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COMPENSATION FOR TERRORISM: WHAT WE ARE LEARNING

*Marshall S. Shapo**

INTRODUCTION

My title, “Compensation for Terrorism: What We Are Learning” reflects the humility that surely must affect us all as we probe this subject. It suggests that our education will be in process for some time to come.

I will specify and seek to tie together several strands of politics and legal analysis that run through the problem. One of the many things we are about here is an attempt to develop analytical categories that will enable us to better rationalize the social response, so far, to the issue of compensation for the events of September 11, 2001, and to construct, in relatively unhurried fashion, a matrix for further responses. I speak principally to the fashioning of policy, but also to outline some ideas on which courts may draw in judging disputes that grow out of present and future legislation and regulations.

Among the topics that I will examine are:

- (1) The emergence of a fragile political consensus;
- (2) the need to develop principles from an ad hoc response to a novel set of events of which we may have seen only the beginning;
- (3) the problem of identifying compensable events within a group of concepts that are difficult to define both as matters of philosophy and of law—categories like “misfortune” and “accident”;
- (4) the definitions of both fault and responsibility;
- (5) the possible need to redefine what we must assume to be the ordinary burdens of life;
- (6) the continuing challenge of placing currency valuations on intangibles, including pain and affective relationships; and
- (7) the especially difficult problem of how to respond to the surge of emotion that has accompanied these events—a task that colors many of the issues I have mentioned above.

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I frame these remarks with some personal views that began to evolve on September 11, 2002, and the days immediately preceding that anniversary. There was a particular irony about the media coverage of those days, particularly the television coverage. Although the journalism of that period dealt with scenes of horror and episodes of enormous grief, it seemed to me to depict these matters in tones too pastel for reality. Representing some developing aspects of modern culture, it presented an analogue of the idea of instant gratification that I shall term instant closure. I simply reiterate a point others have made when I say that it appears that closure, in the sentimental connotation the term has taken on in recent years, does not seem possible with reference to these events. I suggest that we must consider the subject of this Symposium, as we all must consider the much broader topic that surrounds it, in the context of what may be a "long twilight struggle." These observations color my views on the specific matters I now discuss.

II. THE POLITICS OF COMPENSATION FOR TERROR

The legislation that sets up the September 11th Victim Compensation Fund of 2001,¹ and the rules that implement the Fund—especially the first-cut Interim Rule,² which in large part has become the Final Rule³—are remarkable documents. Created in an extraordinary climate of national emotion, and responding to many different kinds of pleaders and the political pressures they brought to bear, the Fund statute and the Rules represent the development of an uneasy consensus about the obligations that a community under attack bears to its citizens. They were the product of an unusually focused national colloquium among lay persons on a subject on which it is difficult to say who the experts were, or are. Tocqueville was prescient: "[I]t is by taking a share in legislation that the American learns to know the law; it is by governing that he becomes educated about the formalities of government. The great work of society is daily performed before his eyes, and so to say, under his hands."⁴

To read the legislation, as I have noted earlier, is to examine an exercise in public choice, a multifaceted national mediation process in

1. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 231 (2001) [hereinafter *Air Safety Act*].

2. Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,282 (Dec. 21, 2001) [hereinafter *Interim Rule*].

3. Final Rule, September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.47(b)(2) (2003) [hereinafter *Final Rule*].

4. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (George Lawrence trans., J.P. Mayer & Max Lerner eds., 1966).

which airlines, living victims, and families of the dead bring to Congress their diverse complaints.⁵ To read the Rules, and to view television films of the Special Master in intense exchanges with the victims' groups,⁶ is to see Americans "becom[ing] educated about the formalities of government" in living color.⁷ The receipt by the Justice Department of "thousands of comments" on the Interim Rule⁸ indicates that democracy in Tocqueville's sense is very much a functioning institution. Jockeying by groups is historically part of the game, but this response appears to have gone beyond that, evolving into a community conversation about how to deal with fortuitous injuries.

III. THE PROBLEM OF PRINCIPLE

The legislation and the rules, so quickly fashioned, challenge the analyst to find the informing principle beyond raw politics. Several competing principles appear in the public debate about these documents as well as in the statute and rules themselves. We want to keep the airlines flying. We also wish to preserve conventional tort rights under traditional applications of negligence theory, but not to the point that it ruins the airlines. At the same time, we desire a non-litigation alternative for people whose lives are heavily stressed as it is, even without the strain of a lawsuit. But even under that alternative, we want to preserve the traditional valuations of human life that have been developed under tort law over a period of decades. We want to accommodate all these desires in response to one calamitous event.

The legislation is analogous to the early stages of common law development. We respond to a first case in a particular fashion. We are dimly aware that there may be more cases on the way with their own grotesque wrinkles, so we try to justify what we have done in the first case with some thought of the future. But anyone who has dealt in administration at any level understands that a principle that sounds good for just one case may not stand up as future cases arise, each with its own peculiarities. The subsequent cases tend to force changes in principle; and when the principle initially announced rests on a set of complicated rationales, the principles developed for the next set of

5. Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 HOFSTRA L. REV. 1245 (2002).

6. For several verbal cameos of these encounters, see Elizabeth Kolbert, *The Calculator*, NEW YORKER, Nov. 25, 2002, at 42.

7. *Id.*

8. See Final Rule, *supra* note 3, at 11,235.

cases will become yet more nuanced—or occasionally, much more blunt.

Basically, what we have done here is to print a ticket that covers one set of events. We have muddled through, keeping principle in the background, although the varied rationales for this legislation will carry some momentum when we consider how to respond to future events of this kind. But now we must start thinking about the limitations that competing drains on scarce resources will impose, especially if the economy is sluggish or dips over the long term and if terrorists perpetrate more, and perhaps even more horrific, murders.

There are certainly reasons to have printed this particular ticket. The unprecedented occasion of an attack on the continental United States, together with the loss of thousands of lives, provides a foundation for this ad hoc response. The sense of vulnerability and of insult—at least the first time—bolsters the case. The particular horror of people jumping out of 100-story buildings, the heroism of the firefighters, and the images of the collapsing towers—all these things were in the background when Congress acted.

On reflection, though, and thinking about the possibility of a next time, we must give closer attention to the question of how we allocate losses between victims and the polity in times of national disaster. The issue becomes a subset of the vast question of what it means to be an American, or even to sojourn in America.

In an earlier essay, I cited Churchill's decision to create a national insurance scheme for damage from German bombs. He referred to "the principle that all damage from the fire of the enemy must be a charge upon the State and compensation be paid in full and at once."⁹ But one can only speculate how Churchill would have reacted to complaints from the bond firm Cantor Fitzgerald that a nontaxable award of approximately \$3 million to the survivors of a broker with an average income of \$110,000 was insufficient.¹⁰

Tort law has been criticized from the left as inegalitarian.¹¹ A different perspective appears in a criticism of the Special Master's schedules and caps, from the perspective of a Cantor Fitzgerald formula described as "us[ing] gross income and a more bullish estimate of future earnings," that suggests that an award in such circumstances

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

10. See David W. Chen, *Worst-Hit Firm Faults Fairness of Sept. 11 Aid*, N.Y. TIMES, Sept. 17, 2002, at A1, B10.

11. See, e.g., Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 799 (1990) ("Tort damages deliberately reproduce the existing distribution of wealth and income.").

should be “closer to \$5 million.”¹² This critique represents quintessential capitalism. Wherever one stands on the method of calculating tort damages, however, one must confront the issue of what the proper source is—or what the proper sources are—for compensation. Given the availability of insurance that could have been financed by the firm and used to cushion employees’ losses in such an event, arguably the best loss distributor, or at least a proper co-distributor, would be private insurance. At least in a rough and ready way, the schedules and caps may have defined the limits of the argument that individual claimants are unique. They embody some recognition that the Fund comes from the general revenues.

The Cantor Fitzgerald position is understandable from a businessman’s perspective. But Churchill, both a master practitioner and scholar of politics, might have informed the firm that its position may not be a winning one for someone scouting for tax money. For, in that environment, the issue is entirely one of politics, requiring give-and-take against the background of general perceptions of overall fairness.

IV. SORTING OUT MISFORTUNES

September 11th may well have been the beginning of an era in which the resources available for misfortunes of all kinds will diminish for some time. Demands for funds to protect against domestic terrorism appear to be insatiable. To take only two well-publicized examples, the gaps in port security alone would appear to require very large expenditures, and both private enterprise and government already have taken expensive steps to protect buildings. Moreover, at this writing, it appears that these outlays are being dwarfed by the enormous drain on the fisc of a war thousands of miles from home.

Arraying misfortunes on a deserts scale is a tricky business in any event, and when afflicted persons seek to tap tax funds, the keepers of the purse will surely ask where a particular set of events lies on that scale. We should note that there has been an expansion of the scale itself—of the definition of what people are willing to call misfortune. Under a lens that focuses on individual harms, illness and injury are the two most obvious occurrences. When we broaden the focus, we come to natural disasters, wars—and major terrorist attacks. Broadening it even more, we come to poverty, and eventually to the conditions of one’s birth, including not only the socioeconomic status of one’s family but also one’s genetic inheritance. Each of these categories presents a different sort of potential claim on the Treasury.

12. Chen, *supra* note 10, at A1.

When we open up the question of how we define misfortune, we are enjoined by modern theory to scrutinize victims' opportunities to avoid risk. However, looking at the case from the perspective of victims—and even taking into account foreseeability of some kind of attack on the World Trade Center in particular¹³—I shall assume that workers there and in the Pentagon could not have foreseen anything like the dimensions of the terrorist destruction that occurred. From that perspective, September 11th is clearly distinguishable from the classic moral hazard of building on a flood plain. Indeed, a potential distinction also appears between September 11th and a future mass murder by terrorists, at least one localized, as the events of September 11th were, to particular structures. One new practical principle may be that people holding or considering jobs in tall buildings should blend an increased apprehension of risk into their choice of workplace. I instance, purely anecdotally, a law student I know who had job offers from two Chicago firms, one of which is located in the Sears Tower. He told me that at least at the conscious margin of his decision was a reluctance to work in a place that in the morbid popular mind had become considered to be a possible target.

V. THE PHILOSOPHY OF COMMUNITY

As we confront the question of how to compensate victims of terror in general, apart from the unique features of September 11th, we must ask what it means in our America to be a member of a community. The bell "tolls for thee," although the clod John Donne specified as falling was a patch of earth from the Old World.¹⁴ But even if we focus on our New World, and the proud towers of Lower Manhattan that had so much become symbols of it, it is still incumbent on us to ask about the modern relevance of the idea that any person's death diminishes me because of my involvement in humanity. One may at least argue that what is owed by the community to survivors of a person who dies—in this particular setting from an attack—should be determined on more of an egalitarian basis than one related to income. It is at least reasonable to speculate that a seventeenth century divine would have thought so.

It is clear that on some occasions the community is willing to devote what many economists would call an inefficiently large amount of resources to the rescue of people in peril. The most well publicized recent example is that of the extraordinary efforts, conducted in full

13. See *infra* text accompanying notes 36-38.

14. See JOHN DONNE, COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE 441 (Charles M. Coffin ed., 1952).

television view of an anxious nation, devoted to the rescue of nine Pennsylvania miners.¹⁵ Of course, the definition of what an efficient allocation is depends on what factors one plugs into the calculation—including the incentive effects for miners to go back into the shafts. A compelling analogy involves the willingness of soldiers to expose themselves on the point if they know that they will not be left in no-man's land if they are wounded.¹⁶ Although I am mindful of the argument that, at some deep biological level, virtually all behavior is selfish,¹⁷ my personal intuition is that most rescuers act altruistically, or that at least altruism is a very important element among a mixture of motivations. However, I do not pursue that point here. Rather, I simply note that in conventional ways of thinking about self-interest, efficiency analysis often does not rule in rescue situations.

Of course, common sense also tells us that the community will not intervene to alleviate some misfortunes, whether they originate naturally or arise from vicissitudes. Always in the background of such cases are pragmatic questions about frequency of occurrence and about how many have been affected by the misfortune at issue. We can tolerate the inefficient response for one or two episodes of trapped miners, and there may be an outpouring of public support for one set of octuplets because there are so few such events. At some point, however, the polity will close the checkbook.

VI. PROBLEMS OF VALUATION

This discussion leads into a sensitive set of questions concerning the valuation of claimants' interests in any case involving personal injury, fatal or not. A perhaps under-emphasized fact is that one of the hardest pieces of the puzzle in legal formulas that involve costs—either cost-benefit tests or cost-cost tests like the Learned Hand formula¹⁸—lies in the difficulty of defining accident costs. Think of how facilely one may change the total economic cost of injuries by using “gross income and a more bullish estimate of future earnings,” Cantor Fitzgerald's suggestion about the proper basis for the Fund schedules.¹⁹ A difference of more than half again as much in eco-

15. See, e.g., Richard Benedetto, *Miners Survival Celebrated*, USA TODAY, Aug. 6, 2002, at 6A.

16. See, e.g., Lewis LaRue, *A Comment on Fried, Summers, and the Value of Life*, 57 CORNELL L. REV. 621, 625 (1972) (focusing on the morale of patrols whose wounded members require rescue).

17. See, e.g., Richard Dawkins, *God's Utility Function*, SCI. AM., Nov. 1995, at 80 (“God's Utility Function betrays its origins in an uncoordinated scramble for selfish gain.”).

18. *United States v. Carroll Towing Co.*, 159 F. 2d 169 (2nd Cir. 1947).

19. See *supra* text accompanying notes 10, 12.

conomic costs alone—\$5 million as against \$3 million—might turn many a tort case decided under the Hand test.

The difficulty becomes even greater with respect to the valuation of intangibles. Certainly that is a task that tort law takes on every day all over the country, in the most mundane cases involving pain and suffering and in the most poignant cases involving the affective elements of personal relationships. But if terrorism causing mass injuries should become more than a one-time thing, increased numbers of injuries may exert a powerful downward pressure on valuation, particularly the valuation of intangibles. Modern tort law elevates a number of intangibles to the same legal dignity as economic loss. But the same body of law reflects a certain ambivalence about the reality of some intangibles;²⁰ and an assessment of the harm to feelings and a particularized determination of their worth may be an inquiry that is among the first to be jettisoned if terror becomes even an episodic part of American life.

VII. THE COLLATERAL SOURCE PROBLEM

The Fund highlights the twists and turns within the general problem of collateral sources. The statute begins this zig-zag pattern with a particular piece of countertort subtlety. Within a rule requiring the deduction of collateral sources from Fund compensation, it defines life insurance as a collateral source.²¹ Apparently savings are not. The Final Rule specifies that charitable donations are not “collateral source compensation,” but it allows the Special Master to determine that funds provided to victims or their families through privately funded charitable entities are collateral sources.²²

These ad hoc rules exemplify the need to define the major premise. The question posed extends across our various bodies of law designed to compensate victims of injuries. Putting aside deterrence, is society’s main concern the loss of victims or their need? An apparent principal premise of the statute is a compassionate one; and when dollars are the currency of the law, is not the key to compassion a sensitivity to need, rather than loss? Of course, divining the statutory rationale is not that simple a task. Compassion itself may embody a sense of “there but for the grace of God, go I.” Moreover, Congress’s

20. See, e.g., *Keck v. Jackson*, 593 P.2d 668, 669-70 (Ariz. 1979) (“Damages for emotional disturbance alone are too speculative.”) (dictum). I discuss this point in MARSHALL S. SHAPO, *TORT LAW AND CULTURE* ch. 10 (2003).

21. Air Safety Act, *supra* note 1, § 402(4).

22. See Final Rule, *supra* note 3, § 104.47(b)(2) (tracking Interim Rule, *supra* note 2, at 66,287).

creation of the Fund goes beyond compassion. The legislation articulates society's solidarity with the victims and a sense of a community united.

VIII. ALTERNATIVE MODELS

We now refer specifically to several models, which are not necessarily exclusive, on which a legislature might draw in trying to solve this multifaceted problem. One is the *tort* model. Its application in this case ranges from the almost purely hypothetical to the colorably litigable. The primary tortfeasors, individual perpetrators of intentional torts, are dead, and any resources they might have had are presumably unreachable. Investigation has yet to pin the murders to solvent available culprits. There are also potential causes of action, under American law as written, against a variety of private actors. First among them are the airlines, whose financial difficulties are well-known and who are indeed the beneficiaries of largesse under the same statute that created the Fund.²³ Claims might also exist against builders and designers of buildings, but plaintiffs would face uphill fights from the beginning on issues of standard of care and causation, including the problem of multiple causes. Immunity aside, the government itself would be a candidate for tort liability, but the well-publicized cases of omissions to transmit, assess, or act on information relevant to September 11th seem largely to fall into discretionary function territory.²⁴ At least to date, we have learned from *Dalehite v. United States* that “[t]he King can do only little wrongs.”²⁵

An *event-related compensation model* would paint from a palette less varied than the tort palette, yielding a more monochromatic picture. One might describe such a scheme as an ad hoc workers' compensation model because most of the victims were at work. The Fund, as developed in the Rules, does have a “comp” aspect to it. This includes the use of schedules, although the level of compensation far exceeds that available to the comp-covered worker maimed by an industrial machine.

The Fund represents an interesting negative variation on a *true social insurance model*. Such a model would require that claimants, or their employers, or both, had paid into a fund before the event. Pre-

23. See Air Safety Act, *supra* note 1, §§ 101(a)(2) (granting federal compensation to air carriers “for . . . direct losses . . . as a result of any Federal ground stop order” and “incremental losses incurred” through December 31, 2001 “as a direct result of such attacks”); 405(c)(3)(B)(i) (compelling waiver of civil actions by persons who submit claims to the Fund); 408(a) (capping liability at the “limits of the liability coverage maintained by the air carrier”).

24. See *infra* text accompanying note 40.

25. *Dalehite v. United States*, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting).

sumably many of the victims of September 11th actually did that in the form of FICA payments. The twist is that it appears that death payments based on Social Security contributions are collateral sources,²⁶ and thus deductible from compensation awards under the Fund.

A *broad social welfare model* for misfortunes in general, unspecified in advance as to cause, probably would focus on need. The Fund partakes somewhat of the abstract social welfare idea, but bursts through the need rationale with its linkage to income levels.

The New Zealand accident compensation scheme, which has gone through a series of iterations, combines features of several models.²⁷ Its funding has been pinned partly to activities and partly to the general revenues.²⁸ And it has generated penumbral legal questions of a sort dear to the heart of torts teachers. Consider Geoffrey Palmer's description of some interpretations of the definition of "accident" under the New Zealand statute. A man was adjusting an exhaust pipe on his vehicle while lying on his side. "He stood up and within a second or two, suffered a stabbing pain in his lower back."²⁹ The claimant did not recover because, as Palmer summarizes it, "there was no identifiable physical act or event leading to the injury."³⁰ But a woman who suffered a ruptured disc when she "bent down to plait her daughter's hair and sneezed" did get compensation.³¹ On review, this event was held an accident under the statute: "the physical act did not need to be external to [the] body because 'there may be some occasions when the precipitating physical act may occur spontaneously as, for example, if a person dislocated his shoulder when throwing a cricket ball.'"³²

When tribunals split hairs like these on inter-event comparisons, it would not be surprising to find lawyers applying refinements at least as subtle to interpersonal comparisons that involve projections of income levels—or the value of affective relationships.

26. See Air Safety Act, *supra* note 1, § 402(4) ("Collateral source" includes "all collateral sources, including . . . death benefit programs.").

27. See, e.g., Michael Whincup, *Compensation for Accident Victims: The Exemplary Model of New Zealand*, 7 J. CONSUMER POL'Y 497 (1984). For comprehensive commentary on the New Zealand scheme, collected in twenty articles, see 34 VICTORIA UNIV. OF WELLINGTON L. REV. 2 (2003).

28. See Whincup, *supra* at 500-01.

29. GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* 251 (1979).

30. *Id.*

31. *Id.*

32. *Id.*

IX. FAULT AND RESPONSIBILITY

The probabilities of recovering significant amounts in tort seem quite uncertain for both living victims and survivors. Acknowledging that the chances for such claimants to succeed may be more theoretical than practical, we should observe that the events of September 11th pose a fascinating set of questions about the meaning of negligence. A principal touchstone of negligence is foreseeability,³³ a concept that a federal district court judge has employed to the advantage of September 11th claimants in the preliminary stage of tort suits. However, hindsight knowledge, especially projected through the lens of modern media, has powerful potential for claimants to translate it into the language of foresight. One of the most celebrated allegations concerning governmental responsibility arises from the report that an instructor at a flight school in Minnesota “called the FBI several times” to warn about the threat he perceived from one of his students, Zacarias Moussaoui, who was indicted on charges that he was the “20th hijacker.”³⁴ A member of Congress said that the instructor had specifically asked FBI agents, “Do you realize that a 747 loaded with fuel can be used as a bomb?”³⁵

Even in material widely circulated before the summer of 2001, harbingers abound. Purely illustrative, in fiction at that, is a thriller by Nelson DeMille that contains at least three references to the 1993 bombing of the World Trade Center as an exemplar of terrorism.³⁶ Consider one particularly vivid passage in the novel, which was published in 2000. DeMille’s *noir* hero and narrator, John Corey, is looking toward the Center from the office of Koenig, the fictional head of the FBI’s anti-terrorist task force for the New York area. Corey says that Koenig’s

desk was arranged so that every time he looked out the window, he could see these towers, and he could contemplate what some Arab gentlemen had prayed for when they had driven an explosive-filled van into the basement parking garage—namely, the collapse of the

33. See *In re Sept. 11th Litig.*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003); see, e.g., *id.* at 295-97 (claims against aviation defendants for injuries to “ground victims”), 300-01 (claims against World Trade Center owners and operators).

34. Philip Shenon, *Moussaoui Could Be Terrorist, Flight Trainer Warned FBI*, CHI. TRIB., Dec. 23, 2001, § 1, at 4.

35. *Id.* See also Philip Shenon, *Early Warnings on Moussaoui Are Detailed*, N.Y. TIMES, Oct. 18, 2002, at A13 (quoting report of special House-Senate intelligence committee about flight instructors’ suspicions about Moussaoui’s lack of a pilot’s license, his desire for training on a Boeing 747, and the fact that he was “extremely interested in the operations of the plane’s doors and control panel”).

36. NELSON DEMILLE, *THE LION’S GAME* (2000).

South Tower and the death of over fifty thousand people in the tower and on the ground.

And if the South Tower had collapsed just right and hit the North Tower, there would have been another forty or fifty thousand dead.³⁷

Corey concludes that “[w]hat could have been the biggest loss of American life since World War II turned out to be a loud and clear wake-up call.”³⁸ Legal negligence is all in the proof, under the rules of evidence, but here at least is a pre-September 11th literary suggestion that reasonable persons in possession of the Moussaoui evidence would have been alerted to the risk that terrorists might fly planes into the World Trade Center. If the government were considered simply as a private actor, knowledge of that kind on the part of its officials might well be grounds for a tort claim.³⁹ And although presumably the discretionary function exception of the Federal Tort Claims Act would bar actions against the United States by families of September 11th victims,⁴⁰ it may be noted that often the essence of the tort culpability of companies is a discretionary decision by highly placed corporate officials.⁴¹

There is no hint of acknowledgment of this point in the Fund statute, but revelations after its passage suggest that it now comes to represent a kind of expiation by the government itself.

37. *Id.* at 219.

38. *Id.* For other references in the same book see *id.* at 15 (using the words “World Trade Center” as a phrase evoking the meaning “Remember Pearl Harbor” to members of the anti-terrorism task force, concerning which DeMille’s hero comments, “[t]he intelligence community got caught with their pants down on that one, but came back and solved the case, so it was a draw”); *id.* at 47 (saying that terrorists “are dangerous, but mostly to themselves,” the narrator immediately muses, “[b]ut then again, remember the World Trade Center”).

39. See Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b) (2003) (conferring jurisdiction on federal district courts for claims against the United States “under circumstances where the United States, if a private person, would be liable to the claimant”), 2674 (imposing liability on the Government “in the same manner and to the same extent as a private individual under like circumstances”).

40. 28 U.S.C.A. § 2680(a) (2003) (exempting from liability claims against the Government “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency”).

41. See, e.g., *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 739-41 (Minn. 1980) (affirming punitive award in case involving burns from pajamas that ignited when, thirteen years before the event sued upon, a “top official” of the defendant had circulated an internal memorandum expressing concern about the flammability of the fabric).

X. COMPARATIVE HORRORS

One must be careful in comparing injuries across categories of activities,⁴² but in some cases such comparisons may prove instructive.⁴³ Perhaps the most striking statistic for comparison, in analyzing a unique catastrophe where the draft drawn by claimants will be on the general revenues, is that of the overall annual death toll from accidents in the United States. I select the category of accidents, for comparison with a situation of mass deaths caused by the most diabolical intentional torts, precisely because of the fortuity of the deaths and injuries of September 11th from the victims' point of view. The annual number of fatalities in this country from "unintentional injuries" in 2001—a figure that startles most people to whom the question is put without preparation—is 98,000.⁴⁴ This number may not entirely surprise those to whom the consistent recent toll of motoring fatalities alone is a commonplace statistic: in the low 40,000s.⁴⁵

Putting aside the nationally calamitous aspects of the attacks, one is entitled to ask whether an office worker's horror at seeing a plane coming at the ninety-seventh floor of the North Tower is greater than that of the motorist who sees an oncoming car jump the median and, for a few yards, literally fly at him or her. It seems reasonable to believe that, in their last moments, the victims in the Towers were not conceptualizing the insult to the national community of an attack on the homeland but rather coping with their own private hells. It is clear that in cold statistical terms, the annual accident toll in the United States dwarfs that of the attacks. Beyond that, viewing September 11th from the standpoint of the victims, it is not manifest that the awfulness of their deaths was qualitatively worse than that of the more than 90,000 of their countrypersons who died from accidents in 2001.

The other principal statistical analogy is a military one. Mr. DeMille's hero comments that after the 1993 bombing of the Trade Center, "America had become the front lines."⁴⁶ But a datum that puts September 11th in longer historical perspective is the death toll in

42. See *Bittner v. Am. Honda Motor Co.*, 533 N.W.2d 476, 486-87 (Wis. 1995) (barring use of evidence that "compared the risk of injury and death associated with [all-terrain vehicles] to the risk of injury and death associated with products and activities including skiing, bicycle riding, scuba diving, football, and passenger automobiles").

43. See *id.* (approving the use of evidence comparing injury rates of ATVs with those of snowmobiles, minibikes, and trailbikes, classifying all these products as "off-road motorized vehicles").

44. See NAT'L SAFETY COUNCIL, INJURY FACTS 8 (2002).

45. See *id.* (reporting motoring fatalities at 42,900 in 2001).

46. DEMILLE, *supra* note 36, at 219.

the abattoir that was Antietam: the combined fatalities of Union and Confederate soldiers resulting from that battle totaled between 6,300 and 7,600.⁴⁷ It has been observed that the lower figure is not only double the total deaths on September 11th, but four times that of American forces on the Normandy beaches on D-Day.⁴⁸

The numbers just recounted simply emphasize that violent death is a statistical norm on American highways and in our homes and workplaces, as well as in national defense. This means that insofar as we are all involved in the humanity of America, it is necessary to rationalize our choices to grant social compensation for traumatic misfortune. Even if there were an injury Tsar who sat at a great control board every minute of every day, constantly figuring and refiguring the distributive justice of compensation for such events, this would be a challenge indeed. But as I have previously noted, Americans have no Tsar,⁴⁹ and so the challenge is even more daunting. In fact, in practice, a truly comprehensive solution is a chimera. The profile of compensation is always a jagged one. The statute that creates the Fund is simply one more example—admirable in its intention—of Yankee muddling through.

Well over two years beyond September 11, 2001, we are indeed still climbing upwards on a steep learning curve. As we look apprehensively to possible future horrors,⁵⁰ we must continue to think through how to deal with the compensation problems that are likely to arise from a long war with an ununiformed enemy that strikes in calculatedly unpredictable ways. We have noted that the situation, viewed parochially only from a tort standpoint, is one in which immunities cloak many of the domestic actors who would conventionally be seen as culpable. It seems reasonable to predict that if attacks of this sort occur again, we will witness further fragmentation of our injury law beyond tort and the type of statutory compensation systems that have been in place for almost a century. Whether or not any future legislation still makes room for tort actions as the present Fund legislation does, compensation for terrorism will probably become more and more the province of Congress. And the parameters of compensation

47. The higher figure appears in Antietam battlefield information, available at <http://www.nps.gov/anti/battle.htm> (last visited Nov. 3, 2003).

48. See JEAN EDWARD SMITH, GRANT 219n (Touchstone ed. 2002); James McPherson, *Death in September*, CHRON. HIGHER EDUC., Sept. 6, 2002, at B8.

49. See Marshall S. Shapo, *Tort Reform: The Problem of the Missing Tsar*, 19 HOFSTRA L. REV. 185 (1990).

50. See, e.g., *Excerpts from Testimony by C.I.A. and F.B.I. Leaders About Sept. 11*, N.Y. TIMES, Oct. 18, 2002, at A12 (excerpting transcript of statement of C.I.A. Director George Tenet, including assertion that "the threat environment we find ourselves in today is as bad as it was last summer, the summer before 9/11").

are likely at once to become more sharply defined—as to the amounts available to individual claimants—and to become less legally refined, for example, with reference to traditional concepts of culpability and causation. The delicate consensus supporting the Fund statute and Rules, with their options and their particularized schedules and exclusions, may prove to hold for the events of one day only.

XI. SENTIMENT: ITS LIMITATIONS AND ITS PROPER PROVINCE

Our topic is one with high emotional content. As we seek to discern the rationales for the Fund, as legislated and elaborated in the Rules, it is well to draw back and reflect on the roots of whatever consensus exists. The sentimentality of much media programming is understandable, probably reflective of national moods. In the wake of September 11th, the most coolly rational among us must have experienced some waves of perturbation that included the maudlin—some tendency to nod as journalists ask survivors why they think they were “saved,”⁵¹ as if some deity had selected them for life while designating others, closely situated to them, for destruction.

Some will emphasize that sentiment takes us only a little bit of the way to understanding, to a point where rationality takes over and carries us all the rest of the way. I offer a somewhat more complex explanation of the initial solution represented by the Fund. It is one which moves from sentiment to conventional rationality but then beyond that to a kind of rationalized emotion.

Congress reacted to September 11th with a combination of sentiment and a surprising specificity of social engineering. The overall statute, including the “Airline Stabilization” section,⁵² was a hurried attempt to balance the interests of many very interested parties. It provides federally funded compensation for injured survivors and the relatives of those who died, direct subsidies to air carriers for economic losses, and an ad hoc resolution of the problems generally posed by the grinding of the tectonic plates of tort and compensation systems.⁵³

This is a rational set of solutions—politically rational. It is truly a public choice. But there is an element of that choice with some complex psychological coils—one that appears to justify the Fund on a

51. See Hanna Rosin, *All Talk*, NEW REPUBLIC, Sept. 23, 2002, at 12 (reporting broadcaster Connie Chung’s question to chef who worked on 106th floor of North Tower, but was getting his glasses fixed in the basement concourse when a hijacked plane hit the tower, “Why do you think you were saved?”).

52. Air Safety Act, *supra* note 1, tit. I.

53. See generally Shapo, *supra* note 5 at 1245.

basis to which it is not logically linked, at least not on traditional axes of reasoning. I suggested in an earlier essay that “the statute . . . reflects an unfocused desire to strike out against a particularly awful set of life’s misfortunes, events burdening the national soul with a recognition that retribution is not available on behalf of the victims—or the nation—in any tit-for-tat manner.”⁵⁴

Since writing that, I believe I have gained more understanding of the subject from an almost fortuitous visit to the site of the World Trade Center. That occurred on a June 2002 trip to New York City for other reasons, which included a visit to Lower Manhattan to see both a publisher’s representative and a relative. It was the publisher’s representative who urged me to go to the site. I had not planned to visit it because I thought there was little that its appearance at that time would add to what I had read, seen on television, and heard. I was wrong, and the greatest single impact from my visit came just before I saw the site itself. It occurred after I had come up from the subway, when I was walking south along the opaque fence that enclosed the east side of the site. As I looked up above the fence, it came to me in the most affecting way that two enormous structures used to stand there and that they, and thousands of their worktime inhabitants, were gone forever.

All of this bubbled up in my consciousness in the space of no more than a minute or so. What also surged in me, repetitively of thoughts in months past but with extraordinary emotional power, were thoughts of the diabolical plan and the simple execution of that plan by no more than a platoon that had brought about the events of September 11th. And there, walking along the fence before I saw the site, now no longer smoking and somewhat smoothed out but still cavernous, I experienced a feeling for which words are not really adequate.

The best word I can summon is rage. That is a word beyond the desiccated dialogue of the law journal. But I think that a rationalized version of that emotion—beyond traditional notions of reason, without direct logical linkage to the perpetrators—was a vital component of the psychology that inspired the Fund. We were enraged, and we wanted to do something—at least something *for* somebody, if not *against* somebody. If there are next times, we will be cooler in our response in the doing-for category. But on this first occasion, Congress spoke for the community with a meaning that outstrips the wisdom of conventional analysis.

54. *Id.* at 1252.