined along the way, looking at its system in-depth provides useful insights for policymakers and advocates about how the United States should address victims of terrorism. Israel has had a comprehensive permanent fund for victims of hostile acts since 1970 due to its turbulent history of terrorism and hostile acts.<sup>131</sup> After the Six-Day War in 1967, violent acts against Israelis expanded throughout Israel and abroad, so the government enacted the Victims of Hostile Action (Pensions) Law (VHAPL).<sup>132</sup> The VHAPL expanded the legislative scheme initially covering those harmed by war to include victims of terrorism, and it has continued expanding since that time to include more benefits for more victims.<sup>133</sup>

Israel takes a broad view of eligibility for the VHAPL. Its definition of “enemy-inflicted injury” includes attacks with a nationalistic motive, whether or not the perpetrator was involved with a recognized terrorist group.<sup>134</sup> The VHAPL provides a rebuttable presumption that an injury is enemy-inflicted if it is “under circumstances affording reasonable grounds for believing” it is enemy-inflicted.<sup>135</sup> The VHAPL covers not only Israelis in Israel, but Palestinian-Israelis, foreigners injured while legally in Israel, certain foreign nationals affiliated with Israel, and employees of certain Israeli entities abroad.<sup>136</sup> While the law does not cover foreign workers lacking legal status in Israel, a loophole provides them with medical treatment and humanitarian aid. Recently, the government has given these workers full financial benefits.<sup>137</sup>

129. *Id.*

130. *Id.* at 199.

131. Israel experienced a war for independence, five wars in forty-four years, and waves of terrorism, and throughout this time it provided compensation to victims on a case-by-case basis. Hillel Sommer, *Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience*, 36 *IND. L. REV.* 335, 336–37 (2003).

132. *Id.*; Victims of Hostile Action (Pensions) Law, 5730-1970, 24 *LSI* 131 (1969–70) (Isr.) (authorized translation of Hebrew into English prepared by Israel’s Ministry of Justice) [hereinafter VHAPL].

133. Sommer, *supra* note 131, at 336–37.

134. VHAPL, *supra* note 132; Grey, *supra* note 4, at 712–13. Even a single individual acting against a Jew, if acting with nationalistic motive, can satisfy the “hostile act” requirement. Sommer, *supra* note 131, at 339–42 (discussing V.A. (T.A.) 4076/98, *Coca v. Approving Auth.*, 32(10) *Dinim-Dis. Ct.* 485 (Isr.)).

135. Sommer, *supra* note 131, at 340.

136. Grey, *supra* note 4, at 713; *see also* Sommer, *supra* note 131, at 342–43 (describing the extension of compensation schemes to foreign nationals).

137. Sommer, *supra* note 131, at 342 n.38.



The program compensates eligible victims for medical care, giving living stipends for those unable to work for an unlimited amount of time, rehabilitation (vocational training, higher education, or funds for starting their own businesses), and other specialized types of financial compensation.<sup>138</sup> For families of deceased victims, the VHAPL provides the benefits to the victims' families including monthly benefits for the surviving spouse, bereaved children, and bereaved parents.<sup>139</sup> The compensation is based on a percentage of the salary of a low-level government employee, plus possible alimony.<sup>140</sup> In addition, the VHAPL will compensate families for burial and mourning expenses, plus yearly memorial services (including transportation).<sup>141</sup> Families may also be eligible for additional benefits such as tax breaks, help buying a car, school grants, business loans, health expenses, and Bar/Bat Mitzvah expenses.<sup>142</sup>

In addition to the VHAPL, Israel enacted the Property Tax and Compensation Fund Law to compensate victims for personal property damaged from hostile acts.<sup>143</sup> A common goal between the VHAPL and the Property Tax and Compensation Fund is returning claimants' lives to normal as soon as possible after an attack.<sup>144</sup> The assurance of compensation provides a sense of psychological support so victims and families know they are not suffering alone. Law professor Betsy J. Grey suggests that as a result, Israelis tend to respond to terrorism by resuming their normal lives.<sup>145</sup>

The rationale behind these programs is the idea of spreading loss among society.<sup>146</sup> Essentially, because "every restaurant and bus has become a potential frontline in terror's war," Israel has adopted a risk-sharing policy that ensures the entire society bears the cost rather than individuals or families.<sup>147</sup> This policy is consistent with its extensive social welfare policy for other segments of the population.<sup>148</sup>

The National Insurance Institute (NII)—the equivalent of the Social Security Administration in the United States—administers the VHAPL.<sup>149</sup> The Medical Committee of NII makes initial award decisions,<sup>150</sup> which are

138. *Id.* at 343–47.

139. *Id.* at 348–51.

140. *Id.* at 348–49.

141. *Id.* at 349–50.

142. *Id.* at 350–51.

143. *See generally* Sommer, *supra* note 131, at 335–36, 355–57 (summarizing provisions of the Property Tax and Compensation Fund Law and how it differs from the VHAPL).

144. *Id.* at 356.

145. Grey, *supra* note 4, at 725.

146. *Id.* at 712; *see also* Sommer, *supra* note 131, at 338 (noting Israeli Finance Committee Chairperson, M.K. David Pinkas, and British Prime Minister, Winston Churchill, as advocating that these costs should not be borne only by those attacked but by all of society).

147. Sommer, *supra* note 131, at 339.

148. *Id.* at 359–60.

149. *Id.* at 343.

150. Grey, *supra* note 4, at 714.

appealable to NII and may be appealed further to the Labor Tribunal.<sup>151</sup> Notably divergent from the 9/11 Fund, the Israeli system does not require claimants to choose between filing with the State or pursuing a lawsuit. Claimants may only recover once, but they may pursue both a suit for damages and a compensation claim.<sup>152</sup> The victim can then choose to revoke the lesser of the two remedies.<sup>153</sup>

Features of Israel's program bring up several important aspects of establishing a program that the United States should carefully consider: how broad eligibility should be, whether property loss should be covered, whether grants for education and job training should be provided to victims who are recovering, the size of the financial award to the victim or his family, which federal department should administer the program, and whether claimants should have the option of pursuing litigation.

#### IV. POSSIBLE RATIONALES FOR A PERMANENT FUND

While the United States has not endured another terrorist attack even close to the massive scale of 9/11, smaller attempts since 9/11 and the volatile global political situation remind Americans that the threat must always be taken seriously. Feinberg predicts there will be calls for a new compensation program if there is another attack.<sup>154</sup> But is it the federal government's responsibility to ensure compensation to victims? And if so, should it create an ad hoc fund to address one specific incident or a permanent fund designed to address multiple situations? These questions have prompted scholarly discussion and speculation, but a decade after 9/11, Congress has, de facto, chosen to compensate victims of future terrorist attacks through the ad hoc route.

This portion of the Comment will explore possible justifications for creating a permanent fund and compare those rationales with American values<sup>155</sup> to find points of convergence that could meet American needs and expectations. The main justice theories generally implicated when discussing compensation are corrective justice, distributive justice, and deterrence.<sup>156</sup> Within these broader categories are social contract theory, shared risk rationale, social welfare theory, protection of certain industries from litigation costs, providing an alternative to an inadequate tort system, compassionate generosity, efficiency of handling claims, and the combination of political motivations and public expectations.

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151. *Id.*

152. Sommer, *supra* note 131, at 351–52; *see also* Grey, *supra* note 4, at 713–14 (describing how remedies under the VHAPL are not exclusive and claimants may also pursue a lawsuit).

153. Sommer, *supra* note 131, at 351–52.

154. FEINBERG, *supra* note 6, at 177.

155. The author concedes not all Americans share these values, but they are widely perceived as common values of the nation as a whole.

156. *See, e.g.*, Goldscheid, *supra* note 24, at 176.

*Social contract theory* is a rights-based reasoning that looks to the State as the guarantor of preventing harm, and seeks to hold the State responsible when it fails.<sup>157</sup> Under this theory, citizens pay taxes for the fulfillment of this contract.<sup>158</sup> However, American courts have rejected this notion as a response to terrorist attacks.<sup>159</sup> The government responded to the American public's demand for answers by launching the 9/11 Commission<sup>160</sup> to investigate the attacks.<sup>161</sup> The United States has not admitted its liability.<sup>162</sup> The state did not "cause" the attack by failing to prevent it.<sup>163</sup> Therefore, the choice to compensate victims was political, not a legal obligation.<sup>164</sup> Furthermore, when examining social obligations from a criminal justice perspective, "[t]here is nothing in the logic of criminal justice—in its simplest expression, that the guilty should answer for their crimes—that suggests a larger societal responsibility to victims."<sup>165</sup>

Another possible justification for compensation, *shared risk rationale*, is a mix of corrective and distributive justice theory that seeks to spread the loss among society. The idea is that "[c]rime is . . . a cruel sort of lottery that is particularly bereft of any moral meaning, except that by not seeking to correct it the state, in a sense, ratifies the injustice."<sup>166</sup> This theory looks to all to "share the risk engendered by society's ineptitude."<sup>167</sup> The shared risk rationale also aligns with John Rawls' theory of behavior behind a "veil of ignorance"—that is, if we each did not know what social circumstances we would be situated in or what would happen to us in the future, we would all want to live in a society that had a compensation fund.<sup>168</sup> Such a compensation fund would advance corrective justice if the State could collect payments from perpetrators. It would also advance distributive justice by addressing the relationship between the offenders, victims, and the commu-

157. Grey, *supra* note 4, at 683–92; Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83, 88 (2001).

158. Megret, *supra* note 122, at 178.

159. Goldscheid, *supra* note 24, at 213–14.

160. The 9/11 Commission was established on November 27, 2002, as "an independent, bipartisan commission created . . . to prepare a full and complete account of the circumstances surrounding the September 11, 2001 terrorist attacks, including preparedness for and the immediate response to the attacks . . . [and] to provide recommendations designed to guard against future attacks." National Commission on Terrorist Attacks Upon the United States, <http://govinfo.library.unt.edu/911/about/index.htm> (last visited Mar. 17, 2013); *see also* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2408 (2002).

161. *See* National Commission on Terrorist Attacks Upon the United States, THE 9/11 COMMISSION REPORT (2004), at XV, *available at* <http://govinfo.library.unt.edu/911/report/index.htm>.

162. *See* Goldscheid, *supra* note 24, at 219 (stating that funding of victim compensation based on tort damages is "unprecedented" for a government that has not admitted fault).

163. Megret, *supra* note 122, at 194.

164. *Id.* at 171.

165. *Id.* at 151.

166. *Id.* at 189.

167. Charlene L. Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51, 67 (1986).

168. Megret, *supra* note 122, at 189–90.

nity<sup>169</sup> and meeting the communitarian goal of being our brother's keeper.<sup>170</sup>

Another potential foundation for the creation of a permanent fund is *social welfare theory*. This theory focuses on meeting immediate needs and recognizing the social origin of crime, that is, the idea that society as a whole is responsible for the evil that springs from it.<sup>171</sup> The obligation is social, rather than legal or moral.<sup>172</sup> Compensation in this context would seek to bring rehabilitation, restoration, and equity to victims.<sup>173</sup> While social welfare theory is “the most widely advocated basis for victim compensation,”<sup>174</sup> and state crime victim compensation funds have many similarities with welfare,<sup>175</sup> states seem to have rejected this rationale because they do not use public funds for victim compensation.<sup>176</sup> Perhaps by funding the programs through fines and fees, the states were trying to avoid common welfare criticisms about “governmental paternalism” or allowing people to abandon individual responsibility.<sup>177</sup> The Fund did not appear to have social welfare theory as its underlying foundation, as the Special Master made individualized determinations that diverge from the social welfare theory of meeting basic needs.<sup>178</sup>

*Protecting certain industries from financial ruin* is another possible motivation for creating a permanent fund for victims of terrorism.<sup>179</sup> If, as in the case of 9/11, victims are unable to recover restitution or punitive damages because the terrorists are unavailable, they will seek other solutions from the legal system.<sup>180</sup> After 9/11, the airlines, airplane manufacturers, airports, persons with property interests in the World Trade Center, and

169. Goldscheid, *supra* note 24, at 218–19.

170. Robert M. Ackerman, *ADR in the Aftermath Post-Disaster Strategy: Mitigating Disaster: A Communitarian Response*, 9 CARDOZO J. CONFLICT RESOL. 283, 284, 292 (2007) [hereinafter “Ackerman, *ADR*”].

171. Goldscheid, *supra* note 24, at 214–15; see also Megret, *supra* note 122, at 192–94 (stating that “crime is not only meted against society but that it is in a sense also *produced* by social life itself”).

172. “[T]hese responsibilities and duties derive from the conditions of modern society and the grace of the state, not from a legally recognized liability in the relationship between the state and its citizenry.” Burt Galaway & Leonard Rutman, *Victim Compensation: An Analysis of Substantive Issues*, 48 SOC. SERV. REV. 60, 63 (1974); Megret, *supra* note 122, at 192–93.

173. See Rabin, *supra* note 23, at 1854–56 (criticizing the individualized justice model as “inconsistent with the premises of compensating the victims of September 11”).

174. Megret, *supra* note 122, at 192–93 (quoting ROBERT ELIAS, *VICTIMS OF THE SYSTEM: CRIME VICTIMS AND COMPENSATION IN AMERICAN POLITICS AND CRIMINAL JUSTICE* 25 (1983)).

175. State crime victim compensation programs often include assistance such as rehabilitation or training, take into account current and future needs, are offset by collateral sources, and are administered bureaucratically in a consistent way. Megret, *supra* note 122, at 195–97.

176. Goldscheid, *supra* note 24, at 215–16.

177. See Megret, *supra* note 122, at 199 (stating that it is unlikely that individuals would subject themselves to international crime in order to collect victim welfare funds).

178. Goldscheid, *supra* note 24, at 199.

179. See *id.* at 195–96 (reporting that 9/11 Victim Compensation Fund set up in part to protect airline industry from major financial losses).

180. Megret, *supra* note 122, at 149–52.

even the City of New York may have been potential defendants in lawsuits.<sup>181</sup> Congress quickly determined that keeping the airline industry operational was in the nation's interest, and this became the primary purpose for enacting the ATSSSA.<sup>182</sup>

*Practical reasons* may provide additional justification for a permanent fund.<sup>183</sup> Part of the intention of the Fund was the creation of an alternative to an inadequate tort system.<sup>184</sup> The traditional theory of the tort system, corrective justice,<sup>185</sup> was viewed as insufficient not only because the terrorists were unavailable for prosecution, but because the lengthy litigation would have caused even greater stress to the victims already facing huge burdens.<sup>186</sup> Moreover, other parties that were available to be sued simply did not have the resources and insurance to compensate such a large class of victims and their families.<sup>187</sup>

While the other rationales look at a broader societal picture, another underlying principle, "*compassionate generosity*," encompasses a more victim-centric view.<sup>188</sup> While the Fund was primarily designed as part of the government's plan to keep airlines in business, it also was partially motivated by the desire of Congress to extend sympathy and help to victims and families who were suffering.<sup>189</sup> Indeed, this response was seen in the American public as a whole as they rushed to donate blood and inundated charities with over one billion dollars in donations.<sup>190</sup> This impulse to respond charitably is based on generosity as an act of virtue.<sup>191</sup> Feinberg specifically mentioned this aspect of the Fund in the introductory statement of the Interim Final Rule when he called it "an unprecedented expression of compassion . . . designed to bring some measure of financial relief . . . to those most in need."<sup>192</sup> Whether or not such a humanitarian response is a "moral obligation"<sup>193</sup> may be argued, but the undeniable evidence of a nation moved by compassion is proof that many people search for a way to connect when they see suffering.

181. See Sommer, *supra* note 131, at 351 n.102.

182. The Act's purpose was "to preserve the continued viability of the United States air transportation system." ATSSSA, Pub. L. No. 107-42, 115 Stat. 230 (2001).

183. Megret, *supra* note 122, at 163.

184. Goldscheid, *supra* note 24, at 220-21.

185. Ackerman, *ADR*, *supra* note 170, at 289.

186. Goldscheid, *supra* note 24, at 220-21.

187. For example, the airlines' insurance coverage was insufficient to cover anticipated damages. See *supra* text accompanying note 19.

188. See Megret, *supra* note 122, at 183.

189. ATSSSA, Pub. L. No. 107-42 § 403, 115 Stat. 230, 237 (2001).

190. Stephan Landsman, *A Chance to Be Heard: Thoughts about Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393, 393 (2003).

191. Megret, *supra* note 122, at 184.

192. Landsman, *supra* note 190, at 399; September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66274, 66274 (Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104).

193. Megret, *supra* note 122, at 183-87.

The potential for *efficient processing of claims* is another important reason for creating a permanent fund.<sup>194</sup> The Fund allowed victims and families to receive their awards very quickly in comparison to the long and uncertain litigation route.<sup>195</sup> While the Special Master was appointed quickly and regulations for the ad hoc Fund were promulgated within ninety days of the signing of the ATSSSA,<sup>196</sup> having a permanent fund and administrative body in place would allow for even quicker processing and distribution of claims in the event of a future attack. This would also relieve Congress of the difficult task of creating reactive legislation and would enable victims and their families to address financial burdens and move on with their lives more quickly.

The intersection of *political motivations and public expectations* is an additional reason for creating a permanent fund.<sup>197</sup> When society is rocked by an event so tragic and far-reaching as 9/11, it will look to the government for a response.<sup>198</sup> For the sake of social stability and maintaining power, the government has an interest in placating public opinion and responding to its citizens' expectations. By promoting a perception of stability, sustaining certain industries, and appearing victim-sensitive, it can restore public trust that has been shaken by disasters like 9/11.<sup>199</sup>

In light of these sometimes complementary and sometimes conflicting rationales, it is important to consider the specific American context that differs from an individual state, a foreign country, or the broader international community. Common American values of individualism, independence, and pride in a strong work ethic should be considered.<sup>200</sup> Due to their pick-yourself-up-by-your-own-bootstraps mentality and the concept of limited government, Americans generally do not expect the government to reimburse them for all unfortunate events that may befall them.<sup>201</sup> However, this American self-reliance has still allowed for compassionate responses to extraordinary disasters, as the country's reaction to 9/11 demonstrates.

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194. *Id.* at 163–64.

195. FEINBERG, *supra* note 6, at 21.

196. Landsman, *supra* note 190, at 399–400.

197. See Megret, *supra* note 122, at 153–55 (“Victim compensation schemes serve definite political agendas of governments who are intent on portraying themselves as ‘victim-sensitive.’”).

198. *Id.* at 154.

199. *Id.* at 153–54.

200. FEINBERG, *supra* note 6, at 178–79.

201. See Grey, *supra* note 4, at 729 (“Government does not act as an insurer of last resort to compensate those who die as a result of their own choices or life’s misfortunes.”); see also FEINBERG, *supra* note 6, at 181–82 (explaining that the resolve shown by victims of the Oklahoma City bombing characterize this ideal of independence).

## V. CONSIDERATIONS FOR POLICYMAKERS

To provide for a sustainable compassionate response that fits its unique needs and values, the United States must explore many aspects of creating and implementing a new permanent fund for victims of terrorism. It must first discern whether victims of terrorism should be treated differently than victims of other crimes.<sup>202</sup> While “[v]ictims of acts of terrorism are not ontologically more deserving of compensation than victims of other crimes in proportion to the harm suffered,”<sup>203</sup> a different response to victims of terrorism is justified when taking into consideration the unique characteristics and intentional nature of the attacks.<sup>204</sup> Terrorists have specific goals such as destabilizing the nation, so responding through a permanent fund may be one strategic way to prevent terrorists from accomplishing their goals.<sup>205</sup> Moreover, the practical need to provide a rapid, effective response to a potentially large number of victims also provides justification for a differentiated approach.<sup>206</sup>

But should a permanent fund be established, or should the federal government create ad hoc funds as needed? For this analysis, we must compare the advantages and disadvantages of a permanent compensation fund.

### A. *Advantages of a Permanent Compensation Fund*

The advantages of a permanent fund are many. Because America is not currently reeling from the immediate shock of a terrorist attack, it can develop a long-lasting program through a slower, more deliberate and detailed legislative process than what occurred in the aftermath of 9/11. The process of conversation, hearings, and debate would allow the American public to have a voice in value judgments rather than tasking one person with that role.<sup>207</sup> If a fund were put in place through such a process, the public would adjust its expectations accordingly in the event of another attack.<sup>208</sup>

Developing a permanent fund would provide a chance to clarify the criteria for when the federal government should intervene and compensate victims.<sup>209</sup> A permanent fund would also result in a more equitable and

202. See Grey, *supra* note 4, at 729; FEINBERG, *supra* note 6, at 178–79.

203. United Nations Office on Drugs and Crime, The Criminal Justice Response to Support Victims of Acts of Terrorism 71 (Nov. 29, 2011), available at [http://www.unodc.org/documents/terrorism/Victims\\_Rights\\_E-Book\\_EN.pdf](http://www.unodc.org/documents/terrorism/Victims_Rights_E-Book_EN.pdf) [hereinafter “UNODC”].

204. See Megret, *supra* note 122, at 132–33 (advocating for victim compensation schemes for victims of violent intentional crimes within a nation’s borders).

205. See UNODC, *supra* note 203, at 3.

206. See *id.* at 3, 70–74, 93–94.

207. Sommer, *supra* note 131, at 362.

208. Grey, *supra* note 4, at 729.

209. Law professor Robert Ackerman suggests that policymakers determine these criteria by looking at the inherent nature of the disaster, asking how state, local, and private sources will interact with federal relief and whether political will exists to provide compensation without “a perceived crisis du jour.” Ackerman, *ADR*, *supra* note 170, at 294–95.

efficient system of distribution for similarly situated victims, as a structured process and trained personnel would already be in place before an attack occurred.<sup>210</sup> In addition to these administrative benefits, a permanent fund would provide a psychological “safety net” for the public—the assurance that the government has a proactive response ready in the event terrorists again succeed in targeting the nation.<sup>211</sup> Providing a place for victims to turn, social support, material resources, and a sense of psychological closure would also help society return to the status quo more quickly.<sup>212</sup> All of these advantages would enable the nation to better manage the long-term effects of terrorism.<sup>213</sup> Moreover, careful establishment of a permanent fund would avoid potential constitutional challenges that could plague ad hoc compensation programs.<sup>214</sup>

### B. *Disadvantages of a Permanent Compensation Fund*

These positive aspects must be considered alongside the disadvantages of a permanent fund. Economic implications must be analyzed. Along with the cost of bureaucracy in setting up and administering a permanent fund, there could be demands from the public to increase awards, as gradually happened with Israel’s permanent fund.<sup>215</sup> However, these economic factors are difficult to accurately predict because amount and extent of loss from terrorist attacks can vary widely.<sup>216</sup> Without being able to predict the future, it is unlikely society can accurately assess whether a permanent fund will be fiscally advantageous compared to an ad hoc fund.<sup>217</sup> However, this uncertainty should not excuse policymakers from putting forth their best efforts to design a permanent fund that is realistic in the extent it can compensate victims. A permanent fund can be adjusted later if future events show weaknesses in its structure or administration.

Another potential advantage of an ad hoc fund over a permanent fund is that a retrospective ad hoc fund can assess priorities and respond to the unique situation of each event more flexibly.<sup>218</sup> However, a permanent fund

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210. See Ackerman, *ADR*, *supra* note 170, at 295–96 (arguing that a victim compensation system similar to single payer health insurance can alleviate the “problem of unequal treatment.”).

211. *Id.* at 294–95.

212. Grey, *supra* note 4, at 721, 724–26; see also Ackerman, *ADR*, *supra* note 170, at 292–93 (“[T]he goal of a system financed primarily by taxpayers should be to give victims of disaster . . . the wherewithal to get on with their lives. . . . Sustenance that allows . . . families to get past the immediate crisis can provide for a more stable future [and] allow these families to become productive once again . . .”).

213. Grey, *supra* note 4, at 750.

214. A permanent fund would be more likely to survive constitutional attack if it is considered a reasonable substitution for tort action and addresses future claims, rather than responding retroactively. *Id.* at 730–36.

215. Sommer, *supra* note 131, at 364.

216. Grey, *supra* note 4, at 723.

217. Sommer, *supra* note 131, at 364.

218. Grey, *supra* note 4, at 723.



provides more long-term stability, as the legislative process will involve more time for detailed study, economic projections, and informed debate about what the nation can afford to consistently sustain in the event of multiple terrorist attacks.<sup>219</sup> Moreover, a permanent fund could intentionally be built with a basic structure that provides room for flexibility in the event of small- or large-scale attacks.

Another potential disadvantage of a permanent fund is that Americans may end up institutionalizing a two-tiered system that compensates victims of terrorism more than victims of other crimes.<sup>220</sup> This already happened when the nation decided to offer compensation for victims of 9/11 through the ad hoc Fund, using broader criteria for eligibility and offering more generous compensation than the state victim compensation programs.<sup>221</sup> Because crime victim compensation programs vary from state to state, it will be impossible for a permanent fund to match the eligibility criteria, benefits, or administrative process of any state exactly. However, an ad hoc fund would face this same disadvantage, and the process of creating a permanent fund would provide a greater opportunity for close consideration of this very issue. Open and thorough discussions with the public are the best way to acknowledge and strategically confront this perceived unfairness, rather than trying to hide it by designing a one-time solution that further ignores the dissonance.

### C. *Implementation Considerations for a Permanent Fund*

If a permanent fund is selected, America will need to determine the foundation and goals that will underlie its establishment. It must also make many decisions about the eligibility, benefits, and administration.<sup>222</sup>

#### 1. *Eligibility Criteria: Who Will Qualify as a Claimant?*

In terms of pragmatics, policymakers must first determine eligibility for the program. They must decide what type of attacks will be covered, and this task will likely involve creating a definition of “terrorism.” Establishing a definition of terrorism has been an elusive endeavor, but the common thread for events considered terrorist acts against the United States seem to include the following characteristics: risks beyond those normally assumed in society, the result of an ideological campaign to instill fear and violence,

219. *Id.* at 736.

220. See Goldscheid, *supra* note 24, at 225 (noting that the generosity shown to victims of 9/11, when compared to that shown to victims of domestic and sexual abuse, may be indicative of the differential attitude developed toward victims of domestic and sexual abuse).

221. See *id.* at 224–25 (“[T]he 9/11 Fund illuminates the frequently unmet financial and practical needs victims of violence constantly face.”).

222. See generally Edda Kristjánsdóttir, *International Mass Claims Processes and the ICC Trust Fund for Victims*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 167, 179–94 (Carla Ferstman et al. eds., 2009) (discussing the practical challenges facing mass claims processing).

and action directed against all Americans.<sup>223</sup> These factors differentiate terrorism from other crimes.<sup>224</sup> Many legal and scholarly experts use the U.S. Department of State's definition: "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."<sup>225</sup>

The new fund will need to specify the scope of acts it will cover—for example, whether the acts must occur within America, or if attacks abroad will be covered also. The OVC established the International Terrorism Victim Expense Reimbursement Program (ITVERP) in 2006 to compensate certain victims of international terrorism abroad for "expenses associated with that victimization."<sup>226</sup> Policymakers will need to determine if the new permanent fund will be combined with ITVERP, supersede ITVERP, or act as a separate compensation program altogether. Currently, ITVERP compensates nationals of the United States or officers or employees of the U.S. government who are directly injured—either physically or emotionally—in an act of "international terrorism" as designated by the Attorney General.<sup>227</sup>

Once the scope of incidents covered is established, policymakers must determine who will be eligible claimants. The United States will need to have some frank and politically-charged discussions about domestic partnerships, unauthorized immigrants, and priority of relationships before coming to conclusions about who may receive compensation.

## 2. *Benefits: What Will Claimants Receive?*

Another important aspect of the new fund would be determining how much compensation is appropriate. This depends upon the goals of the fund—if preventing litigation is a main goal, then compensation must be substantial enough to give claimants incentive to choose the new fund.<sup>228</sup> And while the Fund was *sui generis*, the American people will still likely have expectations of generous compensation for a future terrorist attack.<sup>229</sup> Feinberg advised that the prior work of the Fund should not be precedential, because awarding millions to victims and their families is not sound public policy in the American context of limited government.<sup>230</sup> He also advised against individualized determinations, advocating for standardized awards

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223. Goldscheid, *supra* note 24, at 209.

224. *Id.*

225. 22 U.S.C. § 2656f(d) (2006).

226. International Terrorism Victim Expense Reimbursement Program, 28 C.F.R. § 94.11(a) (2012) [hereinafter "ITVERP"].

227. *Id.* at § 94.21; U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, *Who is Eligible?*, INT'L TERRORISM VICTIM EXPENSE REIMBURSEMENT PROGRAM, <http://www.ovc.gov/intdir/itverp/eligibility.html> (last visited June 17, 2012).

228. FEINBERG, *supra* note 6, at 187.

229. Ackerman, *ADR*, *supra* note 170, at 293.

230. FEINBERG, *supra* note 6, at 179.

in the future.<sup>231</sup> Uniform awards for similar injuries would streamline processing and avoid causing division between victims.<sup>232</sup>

Funding a permanent compensation scheme must also be addressed. America must decide how much money such a fund would require and how to acquire those funds. In the current economy, Americans may not be willing to support another entitlement program, and policymakers may lack the political will to push any new legislation forward that carries a large price tag. Another financial aspect that must be considered is whether awards should be offset by collateral sources. Doing so would lighten the financial load on the government, but many victims would find it unfair. For example, victims could interpret such a rule as penalizing them for planning ahead and purchasing substantial life insurance policies. Charities would also find it harder to collect donations if donors perceived their donations would be “subsidizing” a government program. In the spirit of uniformity, Feinberg suggests not deducting collateral sources at all.<sup>233</sup>

### 3. Administration: Who Will Oversee the Fund?

Beyond eligibility and funding for the new permanent fund for victims of terrorism, an administrator of the fund must be established. The government could appoint a special master again, but the same criticisms and dangers would exist. The Fund’s Special Master was “a rare, and tenuous, judicial creature,” as he was not appointed by a court as other special masters are, so his discretion was not answerable to a judge or supervised by the adversarial process.<sup>234</sup> Alternatives that would enhance accountability include a stronger appointment process, the appointment of several special masters, or the appointment of federal magistrates or judges instead of a special master.<sup>235</sup> In addition, incorporating the fund’s administrators into an existing federal agency would provide more structure and oversight.<sup>236</sup> Administrative agencies generally hire organizationally independent administrative law judges to conduct hearings, and their decisions are usually reviewable or have sufficient due process safeguards where their decisions are precluded from review.<sup>237</sup>

Several departments are potential candidates for the task of housing the new fund: the Department of Homeland Security,<sup>238</sup> the Social Security

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231. *Id.* at 182–83.

232. *Id.* at 184–85.

233. *Id.* at 185.

234. Berkowitz, *supra* note 8, at 20.

235. *Id.* at 38–40.

236. *Id.* at 39.

237. *Id.* at 20–22.

238. *See generally* History of the Department of Homeland Security, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/history> (last visited Mar. 17, 2013) (stating the Department was created after 9/11 to secure the nation from threats). Its agencies include Transportation Security Administration, U.S. Customs and Border Protection, U.S. Citizenship and Immigration

Administration, the Department of Veterans Affairs, and the Department of Justice's Office for Victims of Crime. Each of these agencies has experience administering and adjudicating applications for benefits and/or allocating funding for benefits.

#### D. *Non-Monetary Compensation Considerations*

Other considerations beyond financial compensation require the attention of policymakers. Non-monetary and symbolic forms of compensation should not be neglected.<sup>239</sup> Victims and their families have intangible needs for healing and restoration—to what extent should a new fund address these needs? And from a broader perspective, how should it provide for society's intangible needs?

##### 1. *Commemoration of Victims*

One important need is commemoration. Passing on “shared context, shared mourning, and shared memory” through creating a narrative of events has been important to all societies, religions, and cultures.<sup>240</sup> This narrative may take many forms such as raising awareness, sharing information, educating younger generations, erecting statues of heroes, building museums, naming streets, hosting memorial services, collecting and distributing scholarship funds, creating works of art, and publishing books.<sup>241</sup> Such efforts to remember victims and their families help them know they are not alone and reaffirms that the world is a compassionate place.<sup>242</sup> In a survey of surviving families of 9/11 victims, 95% of respondents mentioned the importance of public and private rituals on anniversaries of the attacks.<sup>243</sup>

In 2011, the National September 11 Memorial opened in Manhattan,<sup>244</sup> providing a public space of remembrance. The Memorial is comprised of twin reflecting pools with names of victims inscribed on bronze panels

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Services, U.S. Immigration and Customs Enforcement, U.S. Secret Service, Federal Emergency Management Agency, and the U.S. Coast Guard. *Id.*

239. Theo van Boven, *Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 19, 39–40 (Carla Ferstman et al. eds., 2009).

240. Yael Danieli, *Massive Trauma and the Healing Role of Restorative Justice*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 41, 63 (Carla Ferstman et al. eds., 2009).

241. *Id.* at 63–64.

242. *See id.* at 48, 63–64.

243. Kathleen Nader & Yael Danieli, *Cultural Issues in Terrorism and in Response to Terrorism*, in THE TRAUMA OF TERRORISM 399, 405 (Yael Danieli et al. eds., 2005).

244. The Memorial was dedicated on the ten-year anniversary of 9/11, on September 11, 2011. It opened the next day to the public. NAT'L SEPTEMBER 11 MEM'L & MUSEUM AT THE WORLD TRADE CENTER FOUND., *When Did the 9/11 Memorial Open?*, 9/11 MEMORIAL, <http://www.911memorial.org/node/320816> (last visited Mar. 17, 2013).

along the pools.<sup>245</sup> In addition, a museum is under construction to “bear solemn witness” to the terrorist attacks of 9/11 and the 1993 World Trade Center.<sup>246</sup> Its mission is one of remembrance and resilience.<sup>247</sup>

The Memorial and Museum are funded by public funds totaling over \$330 million and private donations of over \$350 million.<sup>248</sup> Policymakers should determine what type of remembrance events, monuments, or museums would be appropriate for future acts of terrorism, and whether these should be financed through the new permanent fund, charitable donations, other public funds, or a combination of these sources.

## 2. *Restoration of Victims, Families, and Society*

The United Nations Human Rights Committee has outlined several other non-monetary forms of justice that may also be appropriate in instances where human rights have been violated.<sup>249</sup> Many of these principles provide relevant guidance in responding to terrorist attacks. Some of these measures include acts of restoring the victim to his or her original situation through family reunification, citizenship, employment, and property.<sup>250</sup> The provision of rehabilitative care, including medical, psychological, legal, and social services are another form of justice.<sup>251</sup> Other non-material government responses that may be appropriate in response to terrorist acts include truth-seeking (such as the 9/11 Commission), searching for victims, and recovering and burying remains.<sup>252</sup> In addition, government can strengthen “guarantees of non-repetition” through institutional reform, emergency re-

245. NAT'L SEPTEMBER 11 MEM'L & MUSEUM AT THE WORLD TRADE CENTER FOUND., *About the Memorial*, 9/11 MEMORIAL, <http://www.911memorial.org/about-memorial> (last visited Mar. 17, 2013).

246. NAT'L SEPTEMBER 11 MEM'L & MUSEUM AT THE WORLD TRADE CENTER FOUND., *The Mission*, 9/11 MEMORIAL, <http://www.911memorial.org/mission> (last visited Mar. 17, 2013); see NAT'L SEPTEMBER 11 MEM'L & MUSEUM AT THE WORLD TRADE CENTER FOUND., *Frequently Asked Questions*, 9/11 MEMORIAL, <http://www.911memorial.org/faq/general> (last visited Mar. 17, 2013).

247. “Demonstrating the consequences of terrorism on individual lives and its impact on communities at the local, national, and international levels, the Museum attests to the triumph of human dignity over human depravity and affirms an unwavering commitment to the fundamental value of human life.” NAT'L SEPTEMBER 11 MEM'L & MUSEUM AT THE WORLD TRADE CENTER FOUND., *The Mission*, 9/11 MEMORIAL, <http://www.911memorial.org/mission> (last visited Mar. 17, 2013).

248. NAT'L SEPTEMBER 11 MEM'L & MUSEUM AT THE WORLD TRADE CENTER FOUND., *Public-Private Partnership*, 9/11 MEMORIAL, <http://www.911memorial.org/public-private-partnership> (last visited Mar. 17, 2013). Public funding includes the Lower Manhattan Development Corporation, the State of New York, and the Port Authority of New York & New Jersey. *Id.*

249. Van Boven, *supra* note 239, at 38–39; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶¶ 15–23, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter “Basic Principles”].

250. Basic Principles, *supra* note 249, at 7.

251. *Id.* at 8.

252. *Id.*

sponse training, law enforcement, media coverage, and industrial safeguards.<sup>253</sup>

### 3. *Participation of Victims and Families in the Award Process*

Allowing victims to participate in the compensation process is another important component of healing that the Fund sought to implement. Victims and families were given an opportunity to have individual hearings, where many shared memories and emotions.<sup>254</sup> Feinberg witnessed that memory seems to hold value as a “pain reliever.”<sup>255</sup> Though allowing for individual hearings took considerable time and resources, many victims found it to be an important part of finding closure and moving on.<sup>256</sup>

### 4. *The Roles of Communities and Faith in Healing*

While the federal government can choose to implement many or all of these steps toward holistic restoration, Professor Robert Ackerman of Wayne State University Law School, and former director of the Center for Dispute Resolution at Pennsylvania State University’s Dickenson School of Law, points out that government is not enough for complete healing.<sup>257</sup> He stressed that law is not the sole answer, but time, patience, and community are also important.<sup>258</sup> While acknowledging the importance of a large-scale government response for some tragedies, he also advocates for a strong web of local support systems in civil society, starting with small units that are closest to the problems.<sup>259</sup> Ackerman attributes the tendency of society to respond to the Jewish concept of holistic restoration: “[W]hen disaster strikes . . . we have a natural human inclination to reach out and to engage in Tikkun Olam (healing the world).”<sup>260</sup>

Many victims, families, and members of society have also drawn upon their own beliefs to find meaning, healing, and hope. Through his interactions with many families and survivors, Feinberg noted they expressed a wide variety of reactions to God, including newfound faith, renewed faith, and lost faith.<sup>261</sup> Spiritual and religious beliefs and practices are often used as coping strategies and to help victims “reconstruct a meaningful narrative following traumatic experiences.”<sup>262</sup> Moreover, local support systems already know the communities they are serving, what resources are available, and have experience strategizing about how to effectively serve specific

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253. *Id.* at 8–9.

254. FEINBERG, *supra* note 6, at 114.

255. *Id.* at 149.

256. *Id.* at 113.

257. Ackerman, *ADR*, *supra* note 170, at 285.

258. *Id.* at 299–300.

259. *Id.* at 284–85, 289.

260. *Id.* at 284 (emphasis removed).

261. FEINBERG, *supra* note 6, at 131.

262. Nader & Danieli, *supra* note 243, at 404.

groups. Thus, rather than trying to provide for every need, a new permanent fund should leave space for—and encourage—the participation of faith and community organizations in the healing and rebuilding process.

## VI. SPECIFIC RECOMMENDATIONS FOR CREATING A PERMANENT FUND

Taking all of this into consideration, policymakers should design a permanent fund that best suits the nation. The fund should acknowledge the unique harms of terrorism, the needs of victims, the government's financial limitations, and the role of non-governmental actors in restoration and recovery.

### A. *Recommendations for the Rationale Underlying the Permanent Fund*

The government's experience with 9/11 and the Fund should inform its future policies. While the government has legitimate interests in keeping certain industries afloat, it should not allow the fear of their collapse to motivate awarding millions of dollars to each victim of terrorism. It is not realistic to establish a program that the American people cannot afford. A smaller, standardized award for each claimant, combined with some forms of non-monetary compensation, would still be a meaningful gesture to show solidarity and help meet victim needs.

While consideration of each theory described in Part IV will probably help shape the future policy in some way, a blend of *shared risk rationale*, *social welfare theory*, and *efficiency of processing claims* hold the most promise for becoming the foundation of a coherent and sustainable federal program. Such a blended foundation would recognize that each of us could one day be the victim in need of restoration. It would emphasize the role of community while viewing our fellow man with active compassion. Such underlying motivation would seek to treat victims equally—not with unsustainable awards of millions of dollars, but with enough to meet basic needs. It would also recognize the limitations of government while seeking to maximize resources to distribute funds quickly to those in need. This blended justification would require some sacrifice from the public in order to provide compensation for those most affected by terrorism, but it would also leave space for communities to respond with compassionate generosity.

### B. *Recommendations for Award Eligibility*

Victims should be defined broadly to prevent qualified individuals from facing administrative difficulties. A broad definition will facilitate the disbursement of awards quickly to those in need, because the administrator will not need to waste valuable time determining which individuals and groups Congress intended to compensate. Unlike the Fund, which was later expanded by the Zadroga Act to incorporate more qualifying individuals, a

broadened definition should be a part of the new fund's regulations from the outset. The new fund's compensation plan should include all individuals injured or killed in the attack, rescue, or recovery within a reasonable period following the incident. Additionally, the new fund's regulations should have a provision that would allow victims to receive awards if they apply for funding within a certain time period of discovering their latent injuries.

Eligibility should not be based on U.S. citizenship or permanent residency, so that the maximum number of victims may be helped. The victims will have all endured the same tragedy, and their nationality or immigration status should not prevent a compassionate response. Expanding the definition of victim to include even unauthorized immigrants would be a reasonable response in light of the reality of the large unauthorized population in America, the prior awards given to unauthorized immigrants under the Fund, and the nation's interest in preserving strong relationships with the world community. To ensure equal treatment of victims of overseas or domestic terrorist attacks, the new permanent fund should supersede IVERP. Americans and those who have an obligation of loyalty to America (refugees, permanent residents, etc.)<sup>263</sup> should file claims with the new program whether the attack occurs in America or abroad, and whether the attack was specifically aimed at America or the broader world community.<sup>264</sup>

Whether or not domestic partners of victims should be included is a complicated area, which will likely lead to future litigation regardless of what regulations are put in place, as state views on same-sex marriage continue to change and cohabitating partners press for more rights. For the time being, a simple way to address this would be to adopt the approach of the majority of states, which limits or excludes domestic partners as claimants.<sup>265</sup> Moreover, this approach complies with the federal definition of marriage while the Defense of Marriage Act is still in place.<sup>266</sup> Another complexity in the realm of eligibility is determining which family member will be the primary claimant in the event there is no surviving spouse. A simple way to address this would be by comparing various states' laws and policies and implementing the most common approach, though more input from the public should be considered if the public finds this approach unsatisfactory.

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263. See generally Mostaghel, *supra* note 157, at 104–20 (explaining why a broad definition of “victim” is beneficial and comports with historical trends).

264. However, to the extent other nations or intergovernmental organizations compensate the American victims who have suffered due to terrorist attacks abroad, the new permanent fund should decrease its award to the victims accordingly.

265. See Goldfarb, *supra* note 51, at 41.

266. The Defense of Marriage Act defines marriage as “a legal union between one man and one woman.” Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (2006) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).



### C. Recommendations for Benefits Available to Claimants

Like Israel's program, all deceased victims should be treated equally, and death benefits should be standardized based on a government salary. The appropriate level of government salary should be decided by Congress through consultation with financial experts and the American public, but a reasonable starting point of consideration would be the amount awarded to soldiers killed in duty or in active training for duty. The military award currently includes a non-taxable \$100,000 death gratuity, funeral and burial expenses up to \$8,800, travel expenses for immediate family to attend a funeral and/or memorial service, a monthly Dependency and Indemnity Compensation (DIC) based on the number of dependents,<sup>267</sup> financial counseling, bereavement counseling, legal assistance, educational benefits, and access to home loans which may offer better mortgage rates.<sup>268</sup>

Awards should also be given for treatment and counseling for victims and surviving families' psychological harm. When asked about her thoughts on a permanent fund for victims of terrorism, Dr. Yael Danieli, an expert on psychological trauma and treatment of victims and survivor populations, strongly emphasized that such a fund must include provisions for mental health treatment.<sup>269</sup> State crime victim compensation programs and ITVERP cover mental health treatment to varying extents,<sup>270</sup> so the permanent fund should not exclude remedy for this type of harm. Also, the need for psychological treatment in the context of terrorism is justifiable in light of terrorists' goal of inflicting psychological distress on the nation.<sup>271</sup> Besides funding treatment, the government should provide funding for specialized training of disaster mental health responders<sup>272</sup> and the establishment of targeted support agencies<sup>273</sup> to ensure a quality and timely response.

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267. For a single surviving spouse, the DIC award is \$1,195 per month, adjusted annually for cost of living. U.S. DEP'T OF DEFENSE, A SURVIVOR'S GUIDE TO BENEFITS 14 (Aug. 12, 2012), available at <http://www.militaryonesource.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Casualty%20Assistance/Survivors%20Guide.pdf>.

268. *Id.* at 10–18.

269. Conversation with Yael Danieli, Director, Group Project for Holocaust Survivors and their Children, in N.Y.C., N.Y. (Nov. 22, 2011). See generally THE TRAUMA OF TERRORISM (Yael Danieli et al. eds., 2005) (emphasizing the need for provision of psychological treatment for victims of terrorism and their surviving families); ON THE GROUND AFTER SEPTEMBER 11 (Yael Danieli & Robert Dingman eds., 2005) (providing insights gained from mental health responses following 9/11).

270. *Crime Victim Compensation: An Overview*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?bid=14> (last visited Mar. 17, 2013); U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, *What is Covered?*, INT'L TERRORISM VICTIM EXPENSE REIMBURSEMENT PROGRAM, <http://www.ovc.gov/intdir/itverp/expense.html> (last visited Mar. 17, 2013).

271. See Brian W. Flynn, *Mental Health Response to Terrorism in the United States: An Adolescent Field in an Adolescent Nation*, in THE TRAUMA OF TERRORISM 755, 762 (Yael Danieli et al. eds., 2005); UNODC, *supra* note 203, at 94.

272. Lloyd I. Sederer, *Challenges of Urban Mental Health Disaster Planning*, in THE TRAUMA OF TERRORISM 695, 703 (Yael Danieli et al. eds., 2005).

273. UNODC, *supra* note 203, at 93–94.

#### D. *Recommendations for Administration of the Permanent Fund*

While Veterans Affairs (VA) has experience with administering the type of fund most closely associated with this proposed permanent fund for victims of terrorism, the VA does not seem to be the department best suited for administering the new fund. The VA's explicit mission is to serve and honor America's veterans;<sup>274</sup> victims of terrorist attacks are outside that scope. While the Department of Homeland Security has experience administering benefits and dealing with terrorism, the most fitting body seems to be the Office for Victims of Crime (OVC). The mission fit is strong: "OVC is committed to enhancing the Nation's capacity to assist crime victims and to providing leadership in changing attitudes, policies, and practices to promote justice and healing for all victims of crime."<sup>275</sup> In addition, OVC already administers ITVERP and distributes the Crime Victims Fund to state crime victim compensation programs.<sup>276</sup> OVC's experience interacting with victims and understanding victim needs would also be beneficial to fostering a victim-friendly approach.

In terms of making decisions about awards, OVC should appoint administrative law judges or special masters. These decisions should be reviewable by a court to avoid problems related to having discretion rest with a single individual.

#### E. *Non-Monetary Compensation Recommendations*

As noted in Part V, Section D, non-monetary compensation is a significant part of the healing process of the nation, the victims, and their loved ones in the aftermath of a terrorist act. Creators of a permanent fund should carefully consider what financial commitment should be made toward this important aspect of recovery. In particular, policymakers should focus on public commemoration and preserving the rights of claimants.

##### 1. *Commemoration of Victims*

While providing a smaller compensation award to each victim would be a more sound and sustainable policy than awards that reach into the millions, the new permanent compensation fund should also provide for commemoration of attacks in forms of memorials, museums, and remembrance events. These types of expenses seem particularly well suited to the role of the federal government, as these forms of commemoration would be for the public good. They would also be an act of solidarity—the entire nation standing behind the victims, showing the terrorists that they did not succeed in their goal of breaking the nation. If the new permanent fund

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274. *About VA: Mission Statement*, U.S. DEP'T OF VETERAN AFFAIRS, [http://www.va.gov/about\\_va/mission.asp](http://www.va.gov/about_va/mission.asp) (last visited Mar. 17, 2013).

275. *See* U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, *supra* note 15.

276. *See id.*

covered these memorial initiatives fully rather than asking for private donations, it would free businesses and individuals to give more to charities which address individual needs.

## 2. *Claimant Participation in the Award Process*

Ensuring victim participation in decisions affecting them is another important form of non-monetary compensation. The Fund gave claimants the option to have a hearing, which many found to be an important part of the healing process. The administration of a permanent fund should provide an opportunity for claimants to be heard, though it need not follow the same format as the Fund. If the new fund treats claimants more equally, there will not be the same opportunity or need for individualized hearings. Nevertheless, claimants should be given the chance to appeal a decision or seek civil damages if they so choose.

Surviving victims and family members should also be given a voice in other decisions that affect them. Carie Lemack's mother was killed on 9/11 when her plane was involved in the attacks. Shortly thereafter, Lemack co-founded Families of September 11 to help families. The organization has also advocated for improvements to aviation safety, an investigation into 9/11, and a memorial. Lemack told the families, "If we don't start speaking out, they're going to make more decisions affecting us without our say."<sup>277</sup> She advocated for life insurance and pensions to not be deducted from Fund awards. Along with the Family Steering Committee, Lemack was also instrumental in pushing the government to create the 9/11 Commission and advocating for a later bill to strengthen intelligence-gathering agencies.<sup>278</sup>

Like Lemack, relatives of victims have a need for clarity, answers, and accountability. Therefore, the government's response to terrorism should involve a forthright investigation, which is then made available to at least the surviving family members, if not the entire public. The establishment and work of an investigatory commission for future terrorist attacks should be funded by the permanent fund in the interest of transparency. Such a commission could also focus efforts on lessons learned for the prevention and mitigation of future attacks. The preparation and dissemination of these reports would be similar to the investigative reports to which surviving dependents of military members killed in duty are entitled.<sup>279</sup>

Victims should also be given the option of being present in the courtroom when alleged terrorists are put on trial. While the large number of victims and survivors across the country may make this difficult, accommodations such as closed circuit television should be implemented when nec-

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277. Martha T. Moore, *Carie Lemack: A Mother Lost, a Cause Found*, USA TODAY, Oct. 26, 2001, <http://usatoday30.usatoday.com/news/nation/story/2011-09-02/How-911-changed-us-Person-by-person/50246434/1>.

278. *Id.*

279. See U.S. DEP'T OF DEFENSE, *supra* note 267, at 12.

essary. In the 9/11 criminal proceedings against Zacarias Moussaoui, the Senate passed a bill ordering closed circuit televising of the proceedings to several “convenient locations” for victims deemed to have a “compelling interest” in viewing them.<sup>280</sup> This accommodation, at minimum, should be replicated in future large-scale terrorist attacks. For foreign victims and surviving families outside America, efforts should be made to use technology to allow them to view the proceedings.<sup>281</sup>

### 3. *Preserving Claimants’ Right to Litigate*

Respect for the victims’ and family members’ legal rights should be another important component of the new permanent fund. When I spoke with Lemack about how I was writing this Comment recommending a permanent fund for victims of terrorism, she said, “Just make sure they don’t take away our right to sue.”<sup>282</sup> She explained that after the trauma of her mother’s death, she felt disempowered by the ATSSSA’s limits on lawsuits and her lack of opportunity to seek meaningful justice in that way.

A permanent fund should keep intact claimants’ rights to pursue a litigation option against responsible parties if they choose. The United Nations Office on Drugs and Crime (UNODC) recommends that victims should have “right to bring civil proceedings in order to secure at least symbolic reparation or to protect their civil rights.”<sup>283</sup> Like Israel’s program, the American program could allow claimants to pursue lawsuits and then choose between the greater of the awards. Such an option would give greater incentive to the private sector and the government to take all necessary measures to prevent terrorist attacks, and it would provide victims with an opportunity to have wrongdoing acknowledged in a meaningful way.

The arguments against a litigation option—potential bankruptcy of certain industries, astronomical insurance premiums, and the inundation of court resources—are indeed legitimate, but access to the justice system should not be abrogated just because these are possible outcomes. If an industry is going to collapse, the government can still decide to step in to supplement the industry’s insurance and provide funding to salvage it. In essence, that is what the Fund did—it just looked different because federal compensation funds went into the coffers of the Fund instead of directly to the airline industry.

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280. Terrorist Victims’ Courtroom Access Act, S. 1858, 107th Cong. (2002). Zacarias Moussaoui was charged with conspiring in the 9/11 attacks, and S. 1858 provided for closed circuit televising of proceedings so relatives of victims could watch the trial. Bob Port, *Senate Bill Pushes Closed-Circuit Viewing for Victims’ Kin*, NY DAILY NEWS, Dec. 21, 2001, <http://www.nydailynews.com/archives/news/tv-eyed-terror-trial-senate-bill-pushes-closed-circuit-viewing-victims-kin-article-1.917999>.

281. UNODC, *supra* note 203, at 95.

282. Conversation with Carie Lemack, Co-Founder, Global Survivors Network, N.Y.C., N.Y. (Nov. 22, 2011).

283. UNODC, *supra* note 203, at 36.

*F. Engaging Society in a Conversation About the Permanent Fund*

A permanent compensation fund should be created after there has been a deliberate, conversational process with the American public through events such as town hall meetings, draft policies and opportunities for feedback, and the testimony of victims and survivors of prior terrorist attacks. Congress should incorporate these insights into the legislative process, then create the new permanent fund and entrust it to an administrative agency. The administering agency should take the public conversation into earnest consideration when formulating regulations for administering the fund. When the regulations are established, the public will have accurate expectations of who is eligible for compensation, how much modest financial compensation will be available, and what type of non-monetary compensation will be provided. This will not only help victims know where to turn for certain forms of help, but it will hopefully spur society to give generously to supplement the federal response.

The compassion of the American people will rise again if there is another attack, and charities will likely be flooded with donations once again. These charities, including faith-based organizations, can provide services and needed funds to victims and their families at the local community level through offering housing, meals, medical services, counseling, companionship, and more. This sort of giving and personal responsibility for our fellow man should be encouraged by the government because it strengthens communities, has a deeper interpersonal component than the more distant federal response, and lifts the burden from the government's shoulders.

#### CONCLUSION

The government should not be expected to solve all social ills, but it should be prepared to address certain national tragedies to provide for its people and show the world its compassion and resilience.

A permanent compensation fund will never replace legs that will never again walk or a loved one who will never again come home, but it can begin to acknowledge the suffering, encourage the broken, and provide practical help. If a new terrorist attack strikes America, the public will look to the support structures it has depended on in the past: family, community, faith, and government. An approach to a permanent compensation fund for victims of terrorism should recognize the contribution of each of these realms and enable each component to do that at which it is best.

If another attack occurs before Congress decides how to resolve compensation of victims, it will once again have to scramble for an ad hoc solution, and we will have missed an important opportunity to engage society in a discussion of values and the role of communities in the healing process. We have an opportunity to kindle a flame that may be needed to light the way of tomorrow. A permanent compensation fund for victims of

terrorism based on shared risk rationale, social welfare theory, and efficiency, combined with a strengthened role for the community, can be a spark of hope and healing. A broader definition of eligibility, coverage of psychological treatment, and provisions for remembrance, participation, and preserving the right to litigate will result in more meaningful justice for victims and their families. Putting such a program in place now and establishing standardized award amounts will prepare America to respond immediately and effectively if terror does strike again.