



**Tragic Solutions:
The 9/11 Victim Compensation Fund, Historical Antecedents,
and Lessons for Tort Reform**

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Eleven days after the terrorist attacks on September 11, 2001, Congress passed the Air Transportation Safety and Stabilization Act (hereinafter “Act” or “Stabilization Act”)¹ to protect air carriers from tort lawsuits that threatened to cripple air travel in America. The Act capped tort lawsuits against the airlines at their pre-existing liability insurance limits and limited jurisdiction for tort claims to the United States District Court for the Southern District of New York. Moreover, the Act established the September 11th Compensation Fund of 2001 (hereinafter “Fund” or “9/11 Fund”), in which victims of the attacks could opt to waive all federal and state tort claims and receive administrative relief through a predetermined formula, under the discretion of the Fund administrator.

That the airlines were so concerned about their liability exposure, and the Congress so willing to act promptly upon that concern, is a testament to the mess our modern civil justice system has become.² This paper will: (1) outline the contours of the “litigation explosion” in the United States, and the problems it creates; (2) examine briefly the historical precedents for administrative remedies designed to replace common law tort actions; (3) expand this analysis to survey the 9/11 Fund experience; and (4) discuss the implications of this experience for possible policy solutions to the liability crisis.

¹ Pub. L. No. 107-42 (2001), 115 Stat. 230 (2001) (codified at 49 U.S.C.A § 40101 (West 2003)).

² Indeed, the airlines’ fear of massive exposure profoundly demonstrates the uncertainty of today’s legal climate, since it is hardly clear that they would face any liability exposure whatsoever under a proper reading of New York law. See Peter Schuck, *Special Dispensation*, Am. Lawyer, June 2004 (“[I]n the 9/11 litigation against the airlines and the World Trade Center, any fault-based liability is highly doubtful and would in any event take many years to establish, and . . . a third of any recovery would probably go to the lawyers.”); Anthony J. Sebok, *What’s Law Got to Do With It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DePaul L. Rev. 501, 517 (2003) (“[I]t is at least questionable that under New York law most of the personal injury and property claims [stemming from the terror attacks] should survive a motion to dismiss.”); see also Lloyd Dixon and Rachel Kaganoff Stern, *Compensation for Losses from the 9/11 Attacks* (RAND Institute for Civil Justice 2004), available at <http://www.rand.org/publications/MG/MG264/> [hereinafter “RAND Report”] (“To recover from the airlines, the plaintiffs will have to convince a jury that the airlines and other defendants acted negligently, hardly a foregone conclusion when the losses were due to the intentional acts of terrorism.”).

I conclude that the 9/11 Fund was essentially a success story that quickly and efficiently processed and distributed claims and received a positive assessment from most involved. The lessons learned from the Fund's structure and approach, and those derived from other historical analogues, can inform the case for administrative preemption of some common law tort. Such no-fault administrative proposals should be given serious consideration in the tort reform discussion.

(1) *The American litigation explosion*

The expansion of liability in the United States – what my Manhattan Institute colleague Walter Olson has dubbed the “litigation explosion”³ – has continued almost unabated for several decades. Over that span, the cost of tort liability in America has “increased more than a hundredfold,” while population growth has less than doubled and overall economy (gross domestic product) has increased “by a factor of 37.”⁴

The slowdown in relative tort expansion in the 1990s,⁵ largely a function of tort reform measures and extraordinary economic growth,⁶ has reversed itself as courts have overturned successful reforms⁷ and growth in the economy has ebbed.⁸ In 2001, when the overall U.S. economy was in recession, the cost of tort liability, or “tort tax,”⁹ grew 14.7 percent; in 2002, while economic growth remained stagnant, the tax grew another 13.4 percent.¹⁰ These increases were fueled by an explosion in asbestos litigation costs, which slowed somewhat in 2003, but even in that year tort costs grew 5.4 percent, outpacing the economy.¹¹ Overall, the tort tax has risen from 0.62 percent of the economy in 1950 to 2.23 percent in 2003.¹² The American tort tax is well higher than the

³ See generally Walter Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (Truman Talley Books 1991).

⁴ Tillinghast-Towers Perrin, U.S. Tort Costs: 2004 Update, Trends and Findings on the Cost of the U.S. Tort System, at 2 (2004) [hereinafter “Tort Costs: 2004”].

⁵ See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update, Trends and Findings on the Cost of the U.S. Tort System, at 2 (2003) [hereinafter “Tort Costs: 2003”].

⁶ See *id.* at 3 (“In the 1990s, [the long-term] trend reversed itself, with GDP growth in excess of tort cost growth, reflecting a period of steady economic growth and low inflation without significant growth in tort costs.”).

⁷ See, e.g., Victor E. Schwartz, *et al.*, *Who Should Make America's Tort Law: Courts Or Legislatures?*, Washington Legal Foundation monograph (March 1997).

⁸ See Tort Costs: 2003, *supra* note 5, at 10 (“The slowdown in economic growth that began in 2001, coupled with significant increases in tort costs, caused the surge in the ratio of tort-cost growth to GDP in 2001 and 2002.”).

⁹ See, e.g., Jim Copland, *The Tort Tax*, *The Wall St. J.*, June 11, 2003.

¹⁰ See Tort Costs: 2004, *supra* note 4, at 2.

¹¹ See *id.* at 2-3. Moreover, in 2003 more than 110,000 new asbestos claims were filed, a record level, see Lester Brickman, *Asbestos Litigation*, transcript of comments to the Manhattan Institute, Mar. 10, 2004, available at <http://www.manhattan-institute.org/html/clp03-10-04.htm>, so it is far from certain that future asbestos expenses will not escalate again absent legislative action.

¹² See *id.* at 5.

corporate income tax and is “far more than enough money to solve Social Security’s long-term financing crisis.”¹³

How does the American experience compare internationally? Essentially, the United States is unique. The percentage of its economy that America devotes to tort law is much greater than in any other industrialized country; in Britain, for instance, the entire tort system – attorneys’ fees, settlement costs, jury awards, and administrative costs – costs less as a percentage of GDP than America’s plaintiffs’ lawyers gross for themselves alone.¹⁴

Of course, costs alone cannot tell the full story of whether the tort system meets its goals. Those who launched the liability revolution, such as professors Fleming James and William Prosser and California Supreme Court Justice Roger Traynor, whom my Manhattan Institute colleague Peter Huber calls “the Founders,”¹⁵ were primarily concerned with risk spreading, or ensuring that victims were compensated for their injuries by those with the “deepest pockets.”¹⁶ The later law and economics professors who systematized the new tort law, chiefly Guido Calabresi and Richard Posner, viewed the civil justice system as a way to deter accidents by forcing actors to internalize their costs, with liability in Calabresi’s calculation falling to the “cheapest cost avoider.”¹⁷

¹³ See Steven Hantler, *The Seven Myths of Highly Effective Plaintiffs’ Lawyers*, Manhattan Institute Civil Justice Forum 42, at 6 (April 2004) (citing Council of Economic Advisers, *Who Pays For Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* 12, 13 (Apr. 2002) [hereinafter “CEA Report”]).

¹⁴ See Tillinghast-Towers Perrin, U.S. Tort Costs: 2000, *cited in* CEA Report, *id.*, at 11.

¹⁵ Peter Huber, *Liability: The Legal Revolution and Its Consequences* 6 (Basic Books 1988); *see also* George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985). *See generally* William Prosser, *Assault upon the Citadel*, 69 Yale L.J. 1099 (1960); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 (1963).

¹⁶ *See* James M. Wootton, *How We Lost Our Way: The Road to Civil Justice Reform*, Washington Legal Foundation Critical Legal Issues Working Paper No. 120, at 14 (2004), *citing* William Prosser, *et al.*, *Cases and Materials on Torts* 352 (9th ed. 1994).

¹⁷ *See, e.g.*, Guido Calabresi, *The Cost of Accidents* 40 (Yale U. Press 1970). In Calabresi’s way of thinking about the economics of tort law, deterring accidents (to the cheapest cost avoider) is the “primary” goal of tort law, mitigating the harm of accidents (through risk spreading) is the “secondary” goal, and minimizing administrative costs the “tertiary” goal – although all three goals could be compared economically, and Calabresi does not try to prioritize among them apart from the semantic delineations. *Id.* at 26-29. Thus, Calabresi implicitly acknowledges risk spreading as a tort objective, though unlike the Founders he tends to view the issue economically, as a means of involuntary (but presumably efficient) insurance. Although he emphasizes lowering administrative costs as a tort objective (in his view, eliminating trials over questions of fault or negligence would facilitate this goal), he does not adequately consider how weakening common law principles of causation and reducing the availability of affirmative defenses based on a plaintiff’s conduct creates a moral hazard problem frustrating his primary accident deterrence objective, nor how expanding the ease of recovery in tort creates an incentive for individuals to substitute seeking compensation through liability in place of productive endeavor.

I should emphasize that although both Calabresi and Posner adopt economic methodology, they have differing views on whether strict liability or negligence is more efficient. *Compare* Guido Calabresi and Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972) *with* Richard Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972).

With regard to either normative starting point – *insurance and compensation*, or *safety and efficiency* – the new tort law has in large measure failed to reach its goals.¹⁸

In the modern American tort system, most people who are injured are not compensated and many who are compensated are uninjured. For example, in medical malpractice litigation, the famous 1991 Harvard Medical Practice Group Study¹⁹ emerged with “two striking findings: most persons with potentially legitimate claims appeared not to file them, but most claims that were filed had no evident basis.”²⁰ In asbestos litigation, many of those suffering from mesothelioma, a deadly cancer linked to asbestos exposure, go undercompensated, while those with no cognizable medical injury receive payouts from bankrupt firms and their successor trusts.²¹ In class action cases, plaintiffs routinely receive coupons for their injuries, often inadequate to make them whole, while their lawyers pocket millions in cash.²²

What explains these results? The baseline problem evidenced in the medical malpractice outcomes stems from the high cost of litigation and absence of a loser-pays rule in American law, which gives U.S. plaintiffs’ lawyers an incentive to avoid low-

¹⁸ Cf. Huber, *supra* note 15, at 11 (“If you pay a steep, unsettling, and broad-based tax, you expect something in return. The Founders promised the world that their tax would bring measurable progress toward two deeply held social goals: protecting life and limb, and helping the injured when accidents do happen nevertheless. How well has the tort tax achieved these goals? The record is a mountain of pretentious failure.”).

¹⁹ See, e.g., Troyen A. Brennan, *et al.*, *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I*, *New Engl. J. Med.* 324, 370-6 (1991); *The Nature of Adverse Events in Hospitalized Patients: Results of the Harvard Medical Practice Study II*, *New Engl. J. Med.* 324, 377-84 (1991). The study reviewed “a weighted sample of 31,429 records” of “nonpsychiatric patients discharged from nonfederal acute care hospitals in New York in 1984.” Richard Anderson, *An “Epidemic” of Medical Malpractice? A Commentary on the Harvard Medical Practice Study*, Manhattan Institute Civil Justice Memo No. 27 (July 1996), available at http://www.manhattan-institute.org/html/cjm_27.htm.

²⁰ Anderson, *id.* at http://www.manhattan-institute.org/html/cjm_27.htm.

²¹ See Brickman, *supra* note 11 (“[A]pproximately 110,000 new asbestos claims were filed in 2003 – the most ever in one year. . . . [Plaintiffs’ lawyers] assert claims on behalf of each client in their inventories who are recruited by screenings, against each of the bankruptcy trusts and a few dozen or more of the solvent defendants. Even if they only collect a few hundred to a few thousand dollars per claim, it adds up. For a single claimant, one without any asbestos-related illness recognized by medical science, this can amount \$60,000, even as high as \$100,000.”); Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America, 2003 10 (Manhattan Institute 2003) [hereinafter “Trial Lawyers, Inc.”] (“Since cases of serious illness—mesothelioma and other cancers—have remained level at about 4,000 a year, [plaintiffs’ lawyers] have stepped up recruitment of ever more marginally impaired claimants. . . . Claimants suffering from deadly mesotheliomas get a scant \$10,000 from the trust set up by Johns-Manville to settle its asbestos claims.”); Facts & Figures About Asbestos Litigation: Highlights from the New RAND Study (Manhattan Institute Center for Legal Policy and U.S. Chamber of Commerce Institute for Legal Reform 2003), available at <http://www.instituteforlegalreform.org/resources/012303.pdf> (showing that only 3% of new asbestos claims were for mesothelioma and almost 90% were nonmalignant). See generally Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 *Pepperdine L. Rev.* 33 (2004).

²² For example, the much-publicized Blockbuster video class action alleging that the video store improperly profited from late fees by changing its policies without adequately informing its customers gave plaintiffs up to \$18 in video rental coupons (excepting “new releases”) while paying their attorneys \$9.25 million in cash. See Walter Olson, *Blockbuster Video class action* (June 11, 2001), available at <http://www.overlawyered.com/archives/01/june2.html#0611a>, and links therein.

dollar, high-probability cases.²³ Conversely, the American system encourages weaker claims because the plaintiff does not have to bear the full cost of a losing case.²⁴

The contingency fee, another historically unique feature of the American system,²⁵ is designed to allow low income claimants access to justice that would be unavailable absent a loser pays rule,²⁶ but it fails to ameliorate the aforementioned problem: lawyers still have an incentive to reject good but low-value cases since expected recovery is less than expected fees, while lawyers have even more incentive to bring high-dollar, long-shot cases when they have a stake in the outcome and the defendant will not be reimbursed for defense costs. Furthermore, because a plaintiff is presumably less sophisticated than his lawyer and has difficulty evaluating the quality of his case, its expected return, and the likely work required to reach a satisfactory outcome, the contingency fee facilitates ethical abuses such that lawyers can extract substantial sums from their clients on easy cases through standard contingency contracts.²⁷

²³ See Richard Epstein, *Cases and Materials on Torts* 889 (7th ed. 2000) (“[E]xcept in extraordinary circumstances, each party bears its own costs in the ordinary tort damage claim in the American system. . . . Both the English and the Continental systems use fee shifting, which entitles the winning party to recover its ‘reasonable’ attorney’s fees (usually as determined by a taxing master) from the losing party as a matter of course. The choice of fee shifting arrangements has profound effects on the willingness of parties to settle or litigate a claim.”); Olson, *supra* note 3, at 37 (“America is the only major country that denies to the winner of a lawsuit the right to collect legal fees from the loser. In other countries, the promise of a fee recoupment from the opponent gives lawyers good reason to take on a solidly meritorious case for even a poor client.”).

²⁴ See Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 *J. Legal Stud.* 35, 58-60 (1982), cited in Epstein, *id.* at 890-91 (“Comparing the two systems, it is apparent that the frequency of suit will be greater under the British system when the plaintiffs believes the likelihood of prevailing is sufficiently high – above a ‘critical’ level – and the frequency will be greater under the American system when the likelihood is below the critical level. This is so because when the plaintiff is relatively optimistic about prevailing, his expected legal costs will be relatively low under the British system – he will be thinking about the possibility of not having to pay any such costs – whereas under the American system he must bear his own costs with certainty. Thus he will be likely to find suit a more attractive prospect under the British system. But when the plaintiff is not optimistic, converse reasoning explains why he would be expected to sue more often under the American system.”).

²⁵ See Epstein, *supra* note 23, at 884 (“Under the contingent fee system, the plaintiff’s attorney agrees to receive compensation for services rendered only out of the funds that the plaintiff receives from the defendant, either by settlement or judgment. In the event that the action is lost, the plaintiff’s attorney receives nothing for time and effort expended and cannot recoup his out-of-pocket expenses of investigative work, expert witnesses and the like. These contingent fees originated in the United States, but recently they have been approved in other jurisdictions that had long regarded their use as an ‘unethical practice.’”).

²⁶ See Olson, *supra* note 3, at 37.

²⁷ See Lester Brickman, *et al.*, *Rethinking Contingency Fees: A Proposal to Align the Contingency Fee System with Its Policy Roots and Ethical Mandates* (Manhattan Institute 1994); see also Lester Brickman, *The Market For Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 *Cardozo L. Rev.* 65 (2003); Richard W. Painter, *The New American Rule: A First Amendment to the Client’s Bill of Rights*, Manhattan Institute Civil Justice Report No. 1 (March 2000), available at http://www.manhattan-institute.org/html/cjr_1.htm (“Lawyers’ clients are supposed to be protected by state ethics codes, but these codes do not adequately protect clients from excessive fees, particularly when lawyers work for contingent fees. A lawyer’s fee ‘must be reasonable’ (Model Rule 1.5), although trial judges almost never initiate review of contingent fees in cases before them, and clients rarely challenge a fee as excessive. It does not

The ease of aggregating cases in the American system through the class action device and parallel methods such as mass and “mass action” torts, while in principle a way to eliminate the structural problems in bringing low-dollar-value suits previously discussed, presents more potential for abuses. By grouping together a large number of low-value, similar claims, attorneys can make it worth their while to achieve compensation for the injured, but there are inherent problems with aggregated claims that have tended to frustrate the goals of full and fair compensation:

First, it is often not the case that claimants are, in actuality, “similarly situated.” Often, various factual differences that might lead to disparate outcomes in individually litigated claims are glossed over were such claims joined into a class.

Secondly, there is a significant agency problem in class action litigation; since, by definition, individual claims are small for class litigation, no individual plaintiff typically has sufficient interest to monitor or control the class attorneys. At the most basic level, this problem is apparent: with a large, disparate class of plaintiffs, who negotiates with the attorneys over fees?²⁸

matter whether a lawsuit is an easy win and for a large amount of money. The lawyer is almost always allowed to charge one-third or more, and plaintiffs’ lawyers usually do.”).

²⁸ James R. Copland, *Class Actions* (May 21, 2004), available at <http://www.pointoflaw.com/classactions/overview.php>. See generally Richard A. Epstein, *Class Actions: The Need for a Hard Second Look*, Manhattan Institute Civil Justice Report No. 4 (2002); Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 William & Mary Env’tl L. & Pol. Rev. 243 (2001). For a particularly egregious example of lawyers exploiting their class action claimants, see Lester Brickman, *Anatomy of a Madison County (Illinois) Class Actions: A Study of Pathology*, Manhattan Institute Civil Justice Report No. 6 (August 2002).

Brickman’s study focuses on Madison County, Illinois, a notorious “magnet court” that ranks as the nation’s worst “judicial hellhole” according to the American Tort Reform Association. See *Judicial Hellholes 2004* (American Tort Reform Association 2004). See generally John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, Manhattan Institute Civil Justice Report No. 5 (2002); John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case Out of It . . . In State Court*, Manhattan Institute Civil Justice Report No. 3 (2001)(showing a 1800% increase in class action filings in Madison County from 1998 to 2000, with 80% of all filings for nationwide classes).

Because class action attorneys can draw from plaintiffs nationwide to get jurisdiction in such places, class actions facilitate plaintiffs’ lawyers’ ability to shop for such forums, which make a mockery of justice. As admitted by noted plaintiffs’ lawyer Richard [“Dickie”] Scruggs, the chief negotiator of the multi-state tobacco master settlement agreement:

[These counties are] “magic jurisdiction[s],” . . . where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they’re State Court judges; they’re popul[ists]. They’ve got large populations of voters who are in on the deal, they’re getting their [piece] in many cases. And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. . . . The cases are not won in the courtroom. They’re won on the back roads long before the case goes to trial. Any lawyer fresh out of law school

Without adequate safeguards to protect plaintiffs' interests, lawyers have every incentive to collude with defendants to negotiate high fees for themselves and inadequate payouts, including coupons or other non-cash compensation, for the class.²⁹ So too can lawyers profit by combining legitimate claims with illegitimate ones and settling for values that undercompensate the former while rewarding the latter.³⁰

These problems are particularly pronounced in complex cases that require juries to make difficult fact determinations on matters of science and technology. Not only do jurors lack sophistication in the areas in which we count on them to act as final arbiters, which today include "redesign[ing] airplane engines and high-lift loaders, rewrit[ing] herbicide warnings, determin[ing] whether Bendectin causes birth defects, plac[ing] a suitable price on sorrow and anguish, and administer[ing] an open-ended system of punitive fines";³¹ but jurors "face accidents up close" without the "broader vision, dominated by the individual case."³² Little wonder, then, that asbestos dockets are flooded with illegitimate claims³³ and that the medical malpractice bar is dominated by extreme but unlikely cases, such as the claim that an infant's cerebral palsy was caused by asphyxiation in delivery.³⁴ "[J]urors, who generally can reach sensible judgments about people, perform much less well when they sit in judgment on technology."³⁵

can walk in there and win the case, so it doesn't matter what the evidence or the law is.

Richard Scruggs, *Asbestos for Lunch*, panel discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., New York), June 11, 2002, at 5.

²⁹ See, e.g., Olson, *supra* note 22.

³⁰ Such an agency problem in aggregated claims goes far in explaining why asbestos courts are flooded by unsick claimants, with too little money left for actual mesothelioma victims. The sick claimants in aggregated claims are unable adequately to police their attorneys, let alone prevent other attorneys from filing suit on behalf of the uninjured, and courts have been all too willing to settle mass tort claims that flood their dockets.

³¹ Huber, *supra* note 15, at 185. See generally Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1991). Today, in the federal courts and some state courts, judges have adopted new rules sensibly removing from juries' discretion the consideration of some expert evidence. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); Peter Huber, *Joiner, Scheffer and Kumho: Refining the Standards for Expert Evidence*, Manhattan Institute Civil Justice Memo No. 35 (December 1998), available at http://www.manhattan-institute.org/html/cjm_35.htm

³² Huber, *supra* note 15, at 185. The juror's closeness to the case is compounded by the cognitive inclination known as "hindsight bias," i.e., "the natural human tendency after an accident to see the outcome as predictable – and therefore, easy to affix blame," Hantler, *supra* note 13, at 3, which "makes the defendant[s] appear more culpable than they really are." *Id.* at 3 (quoting Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571, 572 (1998)).

³³ A study by Johns Hopkins radiologists published last August in *Academic Radiology* found that initial "B" readers contracted by plaintiffs' attorneys to identify lung changes had identified abnormalities in 95.9% of 492 cases; independent readers hired by the radiologists who examined the same x-rays, without knowing their origins, found abnormalities in only 4.5% of cases. See Joseph N. Gitlin, *et al.*, *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiol. 243 (2004).

³⁴ A January 2003 report issued by the American College of Obstetricians and Gynecologists and American Academy of Pediatrics found that "that use of nonreassuring fetal heart rate patterns to predict subsequent cerebral palsy had a 99% false-positive rate." Neonatal Encephalopathy and Cerebral Palsy: Defining the Pathogenesis and Pathophysiology (American College of Obstetricians and Gynecologists and American

If our tort law is failing in its compensatory and insurance functions, though, might it at least be succeeding in its deterrence function? After all, America is a much safer place, in terms of accidents, than it was fifty years ago. One could certainly defend our tort system if it effectively deterred accidents, even if compensation to injured parties was haphazard, unfair, and inadequate.³⁶

What the evidence shows, however, is that the decline in accident rates “has been steady and consistent both before and after the initial expansion of products liability law,” with “little, if any, correlation between the decline in accident rates and the expansion in tort liability.”³⁷ In addition to these time-series findings, extensive cross-sectional studies of punitive damages for a variety of risk measures (including “toxic chemical accidents, toxic chemical accidents causing injury or death, toxic chemical discharges, surface water discharges, total toxic releases, medical misadventure mortality rates, total accidental mortality rates, and a variety of liability insurance premium measures”) have found that “[s]tates with punitive damages exhibit no safer risk performance than states without punitive damages,” so that “there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages.”³⁸

Such results should hardly be surprising, given the incoherence of the tort system previously described. A system that discourages good claims and encourages bad ones and that has very little ability to distinguish between real and “phantom”³⁹ risks cannot set specific deterrence mechanisms. So instead of deterring specific harmful conduct to cause actors to internalize their costs, as the law and economics theorists predicted, the tort tax has tended to be a general levy on products and activities, risky or not.⁴⁰ Perversely, the new tort system most deters those products and activities that are

Academy of Pediatrics Jan. 31, 2003), available at http://www.acog.org/from_home/Misc/neonatalEncephalopathy.cfm (executive summary). Presumably, juries assessing dualing experts, after witnessing a child born with a tragic defect, are particularly ill-equipped to determine whether the case before them falls into the rare category of cases in which a lack of oxygen in delivery was responsible for the cerebral palsy.

³⁵ Huber, *supra* note 15, at 14.

³⁶ Indeed, many in the law and economics school contend that deterrence should be the primary, if not the *only*, objective of the tort system. See, e.g., Posner, *supra* note 17, in Robert L. Rabin, Perspectives on Tort Law 14, 18 (Little Brown & Co. 3rd ed. 1990) (“Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient – the cost-justified – level of accidents and safety.”); see also Charles Fried and David Rosenberg, Making Tort Law: What Should Be Done and Who Should Do It 13 (AEI Press 2003) (“[W]e develop the normative argument that the legal system should achieve the socially optimal management of accident risk.”).

³⁷ Epstein, *supra* note 23, at 717 (citing George Priest, *Products Liability Law and the Accident Rate*, in Liability: Perspectives and Policy (Robert Litan and C. Winston, eds. 1988)).

³⁸ W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations*, 87 Geo. L.J. 285, 297-98 (1998); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 Geo. L.J. 381 (1998); see also Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497 (1991) (concluding that settlement value in securities fraud cases is not function of merit).

³⁹ See generally Kenneth R. Foster *et al.*, eds., *Phantom Risk: Scientific Inference and the Law* (MIT Press 1993) (exploring various “phantom risks” that have been accepted by courts despite strong countervailing scientific evidence).

⁴⁰ See Huber, *supra* note 15, at 170 (“So does the new tort jurisprudence deter? Yes, certainly, it deters all sorts of things. But . . . [w]hen put to the test, the new tort system has failed to discriminate effectively among good risks and bad ones.”).

innovative and best reduce risk or save life and limb,⁴¹ given that courts tend to accept risks for mature products much more readily than for new ones,⁴² and because some activities are inherently dangerous although lifesaving.⁴³ “When all is said and done, the modern rules do not deter risk: they deter behavior that gets people sued, which is not at all the same thing.”⁴⁴

Moreover, to assess fully the tort system as an efficient deterrence mechanism, we must consider its administrative costs. Such costs are fundamental in assessing how well the tort system is achieving its deterrence goals; a system of perfect deterrence of accidents that cost many times the accidents deterred would be useless indeed.⁴⁵ In essence, the cost of accidents and the cost of administering a system to deter accidents are indistinguishable from an economic point of view.⁴⁶

By any measure, the administrative costs of the tort system are astronomical:

If viewed as a mechanism for compensating victims for their economic losses, the tort system is extremely inefficient, returning only 22 cents of the tort cost dollar for that purpose. . . . Of course, the tort system also provides compensation for victims’ pain and suffering and other noneconomic losses. Even including these benefits, the system is less than 50% efficient.⁴⁷

Thus, the American tort system has failed to meet both equity and efficiency goals. Awards are random, slow, and inequitable; and the system shows no evidence of

⁴¹ See *id.* at 162 (“The indiscriminate liability that characterizes modern tort law has done more than prevent the progress of safety: It has forced several great marches backward. The strategy of reducing liability by reducing effort and initiative across the board is all too common, and time and again one finds that safety itself is the largest casualty.”).

⁴² See *id.* at 14, 157-58 (“Under jury pressure, the new touchstones of technological legitimacy have become age, familiarity, and ubiquity. It is the innovative and unfamiliar that is most likely to be condemned. . . . People everywhere underestimate the risks they know well and face every day and overestimate those that are new and foreign. The familiar is safe, or at least bearable enough, no matter how appallingly dangerous it may be in reality. The unfamiliar is suspect, intrusive, and probably dangerous, no matter how reassuring the statistics may be.”).

⁴³ Thus, in medical care, we see that high-risk specialists like obstetricians and neurosurgeons are generally punished. See, e.g., Ted Frank, *Bush: “I’m here to talk about how we need to fix a broken medical liability system,”* January 6, 2005, available at <http://www.pointoflaw.com/archives/000836.php> (“[A] survey of obstetricians in Illinois showed that 11% of them had stopped delivering babies between 2002 and 2004; the article also noted that Will County’s only neurosurgeon has ceased brain surgery, meaning there’s no one within a two-hour drive of a local car accident to perform such critical work.”).

⁴⁴ Huber, *supra* note 15, at 164.

⁴⁵ See Calabresi, *supra* note 17, at 28 (“The third subgoal of accident cost reduction is rather Pickwickian but very important nonetheless. It involves reducing the costs of administering our treatment of accidents. . . . [I]n a very real sense this ‘efficiency’ goal comes first. It tells us to question constantly whether an attempt to reduce accident costs, either by reducing accidents themselves or reducing their secondary effects, costs more than it saves.”).

⁴⁶ See *id.* at 225 (“Once it is decided that a particular system of accident law will be used, the expenses of administering that system can be viewed simply as accident costs.”).

⁴⁷ Tort Costs: 2003, *supra* note 5, at 17.

detering specific risky behavior such that actors economically internalize the cost of accidents, in fact deters innovation and products and behaviors that are useful but novel with unknown risk profiles, and is incredibly expensive to administer. Having failed to meet both its compensatory and deterrence objectives, the tort system is ripe for reform.

(2) *Administrative preemption of tort: a brief history*

Before turning to the specific workings of the 9/11 Fund, I will briefly examine historical precedents in which the government similarly created administrative remedies to compensate disaster and/or preempt common law tort claims. Although the Fund has been called “unprecedented” – which it is in terms of size – Stanford’s Michele Dauber has extensively chronicled how “the federal government has been involved in compensating the victims of calamities of various kinds, including victims of what we now call ‘terrorism,’ since the earliest days of the Republic.”⁴⁸

By the time that Congress appropriated direct relief following a devastating 1827 fire in Alexandria, Virginia, it had already granted dozens of separate claims for relief, encompassing thousands of claimants and millions of dollars, following such events as the Whiskey Rebellion, the slave insurrection on St. Domingo (Haiti), and numerous floods, fires, storms, and earthquakes.⁴⁹

As with the 9/11 Fund, in historical relief appropriations the “relief funds were most often distributed through a centralized federal compensation bureaucracy,” headed by a commissioner, “with broad discretion to evaluate applications, take evidence, and distribute benefits according to statutory eligibility criteria.”⁵⁰

These historical processes, however, did not always proceed as smoothly in practice as did the 9/11 Fund. As Dauber has documented, Richard Bland Lee, the administrator of the Claims Commission processing injuries sustained during the War of 1812, was subjected to Congressional criticism that “he had broadly (and illegitimately) interpreted the provisions of the [statute] in order to make an award to undeserving claimants.”⁵¹ John Randolph of Virginia accused Lee of “malfaisance,” and Congress acted to constrain his discretion.⁵² A Congressionally appointed Committee of Claims

⁴⁸ Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DePaul L. Rev. 289, 289-90 (2003); see also Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 Law & Soc’y Rev. 257 (1999); Michele L. Landis, “*Let Me Next Time Be ‘Tried by Fire’*”: *Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 Nw. U. L. Rev. 967 (1998).

⁴⁹ Dauber, *supra* note 48, at 293.

⁵⁰ *Id.* at 294; see An Act to Authorize the Payment for Property Lost, Captured, or Destroyed by the Enemy, While in the Military Service of the United States, and for Other Purposes, ch. 40, § 9, 3 Stat. 261 (1816) [hereinafter “War of 1812 Act”].

⁵¹ *Id.* at 320.

⁵² *Id.* at 327, 330.

determined that “claimants had perpetrated an extensive ‘system of fraud, forgery, and perhaps perjury.’”⁵³ Ultimately, “Richard Bland Lee left government service ruined, indebted, and desperate. He left his family and emigrated to Kentucky”⁵⁴

What accounts for the War of 1812 Claims Commission’s negative perception? Of the 850 cases processed by Lee between July and December 1816, the vast majority “were made under section 1 [of the compensation act] for the lost horses of militia officers; such claims generally amounted to less than fifty dollars each.”⁵⁵ Although such claims were effectively processed and uncontroversial, problems arose with claims under section 9, “which provided that the government would reimburse a civilian for the ‘destruction of his or her house or building by the enemy, while the same was occupied as a military deposite, under the authority of an officer or agent of the United States.’”⁵⁶ As Dauber explains:

[M]ost of the war was fought by ill-equipped and ill-trained militia in a constant state of drunken mutiny. There was little discipline in the ranks and few officers were present giving orders. Yet the law provided compensation only for property destroyed while occupied pursuant to an officer’s order. . . . The evidentiary problem was compounded by the size of these claims. Compared with the small claims for dead horses and lost guns, claims under section 9 were astronomically expensive, often exceeding \$10,000 each.⁵⁷

Thus, the War of 1812 Act generally had to deal with much more complicated questions of injury and causation than the 9/11 Fund. Such inherent difficulties should serve as a cautionary note in considering application of the 9/11 Fund model to a broader tort reform agenda.

Furthermore, any consideration of administrative remedies in tort should consider, in addition to the “disaster model,” other historical analogues with a much broader application, such as now-ubiquitous programs for workers’ compensation, no-fault auto insurance, and the federal government’s decision to preempt common tort law claims for injuries from children’s vaccines. I will now discuss each example briefly.

Workers’ compensation

Beginning torts students are well familiarized with the New York Court of Appeals’ 1911 decision in *Ives v. South Buffalo Railroad* to overturn as unconstitutional the state’s workers’ compensation law, the first of its kind in America, which had been

⁵³ *Id.* at 335.

⁵⁴ *Id.* at 336.

⁵⁵ *Id.* at 306.

⁵⁶ *Id.* at 297 (quoting War of 1812 Act, *supra* note 50).

⁵⁷ *Id.* at 307-08 (citations omitted).

passed the previous year.⁵⁸ The court was troubled by the statute's "rule of liability . . . that the employer is responsible to the employee for every accident in the course of employment, whether the employer is at fault or not, and whether the employee is at fault or not, except when the fault of the employee is so grave as to constitute serious and willful misconduct on his part."⁵⁹ In keeping with other decisions in the *Lochner* era,⁶⁰ the court held that the state's imposing liability without fault was an unconstitutional violation of "the right to property."⁶¹ As many commentators have noted, the opinion was perplexing in that the emergence of negligence in the law had then a rather recent provenance while no-fault liability was a long-standing principle of Anglo-American common law.⁶² As Richard Epstein notes, however, "the words 'liability without fault' in the context of workers' compensation set up a new system that differs as much from common law strict liability as it does from common law negligence":

[C]ommon law strict liability, properly conceived, makes allowance for affirmative defenses based on plaintiffs' conduct . . . that are expressly abolished or restricted by the workers' compensation statutes. . . . The modern workers' compensation law [also] imposes on employers liability for injuries . . . "arising out of and in the course of employment[.]" . . . [and therefore] largely eliminates the requirement of a causal nexus between defendant's (particular) acts and the plaintiff's harm that is so central to the traditional common law theory of tort liability.⁶³

In any event, New York in short order amended its state constitution to allow for the workers' compensation law,⁶⁴ and other states followed its lead in adopting workers' compensation statutes. "Between 1910 and 1921, forty-two states passed industrial injury legislation, replacing tort law with an administrative system affording compensation for accidental injuries arising on the job."⁶⁵ By 1995, "[a]pproximately 97% of all wage and salary workers, totaling about 112.8 million workers, were covered by workers' compensation"⁶⁶

⁵⁸ See generally 94 N.E. 431 (N.Y. 1911); 1910 N.Y. Laws 625.

⁵⁹ *Id.* at 436.

⁶⁰ *Cf. Lochner v. New York*, 198 U.S. 45 (1905).

⁶¹ See *Ives*, *supra* note 58, at 439.

⁶² See, e.g., *Gilbert v. Stone*, 82 Eng. Rep. 539 (K.B. 1647)(holding defendant liable for trespass against plaintiff even when taking was done under external threat of physical violence); *Gibbons v. Pepper*, 91 Eng. Rep. 922 (K.B. 1695)(holding defendant liable for his out-of-control horse running over plaintiff, even when defendant claimed not to have been negligent and plaintiff failed to heed his call to move). Compare *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868)(holding defendants strictly liable for water flooding plaintiff's property from reservoir on defendant's property) with *Brown v. Kendall*, 60 Mass. 292 (1850)(holding that defendant who accidentally struck plaintiff in the eye while separating fighting dogs was not liable because "the conduct of the defendant was free from blame").

⁶³ See Epstein, *supra* note 23, at 967.

⁶⁴ See *id.* at 965.

⁶⁵ Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 San Diego L. Rev. 13 (1988), in Rabin, *supra* note 36, at 284.

⁶⁶ Epstein, *supra* note 23, at 961 (quoting National Safety Council, *Accident Facts: 1998 Edition*, at 59).

How has workers' compensation operated in practice? In short, there's some good and some bad, and the answer depends on the specifics of the state scheme in question. "[L]iterally thousands of cases . . . have probed the outer limits of coverage under the workers' compensation statutes," which is according to Epstein "a certain irony":

[O]ne of the major arguments against the common law system of employer's liability based on negligence was that it unavoidably led to a high volume of case-by-case adjudication. The introduction of the workers' compensation statute with its more generous coverage formula rendered easy many liability questions that were vexed at common law. But by expanding the boundaries of the compensable event outward, it ushered in a new class of contested cases⁶⁷

Moreover, "fraud and abuse" have driven substantial cost increases in workers' compensation systems, particularly in "mental distress" cases.⁶⁸

That said, workers' compensation typically offers much more predictable damage awards than modern tort actions. Tort actions allow "full recovery of lost earnings and medical expenses," in addition to noneconomic damages such as "pain and suffering," typically with "no maximum limitation on damages."⁶⁹ Rather than offering "full compensation" for injuries, workers' compensation statutes limit awards to include only "disability," i.e., "the degree to which [the injury] impairs the worker's earning capacity."⁷⁰

In addition, while actions in tort assign damages to the jury's discretion (with judicial oversight), workers' compensation plans "impose, albeit with wide variations, strict limitations on the amount of compensation recoverable from the employer."⁷¹ Benefits paid out in workers' compensation are, in varying permutations, functions of the employee's average weekly wage.⁷² Injuries are categorized as totally or partially incapacitating, permanent or temporary, with death treated separately.⁷³ The plans are highly systematized; injuries that result in total or partial loss of a body part generate scheduled losses as a function of average weekly wage, with different values for, e.g., an arm or leg, hand or foot, eye or finger.⁷⁴

⁶⁷ *Id.* at 970-71.

⁶⁸ *Id.* at 981.

⁶⁹ *Id.* at 982.

⁷⁰ *Id.* at 982-83.

⁷¹ *Id.* at 983.

⁷² *See id.*

⁷³ *See id.* at 983-84.

⁷⁴ *See, e.g.,* New York Workers' Compensation Law § 15(3)(McKinney 1993)(providing for varying compensation levels for different body parts), *cited in id.* at 985.

Finally, unlike the 9/11 Fund, the workers' compensation statutes generally provide exclusive remedies, i.e., they abrogate completely any common law tort claims.⁷⁵ Some courts, have, however, "gutt[ed] the exclusive remedy provision" by effectively "convert[ing] every failure to warn case into an intentional tort"⁷⁶ Workers' compensation's exclusive remedy provision has also been severely eroded by asbestos injury litigation, which has often permitted recovery for work-related injuries under theories of fraud.⁷⁷

In summary, even as workers' compensation has expanded employers' liability beyond the common law and failed to eradicate fraud and abuse, by eliminating trials over fault the plans have reduced at least some administrative costs,⁷⁸ and the system has limited damages and improved their predictability. Although workers' compensation frustrates at least some of the risk spreading goals of tort – injured workers are not "fully compensated" for their injuries⁷⁹ – it conversely improves equity by allowing access to compensation for lower-value cases and treating like cases alike. Moreover, the predictability of workers' compensation probably better facilitates the system's ability to deter workplace injuries, though the collapse of causation in compensating all injuries "arising out of and in the course of employment" may work against that goal.⁸⁰ And although workers' compensation systems are designed to be an exclusive remedy, preventing separate tort litigation, the courts have gradually eroded these protections.

⁷⁵ See, e.g., *Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882 (Mich. 1986).

⁷⁶ Epstein, *supra* note 23, at 990 (citing *Jones v. VIP Development Co.*, 472 N.E.2d 1046, 1051 (Ohio 1984)).

⁷⁷ See *id.* at 990-91 (discussing *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 514-15 (N.J. 1985)).

⁷⁸ By placing liability over injuries "arising out of and in the course of employment," workers' compensation largely eliminates traditional questions of causation. See text accompanying note 63. For example, workers injured in the 9/11 terrorist attacks are entitled to receive workers' compensation, see RAND Report, *supra* note 2, at 17, even though their employers (e.g., investment banks, the Department of Defense) obviously did not cause their injuries.

Although such a decision rule likely lowers administrative costs, it also tends to expand the volume and scope of cases, see *supra* note 17; text accompanying note 67, and it may frustrate tort's deterrence goals. In cases with complex causation problems, such as products liability and medical malpractice claims, any administrative alternative to tort would have to have a better mechanism for addressing causation.

⁷⁹ I should note, however, that many workers can and do receive additional compensatory coverage for medical expenses and disability, through private insurance and/or government assistance programs such as Medicaid and Social Security disability. Workers are very unlikely to have insurance against pain and suffering, perhaps suggesting that the difficulties in estimating such losses results in risk premia and administrative costs that outweigh individuals' desire for such compensation.

⁸⁰ See *supra* note 78. The basic economic question is whether the reduced administrative costs of avoiding fact finding over causation and affirmative defenses outweighs (a) increased employee monitoring costs (that employers adopt in response to being liable without cause, even when plaintiffs are negligent or assume high risks), plus (b) the increased volume in (often more attenuated) claims (stemming from lowering the barrier to workers' recovery).

No-fault automobile insurance

A second useful historical analogy is no-fault automobile insurance, which adopts many of the principles of workers' compensation. Because automobile accidents comprise some 60 percent of all tort claims,⁸¹ roughly two million claims per year,⁸² reformers have been anxious to reduce their systemic costs. In 1965, academics Robert Keeton and Jeffrey O'Connell sharply critiqued the system's handling of auto accidents and outlined a plan of no-fault insurance to supplant traditional torts.⁸³ No-fault automobile insurance was subsequently adopted in 24 states from 1970 to 1976 (beginning with Massachusetts, where it was introduced by then-state legislator Michael Dukakis).⁸⁴

In no-fault auto plans, "the claim for benefits will ordinarily be a claim, not involving any third party, against the injured person's own insurance company."⁸⁵ Unlike workers' compensation, no-fault auto plans typically award "actual losses" rather than using predetermined compensation schedules. Also, no-fault auto plans do not function as exclusive remedies like workers' compensation systems but rather offer only a "partial" tort exemption: "some victims – those with injuries of greater consequence – are entitled to claim compensation based on fault as well as no-fault compensation."⁸⁶ What claim in tort is permitted varies greatly among various states' plans, from requiring high thresholds before a tort action can be pursued to "add-on" plans "in which the plaintiff's right to maintain a tort action [is] not limited by the adoption of the no-fault plan."⁸⁷

Assessing the performance of no-fault plans is complicated by the wide variance in their form. According to Richard Epstein, "the dominant impression is that they have not done as well as their supporters have hoped nor as badly as their detractors have feared."⁸⁸ Typically, add-on states and low-monetary-threshold states have failed to reduce insurance premiums compared with their peers.⁸⁹ "No-fault proponents like

⁸¹ See Brian J. Ostrom and Neal B. Kauder, *Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project 23-24* (National Center for State Courts 1994).

⁸² See Deborah Hensler *et al.*, *Compensation for Accidental Injuries in the United States 121* (RAND Institute for Civil Justice 1991).

⁸³ See generally Robert Keeton and Jeffrey O'Connell, *Basic Protection for the Accident Victim* (1965). The first no-fault auto insurance plans were suggested in the Columbia Plan of 1932, although this proposal called for third-party insurance rather than the first-party plans adopted in the 1960s. See Report of Committee to Study Compensation for Automobile Accidents (Columbia Reports 1932), *cited in* Epstein, *supra* note 23, at 995. Richard Epstein cites as the historical antecedent of the no-fault auto plans early no-fault suggestions for railway proposals. See *id.* (citing Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 Harv. L. Rev. 705 (1916)).

⁸⁴ See Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society 107* (2002).

⁸⁵ Robert Keeton, *Compensation Systems and Utah's No-Fault Statute*, 1973 Utah L. Rev. 383, 396, *cited in* Epstein, *supra* note 23, at 996.

⁸⁶ *Id.*

⁸⁷ Epstein, *supra* note 23, at 1010; see also Burke, *supra* note 84, at 107.

⁸⁸ *Id.* at 1008.

⁸⁹ See generally U.S. Department of Transportation, *Compensating Auto Accident Victims: A Follow-Up Report on No-Fault Auto Insurance Experiences* (1985).

O’Connell consider them pale imitations of true no-fault,” and instead point to states like Michigan, New York, and Florida, in which “only people with exceptionally severe injuries can file a lawsuit.”⁹⁰ “Most analysts conclude at the very least that [these states] have held their premium costs below those of comparable states; they also appear to pay victims faster, at a lower transaction cost.”⁹¹

States’ failure broadly to adopt workable no-fault insurance plans stems from the political economy of tort reform. “The professors’ original plan was designed to slash fault-based litigation, but many state legislatures created no-fault systems that allowed lawsuits to flourish.”⁹² Despite enthusiasm from “policy wonks,” bipartisan support, and the endorsement of most insurance companies and some unions, lawyer interest groups aggressively fought the reforms, since no-fault plans threatened their livelihood:

Because auto accidents are such a common source of litigation, they are a major source of revenue for plaintiff lawyers. No-fault reduces opportunities for litigation by limiting pain-and-suffering damages and legal wrangling over fault. . . . [Thus] the threat of a national no-fault auto-insurance system . . . mobilized the plaintiff lawyers in the Association of Trial Lawyers of America, turning a politically quiescent trade association into a major Washington lobbyist. ATLA played a key role in the defeat of national no-fault in Congress, and its state affiliates had a powerful impact on state-level no-fault battles. . . . Even in states where no-fault was passed, opposition by plaintiff lawyer groups led to watered-down versions of no-fault such as the add-on and low-monetary-threshold systems⁹³

The failure of such “watered-down” no-fault reforms, which often made matters worse, should be a cautionary note to tort reformers. Well-conceived theoretical plans can go awry when adopted piecemeal or otherwise perverted by the whims of the political process.

Childhood vaccines

A third useful historical example of tort reform is the Vaccine Injury Compensation Program (“VICP”), in effect since 1988.⁹⁴ Vaccinating infants is essential to the public health, but a small fraction of those vaccinated invariably have an adverse

⁹⁰ Burke, *supra* note 84, at 108.

⁹¹ *Id.*

⁹² *Id.* at 107.

⁹³ *Id.* at 108-09.

⁹⁴ See generally National Childhood Vaccine Injury Act, Pub. L. No. 99-660, Title III, § 301, 100 Stat. 3755 (1986).

reaction. Historically, courts had considered vaccines “unavoidably unsafe products” and thus immunized vaccine manufacturers from liability.⁹⁵ In the 1960s and 1970s, however, courts loosened these requirements in permitting liability for the Sabin live virus polio vaccine under a “failure to warn” theory.⁹⁶ Soon, “large verdicts and settlements multiplied.”⁹⁷

The federal government assumed liability for swine flu vaccines in the 1970s and soon faced over 4,000 claims, upon which it paid out more than \$72 million.⁹⁸ In 1984, a jury held the manufacturer of the diphtheria, pertussis, and tetanus (“DPT”) vaccine liable for over \$1 million in a single claim.⁹⁹ “Within five years a trickle of DPT lawsuits [had become] a flood. The price of DPT zoomed from 11 cents in 1980 to \$11.40 by 1986, an increase of more than 10,000 percent.”¹⁰⁰ Wyeth left the DPT vaccine market altogether in 1984, and one of the two remaining suppliers “was reporting difficulty in finding liability insurance and was considering leaving the U.S. market.”¹⁰¹ Fearing a vaccine shortage, the Centers for Disease Control asked doctors to delay giving children DPT booster shots.¹⁰²

In response, Congress passed the National Childhood Vaccine Injury Act of 1986. The statute created the VICP, which bars all tort claims until parents of children allegedly injured by a vaccine have exhausted a no-fault remedy. In essence, the system makes the federal government the insurer for vaccine-related injuries, with payouts coming from a fund supported by a small vaccine surtax. Claimants appear before a special master and have the burden of establishing injury, according to a “vaccine injury table,” and if successful, the Justice Department as respondent has the burden of proof for causation. Either party can appeal to the U.S. Court of Claims, and ultimately to the Federal Circuit. If the claimant is still unsatisfied, he can file a motion rejecting the judgment at that time and initiate litigation, although under the statute the plaintiff must then establish defendant’s fault, cannot sue under a “failure to directly warn” theory, must establish that injury was avoidable if the vaccine was “duly prepared and accompanied with appropriate warnings,” and cannot seek punitive damages if the vaccine complied with Food and Drug Administration standards unless the defendant “failed to exercise due care.”¹⁰³

⁹⁵ Restatement of the Law 2d, Torts, § 402A comment k (American Law Institute 1965)(asserting that makers of vaccines and other drugs “is not to be held to strict liability for unfortunate consequences attending their use merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk”).

⁹⁶ See *Givens v. Lederle*, 556 F.2d 1341 (5th Cir. 1977); *Reyes v. Wyeth Laboratories, Inc.*, 498 F.2d 1264 (5th Cir. 1974); *Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968).

⁹⁷ *Burke*, *supra* note 84, at 144.

⁹⁸ See *id.*, citing Edward W. Kitch, *Vaccines and Product Liability: A Case of Contagious Litigation*, Regulation, May/June 1985, at 13.

⁹⁹ *Toner v. Lederle*, 828 F.2d 510 (1987).

¹⁰⁰ *Burke*, *supra* note 84, at 144.

¹⁰¹ *Id.* at 149. See generally Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277 (1985).

¹⁰² See *id.*

¹⁰³ See *id.* at 153-54.

In practice, the VICP has been generally successful. As of February 2002, “the program had paid out more than \$1.3 billion to 1,705 claimants.”¹⁰⁴ Although the average award has been high (\$824,463), only 31 percent of 5,453 claimants received any compensation whatsoever.¹⁰⁵ Only 1.1 percent of all adjudicated claims have been appealed to the Circuit Court, and only a small number of claimants have filed a motion rejecting the judgment.¹⁰⁶ Also, an early study of the program’s performance showed its administrative costs to be substantially lower than traditional tort litigation, at only 9.2 percent, versus 54 percent for the average tort claim.¹⁰⁷ As a result of the VICP, lawsuits against DPT manufacturers have fallen dramatically, from 255 in 1986 to only 4 in 1997.¹⁰⁸

With the liability climate more stable and predictable, “research and development of vaccines has exploded.”¹⁰⁹ Safer “whole cell” DPT vaccines have replaced older versions, and several new vaccines have been widely adopted.¹¹⁰ Biotechnology firms have entered what was a “dead-end field,” and “[t]he head of Merck’s vaccine unit has called this the ‘best time’ for vaccine research in decades.”¹¹¹

Notwithstanding these broad successes, over time problems have emerged with the VICP that are not dissimilar to those that emerged in workers’ compensation systems. The process has become more adversarial, and the time required to adjudicate a claim has increased: according to a 1999 General Accounting Office report, “only 14 percent of claims were decided within a year, 39 percent took between two and five years, and 18 percent dragged on for over five years.”¹¹²

More ominously, plaintiffs’ lawyers have begun to circumvent the VICP. After the Environmental Protection Agency concluded in 1999 that, in theory, a combination of vaccines in infants could lead to blood mercury levels slightly exceeding EPA guidelines, hundreds of suits emerged alleging that thimerosal, a vaccine preservative containing mercury, is harmful.¹¹³ These suits claimed that thimerosal was linked to autism and

¹⁰⁴ *Id.* at 160, citing U.S. Dep’t of Health and Human Svcs., Health Resources and Svcs. Admin., Vaccine Injury Compensation Program, *Monthly Statistics Report* (February 28, 2002), available at <http://www.hrsa.gov/osp/vicp/monthly.htm>.

¹⁰⁵ *See id.* at 161.

¹⁰⁶ *See id.* at 160-63, citing U.S. Dep’t of Health and Human Svcs., Office of Special Programs, *Background Information on the VICP*, available at <http://www.hrsa.gov/osp/vicp/abdvic.htm>.

¹⁰⁷ *See id.* at 161, citing Denis J. Hauptly and Mary Mason, *The National Childhood Vaccine Injury Act*, 37 Fed. Bar News & J. 455 (1990); Tort Costs: 2003, *supra* note 5, at 17; text accompanying note 47

¹⁰⁸ *See id.* at 163.

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.*, citing Elyse Tanouye, *The Vaccine Business Gets a Shot in the Arm*, Wall. St. J. Feb. 25, 1998, at B1.

¹¹² *Id.* at 161, citing United States General Accounting Office, *Vaccine Injury Compensation Program Challenged to Settle Claims Quickly and Easily* 8, fig. 1 (December 1999).

¹¹³ *See, e.g.*, Editorial, *The Truth about Thimerosal*, Wall St. J., Dec. 5, 2002, at A18; Jim Copland, *Liable to Infection: Flu vaccine in short supply partly because of trial lawyers and ‘tort tax,’* Dalas Morning News, Dec. 14, 2003, available at http://www.manhattan-institute.org/html/dmn-liable_to_infection_flu.htm (“One class-action claim demanded \$30 billion—that’s five times the entire vaccine market itself!”).

other neurological disorders, despite the fact that “[n]o scientific study has found any link between vaccines and autism.”¹¹⁴ The thimerosal suits have attempted to circumvent the VICP by alleging that as a preservative thimerosal is “an adulterant or contaminant” rather than a vaccine component, and therefore outside the system.¹¹⁵

(3) *The 9/11 Victim Compensation Fund*

With these historical analogies in mind, the 9/11 Fund looks like a significant success.¹¹⁶ In this section of the paper, I will discuss the Fund’s structure and performance.¹¹⁷

The Stabilization Act created the Fund “to provide speedy and generous compensation to the families of the deceased and physically injured, . . . with low legal fees and other transactions costs, in place of tort remedies that had been severely limited.”¹¹⁸ Anthony Sebok recounts the law’s development as follows:

First, within days after the attacks on four airplanes, the World Trade Center, and the Pentagon, American Airlines and United Airlines requested federal aid, including protection against lawsuits arising from the attack. Second, some Democrats in Congress objected that victims of the attack should not lose their right to sue and receive nothing in return. Third, the sponsors of the bill and the White House agreed to create the September 11th Victim Compensation Fund of 2001. Later that year Congress extended the Fund to limit suits against the City of New York, the Port Authority of New York and New Jersey, the other airports, Boeing (who made the airplanes used in the attack), and the jet fuel manufacturers (who sold the fuel to the airlines).¹¹⁹

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Schuck, *supra* note 2 (“By almost all accounts, the fund has succeeded admirably in the difficult, morbid task that Congress assigned it.”).

¹¹⁷ For an exhaustive study of 9/11 compensation and the Fund’s structure, performance, and rationale, see RAND report, *supra* note 2. See also Schuck, *supra* note 2 (analyzing the Fund normatively and considering its potential for application); Kenneth S. Abraham and Kyle D. Logue, *The Genie and the Bottle: Collateral Sources under the September 11th Victim Compensation Fund*, 53 DePaul L. Rev. 591 (2003)(assessing the Fund’s treatment of collateral benefits); Dauber, *supra* note 48 (comparing the Fund’s performance with that of the War of 1812 Claims Committee); Sebok, *supra* note 2 (comparing the Fund’s treatment of injuries to underlying tort law principles); Michael I. Krauss, *Sympathy Yes, Money No*, Forbes, March 4, 2002, available at <http://www.forbes.com/forbes/2002/0304/050.html> (discussing the Fund’s justification).

¹¹⁸ RAND Report, *supra* note 2, at 21.

¹¹⁹ Sebok, *supra* note 2, at 501; see Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597, 646 (2001)(extending tort limitations of the Stabilization Act to any “aircraft manufacturer, airport

The 9/11 Fund limited recovery to a discrete class of victims, determined by time and place. To be eligible for recovery under the Fund, victims had to have been on the tragic flights or at the World Trade Center or Pentagon sites “within 12 hours of the attacks, suffered a physical injury, and been treated by a medical professional within 24 hours of the injury, within 24 hours of rescue, or within 72 hours of injury or rescue for those victims who were unable to realize immediately the extent of their injuries or for whom treatment by a medical professional was not available on September 11.”¹²⁰ Rescue workers who were at the site within 96 hours of the attacks were eligible, and the Fund administrator could extend the general limits beyond 72 hours at his discretion.¹²¹ Victims who had suffered only emotional injuries were not eligible to recover. The Fund thus had a clearly defined class of victims, without complex questions of causation.¹²²

To participate in the Fund, victims had to opt in.¹²³ The Fund administrator then had 120 days to reach a decision, and monies were to be distributed within 20 days of that final determination. “[T]he act vest[ed] the fund’s special master, Kenneth Feinberg, with enormous discretion in the interpretation of the statute and the framing of regulations.”¹²⁴ Indeed, the Act permitted no judicial review of the special master’s final decision.¹²⁵

The Fund granted awards for economic loss based on the victim’s annual income prior to the attack. Awards for incomes exceeding \$231,000 (the 98th percentile) had to make special submissions to the Fund’s special master.¹²⁶ Awards for noneconomic losses for death cases were flat at \$250,000 per victim and \$100,000 for a spouse and each dependent child.¹²⁷ Somewhat controversially, the Fund deducted from awards all collateral source benefits, including “life insurance, pension funds, death benefit

sponsor, or person with a property interest in the World Trade Center, on September 11, 2001, whether fee simple, leasehold or easement, direct or indirect, or their directors, officers, employees, or agents”); *see also* Abraham and Logue, *id.* at 595 (“With the airlines facing possible bankruptcy in the aftermath of September 11th, they needed both financial backing from the government and some degree of protection against tort liability for the alleged security failures that may have made the attacks possible. The Act gave them the former and the adoption of the Fund gave them the latter, though only indirectly. The indirect protection from tort liability came by virtue of the Fund’s largely successful effort to provide a nonmandatory, but generally acceptable, alternative to seeking compensation through tort suits.”).

¹²⁰ RAND Report, *supra* note 2, at 121.

¹²¹ *See id.*

¹²² Obviously some individuals might have claimed injury where the causal nexus between the injury and the terror attack was unclear. But because the Fund only offered compensation to individuals who had sought medical attention shortly after the attack, and before the passage of the Act, the scope for fraud and abuse was limited.

¹²³ The opt-in time was limited; the Fund terminated operations on June 15, 2004. *See* Schuck, *supra* note 116.

¹²⁴ *Id.*; *see* Stabilization Act, *supra* note 1, at §§ 404(a)(2), 405(b).

¹²⁵ *See id.* at §§ 404(a)(2), 405(b).

¹²⁶ *See* September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,236-37 (Mar. 13, 2002) (codified at 28 C.F.R. § 104 (2003)).

¹²⁷ *See* 67 Fed. Reg. 11,239 (Mar. 13, 2002). The Stabilization Act defines noneconomic losses as “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other non-pecuniary losses of any kind or nature.” Stabilization Act, *supra* note 1, § 402.

programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.”¹²⁸ Charitable donations, however, were not counted as collateral benefits.¹²⁹

Although the Stabilization Act did not abrogate victims’ tort law claims, the Fund was created as the exclusive remedy for individuals who opted to participate.¹³⁰ Moreover, the Stabilization Act capped all common law tort claims at the preexisting policy limits of the airline carriers and other possible defendants. Exclusive jurisdiction for any 9/11 tort claims was granted to the United States District Court for the Southern District of New York.¹³¹

Initially, participation in the 9/11 Fund was slow; by August 2003, only some 40 percent who were eligible had submitted a claim to the Fund.¹³² By the end of 2003, however, 97 percent of the 2,976 individuals killed in the attacks had submitted a claim, leaving only 97 families outside the Fund apparatus.¹³³ Payouts for death claims after collateral offsets “ranged from \$250,000 to \$7.1 million, with a mean of \$2.08 million.”¹³⁴ The Fund also compensated 2,677 individuals injured in the attacks, with compensation ranging from \$500 to \$8.6 million. Total payouts from the Fund were approximately \$6.9 billion,¹³⁵ which represented approximately 69 percent of total payouts to those killed or injured.¹³⁶

How does this performance compare to similar tort claims? Though generous, the economic awards issued through the Fund were smaller than those realized in comparable successful tort claims. The RAND Institute for Civil Justice database locates 12 jury verdicts for plaintiffs in aviation wrongful death cases since 1994, with an average award of \$7.4 million.¹³⁷ It should be noted, however, that “[s]uch awards may not be an appropriate standard for reference because they may have been reduced by the trial judge, on appeal, or in subsequent settlements. Also, jury verdicts are almost certainly higher than the mean and median awards for all aviation accident cases, most of which settle before a lawsuit is filed or before trial begins.”¹³⁸

That said, airlines almost certainly would have contested massive tort actions stemming from 9/11. Although collections would conceivably have been higher under a

¹²⁸ Stabilization Act, *supra* note 1, § 402(4).

¹²⁹ Fund special master Kenneth Feinberg originally determined that charitable donations would count as collateral sources but changed his position in the face of public outcry. *See* RAND Report, *supra* note 2, at 23 & n.15. Feinberg also ultimately ruled that the value of 401(k) funds would not count as collateral sources. *See* 67 Fed. Reg. 11,234 (Mar. 12, 2002).

¹³⁰ *See* Stabilization Act, *supra* note 1, at § 405.

¹³¹ *See id.* at § 408(b)(3).

¹³² *See* RAND Report, *supra* note 2, at 24.

¹³³ *See id.* at 24-25. “[A]pproximately 70 families pursued wrongful death claims. The remaining 30 or so neither pursued wrongful death claims nor were compensated by the fund.” *Id.* at 25.

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ The remaining payout came from private insurance and charity. *See id.* at xxiii.

¹³⁷ *Id.* at 34-35.

¹³⁸ *Id.* at 35.

tort regime, assuming liability,¹³⁹ so too would the expected time of recovery given the airlines' likely propensity not to settle quickly; cases stemming from the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988 took 15 years to settle.¹⁴⁰ Moreover, contested tort litigation over 9/11 would almost certainly have had much higher administrative costs than did the Fund.

Those families who chose not to opt into the Fund apparatus have "litigation pending against thirteen airlines, seven airport security firms, three airport authorities, Boeing, the operators of the World Trade Center, and the Port Authority of New Jersey and New York."¹⁴¹ In addition to these pending claims by families outside the 9/11 Fund, there have been some suits involving the Fund itself. Nine families, including seven from the brokerage firm Cantor Fitzgerald, alleged that as high-wage earners they were unfairly discriminated against by the Fund. This claim was quickly rejected on May 8, 2002, by Judge Hellerstein in the Southern District, a decision subsequently affirmed in substantial part by the Second Circuit Court of Appeals.¹⁴²

Criticisms of the Stabilization Act and the 9/11 Fund have focused on two main issues: (1) the Fund's failure to treat all cases alike, both among the 9/11 victim class and between 9/11 victims and other victims of terror, crime, and calamity; and (2) the Fund's unusual requirement that all collateral sources be offset against Fund payouts. The first issue, as between 9/11 and other victims, is beyond dispute:

It is not simply that the fund compensates the victims of one set of terrorist attacks (9/11) but not victims of other terrorist attacks on American and foreign soil (Oklahoma City, Khobar Towers, and others). It is also that the fund compensates the 9/11 victims while most other innocent victims of crime, intentional wrongdoing, or negligence must suffer without remedy unless they are "lucky" enough to have been injured by someone who can be held liable under the tort system's peculiar, often arbitrary rules and who is also sufficiently insured or secure financially to pay the judgment.¹⁴³

Of course, as Peter Schuck notes, the decision to establish a fund for 9/11 victims is a political one, stemming from their status "as a symbol of a unique trauma inflicted on the nation's collective psyche," as well as Congress's desire "to protect airlines against

¹³⁹ As mentioned at the outset, however, liability in this case is far from certain. See *supra* note 2.

¹⁴⁰ See RAND Report, *supra* note 2, at 41.

¹⁴¹ Sebok, *supra* note 2 (citing In re Sept. 11 Litig., No. 21 MC 97 (AKH) 2003 U.S. Dist. LEXIS 15522, at *6, 11 (S.D.N.Y. Sept. 9, 2003)).

¹⁴² See *Colaio v. Feinberg*, 262 F. Supp. 2d 273 (S.D.N.Y. 2003), *aff'd in part and dismissed in part*, *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003) ("Since we have found the regulations, interpretive methodologies and policies to be consistent with the meaning of the Act, calculation of compensation, even if based on disproportionate consumption rates, represents an exercise of the broad discretion given to the Special Master. There is simply no 'meaningful standard' against which to judge the exercise of that discretion.").

¹⁴³ Schuck, *supra* note 2.

potentially massive liability.”¹⁴⁴ So the distributive equity point in this context is largely academic, especially given that, as Schuck admits, “most other innocent victims . . . must suffer without remedy,” but our tort system uniquely compensates a few.

Serious questions remain, however, about the Fund’s varying treatment of members of its own victim class. Implicit in the economic damage awards’ reliance on economic damages is that richer victims recovered much more than poorer ones. “Those who received less wondered why the lives of their loved ones were valued less than others who made more money,”¹⁴⁵ while the decedents of the highest earners complained that Feinberg’s informal caps on earnings above the 98th percentile left them undercompensated.¹⁴⁶

Moreover, the Act’s collateral offset provisions “struck many as especially unfair, given that the collateral offsets would have the greatest effect on the families of those victims who happened to have planned ahead (or whose employer planned ahead) and purchased insurance, a group that included the families of the firefighters and police officers who died while attempting to rescue others.”¹⁴⁷ Although “a minority of states require collateral offsets of tort awards to take into account various types of non-tort compensation,” the Fund’s requirement of an offset for life insurance was unprecedented.¹⁴⁸

Despite these objections, the 9/11 Fund performed admirably as a vehicle for quickly compensating victims. Ken Feinberg avoided the fate of Richard Bland Lee. According to Michelle Dauber, Feinberg succeeded because although he “emphasized the victim status of the claimants from the beginning,” he ultimately “treat[ed] the claimants as recipients of a federal benefit program subject to bureaucratic procedures grounded in calculation and verifiability rather than emotion and sympathy.”¹⁴⁹ The 9/11 Fund paralleled workers’ compensation schemes in making payouts, other than to the highest-earning individuals, according to a predetermined “grid.” Although this approach generated “outraged protest” from some claimants, “it demonstrate[d] to onlookers that that the relief official [was] sufficiently independent of claimants to protect the public fisc.”¹⁵⁰ As Dauber explains:

When relieving innocent victims, Congress generally establishes only a minimal bureaucratic apparatus charged with the imperative to distribute as much cash as possible as fast as possible, and empowered to make exceptions to rules of evidence, means tests, and other standards in order to meet the particular needs of claimants. By contrast, vetting the claims of recipients is a far stickier business,

¹⁴⁴ *Id.*

¹⁴⁵ RAND Report, *supra* note 2, at 36.

¹⁴⁶ See text accompanying note 142.

¹⁴⁷ Abraham and Logue, *supra* note 117, at 599.

¹⁴⁸ *Id.* at 601.

¹⁴⁹ Dauber, *supra* note 48, at 349.

¹⁵⁰ *Id.*

rife with suspicion, indifference, and severe problems of moral hazard and dependency. The government consigns these “cases” (for they are by this time cases and not individuals) to a much thicker bureaucracy, employing rigidly standardized rules to protect both the public fisc and the public morals from self-interested recipients who engage in “fraud, forgery, and perhaps perjury” as an 1818 congressional committee report chastised the [War of 1812] Buffalo claimants.¹⁵¹

In sum, the 9/11 Victims’ Fund offered a successful template for dealing with disaster. It systematized compensation in keeping with the best-functioning workers’ compensation schemes, and the Fund administrator avoided the personal involvement that can jeopardize such efforts. Although victims’ rights in tort were not wholly abrogated, most individuals opted into the system, showing its attractiveness to plaintiffs as well as defendants.

(4) *Policy implications and conclusion*

The 9/11 Fund experience offers several useful cautions for those who would use it as a model:

First, the 9/11 Fund relied on the abilities of Mr. Feinberg, and it is unlikely that a sustained administrative program would be able to vest so much discretion with a single individual.¹⁵² A program modeled after the Fund would have to develop a more institutional arbiter of claims, probably incorporating an appeals process.

Second, while the Fund worked as a retrospective remedy for a discrete tragedy for which deterrence of future calamities was inconsequential, a reform proposal designed to compensate harms *ex post* would need to be mindful of the *ex ante* deterrence incentives it would create.

Third, the 9/11 Fund differed from many potential tort situations in that actual injury was easy to establish: claimants came from a discrete class of victims killed or injured in a specific event.¹⁵³ There was no reasonable question presented as to who fell into that class – each individual had been aboard one of the four hijacked aircrafts or was in or around the World Trade Center or Pentagon at or subsequent to the attacks. Because of the strict time requirements placed on filing,¹⁵⁴ and the requirement that those injured had sought immediate hospitalization,¹⁵⁵ there was little prospect of claimants

¹⁵¹ Dauber, *supra* note 48, at 293.

¹⁵² See Schuck, *supra* note 2 (“It is doubtful . . . whether a future administrative program for victims of a large-scale catastrophe would be as flexible, personalized, and antibureaucratic as the 9/11 fund has been.”).

¹⁵³ See text accompanying notes 120-122.

¹⁵⁴ See *supra*, note 123.

¹⁵⁵ See text accompanying notes 120-121.

trying to push the limits of the program as has happened in workers' compensation systems over time.¹⁵⁶ Any subsequent program modeled on the Fund would need to be mindful of clearly defining the class of those covered.

Fourth, the Fund administrator did not have to address issues of causation; presumptively, under Congress's Act, anyone killed or seriously injured (i.e., requiring at least one day's hospitalization) fell under the compensation scheme.¹⁵⁷ The proximate cause of the claimants' injuries was the actions of the terrorists, but cause was immaterial to the Fund's operation.¹⁵⁸

In contrast, an administrative scheme that had to deal with broader tort problems, such as asbestos or drug injury, would have to be able to assess claims of injury and causation. A structure like the VICP or workers' compensation provides a good template. For most such cases in which administrative remedies might make sense as a tort supplement, determining not only injury but also cause is essential, e.g.:

- Are the individual's lungs impaired, and is that impairment attributable to asbestos exposure or some other cause?¹⁵⁹
- Did the patient's heart attack result from an adverse drug reaction or natural causes?
- Was the infant's cerebral palsy caused by asphyxiation in delivery or a genetic defect?¹⁶⁰

Fifth, the 9/11 Fund succeeded in part because it made large cash payouts, given by the government.¹⁶¹ The government is unlikely to be the payor in future alternative compensation schemes,¹⁶² and for more sweeping cases of injury – say asbestos or a pharmaceutical alleged to be linked with death, such as Vioxx – serious consideration should be given to how much award is sustainable. Some workers' compensation programs are assailed for their stinginess, but the lessons of the workers' compensation experience is that by lowering the barriers to receive redress a reform encourages people to seek more compensation and attempt to exploit the system.¹⁶³

¹⁵⁶ See text accompanying note 67.

¹⁵⁷ Note, however, that some individuals receiving compensation from the 9/11 Fund belonged to a somewhat more ambiguous class, "those injured by environmental exposures." RAND Report, *supra* note 2, at xxv; see also *supra*, note 122.

¹⁵⁸ In this sense, the Fund was not dissimilar from workers' compensation programs. See text accompanying notes 63, 67.

¹⁵⁹ Cf. *supra* note 33 (noting wide discrepancy between claims of asbestos injury from B readers of plaintiffs' attorneys and independent readers).

¹⁶⁰ Cf. *supra* note 34 (noting rarity of asphyxiation as a cause of infant cerebral palsy).

¹⁶¹ See Schuck, *supra* note 2 ("[T]he fund's awards are far more generous and quickly and easily obtained than a tort remedy in most cases."); see also text accompanying notes 132-140.

¹⁶² The government might insure losses, however, if funded through a specific surtax set-aside as in the VICP.

¹⁶³ See text accompanying note 67; *supra* notes 17, 78, 80.

Therefore, the 9/11 families' complaints about limited payouts for high-earning individuals notwithstanding,¹⁶⁴ serious consideration should be given to limiting payouts not only for noneconomic damages but also for economic damages beyond a certain limit, under the assumption that wealthier individuals can easily contract for private insurance should they so desire. Indeed, such a restriction would have the salutary effect of reducing equitable concerns that rich beneficiaries benefit substantially more than poor ones under the program.¹⁶⁵ To permit private insurance, however, a program with such economic damage limitations could not include all insurance payments as collateral offsets but would instead have to allow for collateral payments on top of those in the administrative system.

Sixth, an additional problem with adapting the 9/11 Fund to a broader tort reform project is the Fund's optional nature. As the experience with no-fault auto insurance makes clear, "add-on" programs of this type tend to perform woefully by allowing potential claimants to opt for the highest-returning option between two parallel systems.¹⁶⁶ Such a problem would be particularly pronounced if damage recovery through the administrative scheme were more parsimonious than under the 9/11 Fund model, as suggested here. Again, the VICP and workers' compensation plans seem to better models. Any administrative remedy should be exclusive and force participants to exhaust statutory remedies before filing suit.¹⁶⁷

Finally, historical efforts at no-fault tort reforms should alert us to the precarious political economy of the endeavor. Having developed as a strong political force in response to no-fault auto insurance plans,¹⁶⁸ the plaintiffs' bar is today an exceptionally effective lobbying enterprise. Thoughtful reformers should not attempt to achieve any reform legislation at any cost but should carefully weigh whether a "watered-down" reform would actually improve the status quo.

In conclusion, the exceptional costs of the U.S. tort system, and its failure to meet either equity or efficiency goals, make a compelling case for experimenting with other methods of victim compensation. No-fault administrative remedies are among the panoply of reform ideas that deserve serious consideration. The 9/11 Fund's experience, along with the experience of prior disaster relief efforts, workers' compensation programs, no-fault auto insurance, and vaccine compensation, offer many instructive cautionary and instructive insights into how such a reform program might be structured.

¹⁶⁴ See text accompanying notes 142, 146.

¹⁶⁵ See text accompanying note 145.

¹⁶⁶ See text accompanying note 89.

¹⁶⁷ It should be emphasized, however, that creative plaintiffs' lawyers are likely to try to circumvent even the most carefully statutes, as has happened in both the vaccine and workers' compensation cases. See, e.g., text accompanying notes 76-77, 115.

¹⁶⁸ See text accompanying note 93.