

SOME THOUGHTS ON COMPENSATION AND REMEDIAL RELIEF FOR DISASTERS IN THE AMERICAN LEGAL SYSTEM

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INTRODUCTION

In a singular effort following the horrendous 9/11 terrorist attack, Congress enacted the September 11th Victim Compensation Fund of 2001.¹ Professor Marshall Shapo soon published a brief commentary on the Fund.² But in characteristic Shapo fashion, his intellectual appetite was not satisfied by a summary overview of the Fund, and within a year, Professor Shapo published a full-scale analysis of the Fund, set in the broader context of compensation for victims of terrorism.³

Alas, more than a decade later, we live in a time when disasters, tragically, have taken on new meaning. Natural disasters arise with greater frequency and growing intensity.⁴ And responsible party disasters—disasters that are man-made—dominate the headlines, generating fear and a sense of disbelief.⁵ Both preventive measures beforehand, and restorative efforts on behalf of victims thereafter, raise enormously difficult questions of how to best address these momentous events.

This Essay will focus on the restorative efforts: compensation and remedial relief for disasters in the United States legal system.⁶ This Essay sets out to briefly describe the multi-layered system in the U.S. for addressing the consequences of catastrophic loss, which is framed in a typology based on a straightforward, two-fold approach.⁷

Part I will discuss compensation for natural disasters, where a combination of legislative no-fault compensation systems, privately held insurance, and governmental assistance programs compensate property loss, which is the dominant, although by no means exclusive, source of harm. Then, Part II will turn to responsible party disasters—where tort serves as

¹ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237 (2001) (codified at 49 U.S.C. § 40101 note).

² See Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 HOFSTRA L. REV. 1245, 1245 (2002).

³ MARSHALL S. SHAPO, *COMPENSATION FOR VICTIMS OF TERRORISM* (2005).

⁴ As I write, the COVID-19 pandemic rages worldwide. Limiting my focus to the domestic front, climate change has contributed mightily to perennial California wildfires and an uptick in hurricane damage on the East and coasts, among other notable natural disasters.

⁵ For a detailed account of the Las Vegas MGM Resorts Mandalay Bay mass shooting, for example, see Bill Hutchinson, Juju Chang, Jasmine Brown, Josh Margolin, Katie Muldowney & Eamon McNiff, *The Anatomy of the Las Vegas Mass Shooting, the Deadliest in Modern US History*, ABC NEWS (Dec. 23, 2018, 6:49 AM), <https://abcnews.go.com/US/anatomy-las-vegas-mass-shooting-deadliest-modern-us/story?id=59797324> [<https://perma.cc/Y484-QRW7>]. Some of the other most prominent mass shootings are discussed *infra* at note 60.

⁶ My focus will be primarily on the federal system, but with some reference to coordinated state and local measures.

⁷ For another perspective on compensating victims of mass disasters, see Stephen D. Sugarman, *Roles of Government in Compensating Disaster Victims*, 6 ISSUES LEGAL SCHOLARSHIP, no. 3, 2007.

the default system for seeking redress for physical harms. In addition to tort, Part III will consider other options for securing compensation, such as targeted informal settlement schemes.⁸

Finally, this Essay will conclude with a brief note on the shortcomings of each of these strategies and suggest the need for a hybrid approach that draws upon each of the positive elements in our patchwork system.

I. COMPENSATION FOR LOSS FROM NATURAL DISASTERS

This Part will discuss the various compensation schemes for natural disasters that are currently in use in the United States. These compensatory programs take a variety of forms, including governmental programs and private market insurance schemes. Though discussed separately, they do not always function as such; individuals enrolled in government programs who also hold private insurance can use the two to complement one another and provide for more complete coverage in the event of a natural disaster.

A. *Natural Disasters: Role of the Federal Government*

The role that the federal government has taken in natural disaster cases is best captured through brief consideration of three models: (1) federal legislation providing a structure of private responsibility but no contribution of public funds; (2) the federal government providing insurance coverage, rather than establishing a scheme of private insurance coverage; and (3) federal and state governments providing comprehensive and coordinated disaster relief.

⁸ There are background compensatory programs that warrant brief mention. But the starting point is to recognize that there is no comprehensive governmental “safety net” for personal injury or property loss victims of disaster or accidental harm. Nonetheless, medical benefits are provided, under Medicare, for the elderly; those who meet low-income eligibility can recover Medicaid benefits. Those who are permanently and totally disabled are eligible for Social Security benefits under the Social Security Disability Insurance (SSDI) program, and death benefits are available under the Social Security system to dependent individuals who meet eligibility provisions. *See Disability Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/disability/> [<https://perma.cc/HHU7-T8CV>]; *If You Are the Survivor*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/survivors/ifyou.html> [<https://perma.cc/Z32M-8KA8>]. As discussed *infra* Section I.A.3, “in-kind” relief (temporary shelter, food, emergency supplies, housing reconstruction loans) is available under the federal government program administered by the Federal Emergency Management Agency (FEMA)—specifically with regard to disasters. At the state level, workers’ compensation benefits, replacing tort relief, are provided for on-the-job injuries. *See infra* note 64 and accompanying text. While less than universally held, private disability insurance is a nongovernmental option—with gaps in this coverage partially met by the Affordable Care Act. *See NAT’L CONF. OF STATE LEGISLATURES, THE AFFORDABLE CARE ACT: A BRIEF SUMMARY 1* (2011), <https://www.ncsl.org/portals/1/documents/health/HRACA.pdf> [<https://perma.cc/675D-68QS>].

1. *Federal Legislation Provides a Structure of Private Responsibility but No Contribution of Public Funds*

A principal example of this model is the Price-Anderson Act, enacted by Congress in 1957.⁹ The Act provides for relief in the event of nuclear power plant accidents by creating a scheme whereby plant operators are required to pool contributions with fixed ceilings on liability. In exchange for a license allowing them to operate nuclear power plants, each operator must purchase at least \$450 million in liability insurance and—in the event of a nuclear accident—contribute a maximum of \$131 million, plus a 5% surcharge, to a common fund.¹⁰ At present, liability limits of this common fund—which would be available in any case of an “extraordinary nuclear occurrence”¹¹—comes to about \$13 billion (with nearly 100 reactors in operation).¹² This means that if there is a nuclear power plant accident, the plants cannot be sued for more than \$13 billion.

Additionally, claims, which are consolidated in federal court, are based on strict liability: There is no requirement that a claimant show negligence, and there is no contributory negligence defense.¹³ While the funding mechanism closely resembles no-fault compensatory schemes through its pooling structure, claimants are required to establish individual causation and damages in a two-party setting. As this brief description suggests, Price-Anderson can be viewed as a hybrid of tort and no-fault liability.

2. *The Federal Government Provides Insurance Coverage Rather Than Establishing a Scheme of Private Insurance Coverage*

In a second model, insurance schemes have been created through state and federal legislative initiatives establishing government funds—the prominent examples being earthquake and flood insurance coverage.

In the case of earthquake insurance, the vast majority of coverage is offered under the auspices of the California Earthquake Authority (CEA), a

⁹ Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210).

¹⁰ See Increase in the Maximum Amount of Primary Nuclear Liability Insurance, 81 Fed. Reg. 96,347 (Dec. 30, 2016) (to be codified at 10 C.F.R. pt. 140); U.S. NUCLEAR REGUL. COMM’N, NUCLEAR INSURANCE AND DISASTER RELIEF 1 (2019), <https://www.nrc.gov/docs/ML0327/ML032730606.pdf> [<https://perma.cc/MB9A-37N3>].

¹¹ 43 U.S.C. § 2210(n)(1) (2012).

¹² U.S. NUCLEAR REGUL. COMM’N, *supra* note 10, at 1.

¹³ See Michael G. Faure & Tom Vanden Borre, *Compensating Nuclear Damage: A Comparative Economic Analysis of the U.S. and International Liability Schemes*, 33 WM. & MARY ENV’T L. & POL’Y REV. 219, 241 (2008) (“[T]he Price-Anderson Act effectively creates strict liability for nuclear operators in the event of a nuclear accident.”).

state agency that underwrites—i.e., provides—the coverage.¹⁴ CEA sets the rates, based on eight zones within the state.¹⁵ The premium varies by location, building construction, and policy coverage.¹⁶

The administration of the system is carried out by the major homeowners' insurers.¹⁷ The policies are sold through the private insurers, who also handle claims management.¹⁸ And the CEA relies on the private insurers for replacement cost information, which is generated by their standard homeowners policies.¹⁹ While private insurers also contribute to the insurance fund, the majority of the money comes from insureds' premium payments to the state entity and CEA's investment portfolio.²⁰ However, because both premiums and deductibles tend to be high, many homeowners decline the opportunity to insure.²¹

In the case of flood insurance, a federal agency, the Federal Emergency Management Agency (FEMA), administers the National Flood Insurance Program (NFIP).²² Under NFIP, the United States is broken into zones based

¹⁴ See *Earthquake Insurance*, CAL. DEP'T OF INS., <http://www.insurance.ca.gov/01-consumers/105-type/95-guides/03-res/eq-ins.cfm> [<https://perma.cc/79DU-XT93>] (“The California Earthquake Authority (CEA) provides most earthquake insurance in California.”).

¹⁵ See CAL. DEP'T OF INS., CALIFORNIA EARTHQUAKE ZONING AND PROBABLE MAXIMUM LOSS EVALUATION PROGRAM app. II, at 15–16 (2012), https://www.insurance.ca.gov/0400-news/0200-studies-reports/upload/EQ_PML_RPT_2002_2010.pdf [<https://perma.cc/9RDU-X5XZ>] [hereinafter CAL. EARTHQUAKE ZONING].

¹⁶ *Id.* at 25–26.

¹⁷ See CAL. EARTHQUAKE AUTH., FINANCIAL STATEMENTS DECEMBER 31, 2019 AND 2018, at 18 (2020), <https://www.earthquakeauthority.com/About-CEA/Financials/Financial-Statements/Year/2019-GASB-Audited-Financial-Statements> [<https://perma.cc/GBV3-4TMX>] (“CEA policies are sold to policyholders by participating insurers of the CEA.”).

¹⁸ *Id.* (“[P]articipating insurers act as independent contractor agents on behalf of the CEA by performing policy and claims services which include policy issuance, premium collection, and claims adjustment.”).

¹⁹ See CAL. EARTHQUAKE ZONING, *supra* note 15, at 6 (“Each year, all licensed insurers report to the California Department of Insurance on a detailed questionnaire their insured exposures for earthquake shake damage on residential and commercial structures in California.”).

²⁰ See *Frequently Asked Questions*, CAL. EARTHQUAKE AUTH., <https://www.earthquakeauthority.com/About-CEA/Frequently-Asked-Questions> [<https://perma.cc/3BT4-59YN>] (explaining that the “CEA is financed solely through insurer contributions, policyholder premiums, and its own investment returns”); CAL. EARTHQUAKE AUTH., *supra* note 17, at 7 (listing 2019 net investment income of \$249 million and underwriting profit of \$238 million).

²¹ See CAL. EARTHQUAKE ZONING, *supra* note 15, at 26 (“For a high value house in a high risk area, the premium can easily run into thousands of dollars per year. . . . [T]he homeowners in the higher risk areas are often deciding not to pay the large premiums.”).

²² See Jennifer B. Wriggins, *In Deep: Dilemmas of Federal Flood Insurance Reform*, 5 U.C. IRVINE L. REV. 1443, 1446–47 (2015).

on flood risk.²³ Maximum residential coverage is set at \$250,000, with varying deductibles available.²⁴

The NFIP is designed to provide an insurance alternative to address the costs of repairing damage to buildings and their contents resulting from a flood. A secondary goal of the program is to restrict flood plain development.²⁵ The success of the program in achieving these goals has been widely criticized.²⁶

Both earthquake and flood insurance are voluntary programs. However, while it is not compulsory for potential victims to carry insurance, mortgage lenders may *require* insurance coverage—particularly in the case of flood zone occupants.²⁷ And, moreover, the NFIP itself requires flood insurance by insureds in participating communities as a condition of loans or lines of credit on secured property.²⁸

3. *Federal and State Governments Provide Comprehensive and Coordinated Governmental Disaster Relief*

A third model features in-kind relief provided by the federal government as a backstop to state and local aid. Here, FEMA plays the principal role and is responsible for administering federal disaster relief funds. A FEMA response is triggered by the President declaring a national emergency or major disaster—in theory, a backup when state and local services are overwhelmed. Its jurisdiction covers the gamut of emergencies—both natural and man-made—once the state in question has met federal requirements for disaster relief eligibility.²⁹ Since its inception in 1979, FEMA has provided assistance in the aftermath of earthquakes,

²³ Carolyn Kousky & Leonard Shabman, *Pricing Flood Insurance: How and Why the NFIP Differs from a Private Insurance Company*, RES. FOR FUTURE, Oct. 2014, at 3 (Discussion Paper No. 14-37) (explaining that “[t]he NFIP sets flood premiums based on flood zones, which are depicted on Flood Insurance Rate Maps (FIRMs)”).

²⁴ *Id.*; see also FED. EMERGENCY MGMT. AGENCY, NATIONAL FLOOD INSURANCE PROGRAM: FLOOD INSURANCE MANUAL app. J at 17 (2020), https://www.fema.gov/sites/default/files/2020-05/fim_appendix-j-rate-tables_apr2020.pdf [<https://perma.cc/7ECS-ZQ2L>] (listing minimum deductible ranges).

²⁵ Wriggins, *supra* note 22, at 1445–46.

²⁶ See, e.g., Omri Ben-Shahar & Kyle D. Logue, *The Perverse Effects of Subsidized Weather Insurance*, 68 STAN. L. REV. 571, 580, 588–89 (2016) (criticizing government insurance programs such as NFIP as both unfair and inefficient).

²⁷ Wriggins, *supra* note 22, at 1447.

²⁸ See Kousky & Shabman, *supra* note 23, at 3 (“In a [Special Flood Hazard Area], flood insurance is mandatory for homeowners who obtain mortgage loans from a federally backed or regulated lender.”).

²⁹ See *How a Disaster Gets Declared*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/disasters/how-declared> [<https://perma.cc/8DUK-LSXY>].

hurricanes, tornadoes, 9/11 terrorist-related property loss, and many recent disasters, including wildfires.³⁰

Specifically, two types of assistance are available under FEMA: individual and public.³¹ The former includes low interest loans, housing grants, and food and health services. The latter provides state and local grants for community rebuilding.³²

On the surface this sounds reassuring, but sharp criticism has been levelled at FEMA's responsiveness to major natural disasters. For instance, in August 2005, Hurricane Katrina gave rise to catastrophic harm, stretching from central Florida to Texas, with Louisiana—and particularly New Orleans—experiencing extraordinary damage when levees and other flood protection structures failed.³³ The governmental response at all levels—local, state, and federal—was delayed and poorly coordinated. The devastation resulted in over 1,800 deaths, over a million displaced, and huge numbers stranded without food, water, or aid.³⁴ In the aftermath, FEMA was upbraided for having no disaster plan in place and failing to provide timely relief.³⁵

Sharp criticism of FEMA once again emerged in the aftermath of Hurricane Sandy.³⁶ Critics were particularly frustrated with the agency's

³⁰ See *History of FEMA*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/about/history> [<https://perma.cc/36RJ-654H>].

³¹ See *Assistance*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/assistance> [<https://perma.cc/XQN5-VLHL>] (distinguishing between individual and public assistance options).

³² FRANCIS X. MCCARTHY, CONG. RSCH. SERV., RL33053, FEDERAL STAFFORD ACT DISASTER ASSISTANCE: PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING 13–14 (2011).

³³ See, e.g., *Timeline: Who Knew When the Levees Broke*, NPR (Feb. 10, 2006, 11:06 AM), <https://www.npr.org/templates/story/story.php?storyId=5200940&t=1597421766711> [<https://perma.cc/85NV-4VDE>] (discussing “28 reports of levee failures the day Katrina made landfall”).

³⁴ *Hurricane Katrina Statistics Fast Facts*, CNN (Aug. 12, 2020, 10:35 AM), <https://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/index.html> [<https://perma.cc/QR4X-3KJ8>]; *Chapter Five: Lessons Learned*, WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned/chapter5.html>.

³⁵ See, e.g., Mike M. Ahlers, *Report: Criticism of FEMA's Katrina Response Deserved*, CNN (Apr. 14, 2006, 3:00 PM), <https://www.cnn.com/2006/POLITICS/04/14/fema.ig/> [<https://perma.cc/RTA6-PESY>]; Eric Lipton, *'Breathtaking' Waste and Fraud in Hurricane Aid*, N.Y. TIMES (June 27, 2006), <https://www.nytimes.com/2006/06/27/washington/27katrina.html> [<https://perma.cc/J45S-3T6L>]; Jennifer Steinhauer & Eric Lipton, *FEMA, Slow to the Rescue, Now Stumbles in Aid Effort*, N.Y. TIMES (Sept. 17, 2005), <https://www.nytimes.com/2005/09/17/us/nationalspecial/fema-slow-to-the-rescue-now-stumbles-in-aid-effort.html> [<https://perma.cc/EQ5F-EUQG>].

³⁶ See, e.g., Mary Williams Walsh, *A Broke, and Broken, Flood Insurance Program*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/04/business/a-broke-and-broken-flood-insurance-program.html> [<https://perma.cc/KYX2-SN5D>] (discussing the “more than a thousand disputed claims left over from Sandy” five years after the hurricane). At the time, Hurricane Sandy was “the second-costliest cyclone to hit the United States since 1900,” resulting in over 100 deaths and nearly \$50 billion in property

failure to meet its obligations to insured homeowners in New York and New Jersey under the flood insurance program.³⁷

B. Natural Disasters: Private Responsibility

When natural disasters occur, private parties often initially turn to their own sources of insurance.³⁸ Private homeowners and general commercial insurance coverage are widely available—and widely acquired. They tend to offer comprehensive coverage; there is no general exclusion for “disasters.” *But* there are exclusions for earthquake and flood damage.³⁹ The exclusion of flood damage is especially relevant in the case of hurricanes, and can lead to disputes regarding coverage, since wind damage is generally covered but flood damage is excluded, and targeting responsibility under the policy can be difficult.⁴⁰

Recent disputes have arisen, in the context of the COVID-19 pandemic, over coverage of business interruption losses under commercial property insurance policies.⁴¹ Obviously, high stakes are involved for all parties in these questions of contract interpretation. But then, high stakes are, by definition, an across the board phenomenon in mass disaster cases.

* * *

As can be discerned from even this brief discussion, the private market and governmental programs can often operate in a complementary fashion. Hurricane damage, just discussed, is a clear example: A residential property owner, when enrolled in the NFIP, would be entitled to coverage benefits under this program, which would supplement privately held insurance

damage. ERIC S. BLAKE, TODD B. KIMBERLAIN, ROBERT J. BERG, JOHN P. CANGIALOSI & JOHN L. BEVEN II, TROPICAL CYCLONE REPORT: HURRICANE SANDY (AL182012), at 1 (2013), https://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf [<https://perma.cc/9QYX-G625>].

³⁷ See Walsh, *supra* note 36.

³⁸ See Alejandro Drexler, Andrew Granato & Richard J. Rosen, *Homeowners' Financial Protection Against Natural Disasters*, 409 CHI. FED LETTER 1–2 (2019) (“The first line of defense from financial damages caused by a natural disaster is homeowners insurance sold by commercial insurers. . . . Government-backed insurance programs, such as the NFIP, provide a second line of defense against losses from natural disasters.”).

³⁹ *Id.*

⁴⁰ See Kousky & Shabman, *supra* note 23, at 10.

⁴¹ General property insurance is typically bundled together with commercial general liability insurance (CGL insurance). On recent disputes regarding business interruption insurance, see Mary Williams Walsh, *Businesses Thought They Were Covered for the Pandemic. Insurers Say No.*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/business/business-interruption-insurance-pandemic.html> [<https://perma.cc/6RVK-7DKN>].

coverage for the wind damage from the event, even if the latter policy was interpreted not to cover flood damage from the storm.⁴²

It should also be noted that the typology adopted in this Essay—distinguishing between natural disasters and responsible party disasters (next to be discussed)—puts aside catastrophes in which the two are inextricably related, and the line can easily blur. Hurricane Katrina was a case in point. Despite its origins as a natural disaster event, tort claims were brought against the Army Corps of Engineers, among other governmental entities, for failing to provide adequate safeguards against the allegedly foreseeable risks that came to fruition.⁴³

II. RESPONSIBLE PARTY DISASTERS

A. Oil Spills and Gas Leaks

While I introduced this paper with reference to 9/11, not all man-made disasters, of course, involve acts of terrorism—no matter how broadly we define terrorism.⁴⁴ For example, as a result of the British Petroleum (BP) Deepwater Horizon disaster of 2010, an estimated five million barrels of oil spilled into the Gulf of Mexico, affecting all bordering Gulf Coast states.⁴⁵ Eleven workers were killed, enormous damage was done to wetlands and estuaries, and massive loss of tourism and recreational usage occurred.⁴⁶

The Oil Pollution Act of 1990—federal legislation enacted in the wake of an earlier massive oil spill known as the Exxon Valdez incident—provides for up to \$350 million in civil liability for spills in deepwater ports, as well as additional liability for costs of removal.⁴⁷ Importantly, the liability limit

⁴² This assumes that the hypothetical homeowner had both private and NFIP insurance. Some homeowners would have one and not the other, while some might have neither.

⁴³ See *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 441–43 (5th Cir. 2012) (dismissed on discretionary acts exemption grounds under the Federal Tort Claims Act).

⁴⁴ See *infra* at Section II.B; see also Robert L. Rabin & Stephen D. Sugarman, *The Case for Specially Compensating the Victims of Terrorist Attacks: An Assessment*, 35 HOFSTRA L. REV. 901, 911 (2007) (discussing the limitations of terrorist acts as an eligibility threshold for disaster victim compensation).

⁴⁵ There are interesting historical antecedents to the brief discussion of oil spill liability that follows. Perhaps the most notable is the Johnstown Flood of 1889, which killed more than 2,200 people. See DAVID G. MCCULLOUGH, *THE JOHNSTOWN FLOOD* 269 (1968); Richard Pallardy, *Deepwater Horizon Oil Spill*, ENCYCLOPEDIA BRITANNICA (2020), <https://www.britannica.com/event/Deepwater-Horizon-oil-spill> [<https://perma.cc/2JN8-7UR9>].

⁴⁶ See Pallardy, *supra* note 45; *Deepwater Horizon—BP Gulf of Mexico Oil Spill*, U.S. ENV'T PROT. AGENCY (Apr. 19, 2017), <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> [<https://perma.cc/8JJX-RPDK>].

⁴⁷ 33 U.S.C. § 2704(a)(4). The *Exxon Valdez* was an oil tanker that collided with a cold-water reef off the Alaskan coast in 1989, spilling 37,000 metric tons of oil in what would be “the worst oil spill in U.S. waters until the Deepwater Horizon oil spill.” Stephen Leahy, *Exxon Valdez Changed the Oil*

does not apply in cases of gross negligence or violation of safety regulations.⁴⁸ After the oil spill in 2010, BP eventually agreed to settle civil liability claims on behalf of affected states for more than \$20 billion.⁴⁹

Apart from oil spills, our contemporary socioeconomic order generates mass disasters on a seemingly random basis that defy generalization—and sometimes confound efforts at compensation. Consider the recent massive natural gas leak of some 100,000 tons from a storage facility near Porter Ranch, a town in southern California.⁵⁰ The devastation of the local community led a number of businesses to sue for lost profits suffered from a substantial period in which closure was required. In a landmark opinion, the California Supreme Court denied recovery to the tort claimants in the standalone economic loss cases.⁵¹

B. Acts of Terrorism: Three Scenarios

In order to explore potential systems of redress for responsible party disasters involving acts of terrorism, it is helpful to break up such disasters into three scenarios: (1) a mass catastrophic event with nationwide repercussions, (2) terrorist acts targeting heavily populated sites, and (3) disasters resulting from localized acts of carnage.

The initial scenario is a mass catastrophic event with nationwide repercussions, highlighted by a reprise on the scale of the terrorist attacks that generated the September 11 compensation scheme, but with one sharp departure: Suppose Congress had not enacted an administrative compensation scheme to address recompense for the loss of nearly 3,000 lives and thousands of injuries. Then, the default system for victims to seek redress would have been tort.

In my view, tort would have been a highly problematic remedy for victims to pursue. First, there would have been the matter of finding solvent

Industry Forever—But New Threats Emerge, NAT'L GEOGRAPHIC (Mar. 22, 2019), <https://www.nationalgeographic.com/environment/2019/03/oil-spills-30-years-after-exxon-valdez/> [<https://perma.cc/F3DX-P4BA>]. Congress passed the Oil Pollution Act of 1990 in response. *Id.*

⁴⁸ 33 U.S.C. § 2704(c)(1).

⁴⁹ It is also without reference to earlier clean-up costs and informal settlements under the Gulf Coast Claims Facility (GCCF) administered by Kenneth Feinberg. “[T]he GCCF processed over one million claims and paid a total of more than \$6.2 billion to over 220,000 . . . claimants.” BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS AND OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE 59 (2012), <https://www.justice.gov/iso/opa/resources/66520126611210351178.pdf> [<https://perma.cc/TB7M-4GK5>]. Ultimately, the total costs of the spill ballooned to \$65 billion. Ron Bousso, *BP Deepwater Horizon Costs Balloon to \$65 Billion*, REUTERS (Jan. 16, 2018, 1:20 AM), <https://www.reuters.com/article/us-bp-deepwaterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL> [<https://perma.cc/G6PJ-7E8J>].

⁵⁰ *So. Cal. Gas Co. v. Super. Ct. of L.A. Cnty.*, 441 P.3d 881, 883–84 (Cal. 2019).

⁵¹ *Id.* at 883–84.

defendants. Even if the terrorists had survived, they would have been impecunious.⁵² While a relatively small number of plaintiffs successfully settled with the airlines after waiving benefits under the 9/11 Compensation Fund,⁵³ if no scheme had existed, a very considerable number of plaintiffs would have brought tort suits. And, if successful, these thousands of plaintiffs would have quickly exhausted the liability insurance limits of the air carriers, likely plunging them into bankruptcy.⁵⁴

Moreover, the success of such suits would not have been a slam dunk; the airlines' liability issues would have posed considerable uncertainty if vigorously defended. For the passenger claimants, could lack of due care have been established? And proximate cause? Perhaps, but not to a certainty. The terrorists, after all, might well have been seen as superseding causes—and what happened seems far from foreseeable. For the building occupant claimants, proximate cause would have been highly contestable against the airlines—and still more problematic (along with difficulties establishing lack of due care) in claims against the building owners.

Correspondingly, the protracted delay, frustration, and uncertainty for this singular class of victims would have been widely viewed as intolerable. More broadly, would it have been publicly acceptable, in the wake of 9/11, to potentially reach different outcomes in tort for two distinct subclasses of highly sympathetic victims (e.g., of survivors of airline passengers, who had comparatively stronger claims, and of building occupants, who had comparatively weaker claims)? In short, then, in the absence of a governmental compensation scheme, even under these dramatic and highly charged circumstances, tort would have been a legally and socially contestable source of compensation.

Setting aside catastrophes with nationwide reverberations, I turn next to a second scenario: What remedies come into play for terrorist acts targeting heavily populated sites, such as sports stadiums, parades, or mass transit stations? Once again, the default system for seeking recompense would be

⁵² See JOHN ROTH, DOUGLAS GREENBERG & SERENA WILLE, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING app. A at 131–34 (discussing funding of the 9/11 attacks).

⁵³ See, e.g., Benjamin Weiser, *Cantor Fitzgerald Settles 9/11 Suit Against American Airlines for \$135 Million*, N.Y. TIMES (Dec. 17, 2013), <https://www.nytimes.com/2013/12/18/nyregion/cantor-fitzgerald-settles-9-11-lawsuit-for-135-million.html> [<https://perma.cc/8KY6-BWNU>].

⁵⁴ The airlines typically had liability insurance coverage of \$1.5 billion per plane, which one can predict could very well have been quickly exhausted by successful mass tort suits by all victims. *Pricing Issues in Aviation Insurance and Reinsurance*, CAS. ACTUARIAL SOC'Y 1–2 (2003), <https://www.casact.org/education/specsem/sp2003/papers/lane.pdf> [<https://perma.cc/WUX4-D5ST>]. Notably, that coverage included property damage and business interruption claims.

tort. And once again, I would argue that tort would be of questionable assistance.

As a starting point, I distinguish between public and private spheres of responsibility. Many of the potential targets of terrorism under this scenario are *public* sites: airports, urban subway stations, and national monuments.⁵⁵ From a tort perspective, claims of governmental tort responsibility have distinct limitations. Courts are extremely reluctant to second-guess through tort high-level governmental policy decisions that allocate resources toward activities like crime prevention, intelligence gathering, and standards of public health and safety.⁵⁶ Under the Federal Tort Claims Act this carve-out is recognized in the immunity afforded to discretionary acts.⁵⁷ Virtually every state and municipal entity recognizes a parallel categorical limitation on tort suits against governmental entities as long as the activities are not characterized as “ministerial.”⁵⁸

By contrast, claims against heavily populated private sites, such as sports stadiums, cannot be dismissed by reference to the safe harbor afforded governmental entities under the banner of discretionary activities or planning decisions. But, still, foreseeability of harm is necessary to establish negligence liability—and the random, unpredictable nature of terrorist acts would make liability highly contestable, at best, in most instances.⁵⁹

Finally, there is a third scenario involving a tragically familiar sequence of recent events in this country: disasters culminating from localized acts of carnage. These calamities do not involve terrorist activity in the conventional sense, but rather random mass shootings—such as Columbine High School

⁵⁵ Consider also sources of communal health and safety, such as utility grids and reservoirs.

⁵⁶ *See, e.g.,* Cope v. Scott, 45 F.3d 445, 447–48 (D.C. Cir. 1995) (discussing this principle and interpreting the Federal Tort Claims Act (FTCA) in light of previous U.S. Supreme Court decisions).

⁵⁷ *See* 28 U.S.C. § 2680(a); *In re* Katrina Canal Breaches Litig., 696 F.3d 436, 443, 450–54 (5th Cir. 2012) (discussing numerous suits by victims of flooding during Hurricane Katrina alleging negligence against the Army Corp of Engineers under the FTCA and dismissing the claims, holding the exemption for discretionary acts applicable).

⁵⁸ *See* Lauer v. City of New York, 733 N.E.2d 184, 187 (N.Y. 2000); Friedman v. State, 493 N.E.2d 893, 898 (N.Y. 1986).

⁵⁹ The government provides a second layer of coverage above a baseline amount of private liability insurance coverage, assuming there is tort liability. The Terrorism Risk Insurance Act of 2002 was enacted after 9/11 to establish the Terrorism Insurance Program. Pub. L. No. 107-297, 116 Stat. 2322 (codified as amended at 12 U.S.C. § 248, 15 U.S.C. § 6701 note, 28 U.S.C. §§ 1606, 1610). In possible subsequent acts of terrorism damaging commercial property, the Program provides a mechanism for excess liability coverage to be assumed by the federal government, capping losses that may be assigned to private insurers; i.e., the federal government becomes a reinsurer. BAIRD WEBEL, CONG. RSCH. SERV., R45707, TERRORISM RISK INSURANCE: OVERVIEW AND ISSUE ANALYSIS FOR THE 116TH CONGRESS 3–4 (2019). The Program was extended most recently in 2019 and will be in effect through the end of 2027. Terrorism Risk Insurance Program Reauthorization Act of 2019, Pub. L. No. 116-94, 133 Stat. 3026 (codified at 15 U.S.C. § 6701 note).

in 1999 where twelve students and a teacher were murdered and many others were injured; Virginia Tech in 2007 where thirty-two people were killed and twenty-three were wounded; and the MGM Mandalay Bay resort hotel in Las Vegas in 2017, where a gunman killed fifty-eight people and injured hundreds of others.⁶⁰

In some of these acts of mayhem, there might be claims against the local governmental entity—a school district, for example—for taking inadequate precautions against the prospect of a terrorist attack. But once again, in most instances the foreseeability of localized, randomly malignant acts would be difficult to establish. Here, too, there would be reluctance to impose judicial second-guessing of administrative decisions about appropriate security measures in these localized attacks.⁶¹

There might also be straightforward claims against the perpetrators, of course. But almost invariably the mayhem is set in motion by deeply troubled individuals who end up committing suicide on the spot, if not killed by law enforcement officers responding to the calls of alarm.⁶²

* * *

In all of these scenarios, it would be possible to resort to an administrative compensation approach to avoid the limitations intrinsic to tort. Putting aside the special circumstances of 9/11, the historical reluctance in the political sphere to adopt compensation schemes for terrorist events—broadly defined—suggests the unlikelihood that this pathway will be pursued.

⁶⁰ *Mass Shootings in the US Fast Facts*, CNN (May 3, 2020, 8:39 AM), <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html> [https://perma.cc/3WQ7-XSMX]. Appallingly, these acts of malevolence are merely representative of many other similar tragedies in recent years. Prominent among these are the 2012 mass shooting at the Sandy Hook Elementary School, which killed twenty-six people including twenty children, and the 2015 shooting in San Bernardino, which killed fourteen. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html> [https://perma.cc/U7JL-5992]; Adam Nagourney, Ian Lovett & Richard Pérez-Peña, *San Bernardino Shooting Kills at Least 14; Two Suspects Are Dead*, N.Y. TIMES (Dec. 2, 2015), <https://www.nytimes.com/2015/12/03/us/san-bernardino-shooting.html> [https://perma.cc/953G-CT3Y].

⁶¹ Nonetheless, across the nation, security has been ratcheted up, particularly in school systems. See Anya Kamenetz & Jessica Bakeman, *To Prevent School Shootings, Districts Are Surveilling Students' Online Lives*, NPR (Sept. 12, 2019, 8:58 AM), <https://www.npr.org/2019/09/12/752341188/when-school-safety-becomes-school-surveillance> [https://perma.cc/G8EL-KFKB].

⁶² See *Mass Shootings in the US Fast Facts*, *supra* note 60. Moreover, these are intentional torts. As a consequence, even if the gunman had some kind of insurance, there would likely be a coverage exclusion. See, e.g., George A. Locke, *Avoiding the "Intentional Injury" Exclusion—Insured Acting with Full Mental Capacity*, in 12 AM. JURIS. PROOF OF FACTS 505, 505 (3d ed. 2020) (“Deeply embedded in the law of liability insurance is the principle that a person should not receive indemnity for the civil consequences of his own intentional wrongdoing.”).

But there is a more foundational inquiry here: Why should acts of terrorism be carved out for special treatment through adoption of a legislative compensation scheme? This question, in turn, raises broader questions of fairness and potential efficacy in addressing both natural and man-made mass disasters.

III. INJURIES FROM MASS DISASTERS: ALTERNATIVES TO TORT— LEGISLATIVE COMPENSATION SCHEMES

If tort is likely to be largely unavailing for victims of mass disasters, and if we assume a desire to compensate, what about a no-fault legislative compensation scheme as an alternative? This was the response immediately after 9/11, when Congress enacted the Air Transportation Safety and System Stabilization Act, which established the September 11th Victim Compensation Fund.⁶³ The terms of the Act were exceedingly generous. Both economic loss and pain and suffering were modeled on tort, rather than the traditional no-fault model of workers' compensation, which generally provides for medical expenses and roughly two-thirds of income loss (with a cap on the latter), without provision for recovery of noneconomic loss.⁶⁴

But the critical question, then and now, remains whether the tort-centric 9/11 model is likely to be (or should be) replicated in the future if a catastrophic murderous incident occurs. It seems highly unlikely, and not simply because in the ensuing two decades it has stood in notable isolation. To a certain extent, realpolitik considerations stand as a roadblock. More

⁶³ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. §§ 40101 note, 44302–44306).

⁶⁴ The Fund, in sharp contrast, provided for medical expenses, loss of present earnings (with no cap), and “loss of business or employment opportunities”—presumably future lost income—“to the extent recovery for such loss is allowed under applicable State law.” *Id.* § 402(5). Moreover, in the domain of noneconomic loss, once again the Fund directive mirrored tort law: allowing for “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.” *Id.* § 402(7). Even after interpretive modification by the Special Master, a massive range of awards was distributed: \$250,000–\$7,000,000 in death cases, *see* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 202 (2005), which was far removed from treating beneficiaries as a community of victims, or premising recovery on basic needs. In contrast to these tort-type provisions, the Act had a strong preclusive provision for collateral sources. Air Transportation Safety and System Stabilization Act § 405(b)(6).

In the aftermath, the 9/11 Fund was generally viewed as a great success (though not without some critics): 97% of surviving families opted for Fund benefits. *See* FEINBERG, *supra*, at 161. The Special Master's experience in administering the Fund is recounted in FEINBERG, *supra*.

In 2011, Congress enacted the James Zadroga 9/11 Health and Compensation Act of 2010, providing no-fault compensation to first responders and bystanders whose long-latency toxic exposures had not qualified for redress under the original September 11th Fund. Pub. L. No. 111-347, 124 Stat. 3623 (2011) (codified as amended in scattered sections of 26, 42, and 49 U.S.C.).

generally, there has been political reluctance to establish no-fault compensation schemes: consider mass victims of asbestos, Hurricane Katrina, and the bombing of the Oklahoma City federal building. None of these tragic mass disasters has generated a congressional willingness to compensate victims.

But the objections to the 9/11 model reflect broader issues of equity, rather than simply the realities of governmental indifference. In my view, terrorist activity is an inadequate foundation to underpin the claims of mass disaster victims. To begin with, it stretches the category beyond its natural meaning to include psychotic attacks that have occurred on school children and other large gatherings of innocent victims. But still more broadly, the consequences for those who are victimized by natural disasters like Hurricane Katrina speak with equal resonance for compensatory relief. To act selectively on an *ex post* basis, as in 9/11, would strain notions of fairness beyond acceptability. And to create an *ex ante* disaster victim scheme, along the lines of workers' compensation, would place infeasible demands on generating an acceptable designation of the compensable event.⁶⁵

CONCLUSION

Each of the institutional components of the U.S. system is far from perfect and can be subjected to criticism.

Tort is administratively expensive, relatively slow, and fails on a horizontal equity criterion because of individualized case-by-case decisions and unpredictability. Moreover, it is not effective as a deterrent in catastrophic loss cases and is haphazard as a compensation mechanism. And, of course, it is not available in natural disaster cases.

Governmental assistance programs—in particular, FEMA—have been consistently criticized for being excessively bureaucratic and slow to deliver necessary services.

Private insurance, as a first-party mechanism, has often been underutilized, and is only a realistic option in scenarios where the occurrence of catastrophic loss is foreseeable to prospective insureds—and even then, is available only if it has not been excluded from the standard coverage.⁶⁶

Legislative no-fault compensation has not been systematically adopted. The sole instance of mass disaster relief triggering legislative no-fault is the 9/11 Fund, which is unlikely to be replicated and raises very substantial

⁶⁵ For discussion of foreign models for compensating the victims of terrorism (Israel and Northern Ireland), see Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 793–95 (2003).

⁶⁶ Moreover, from an equity perspective, it tends to be the case that those least buffered from financial hardship may be least able to secure appropriate coverage.

questions of fairness if limited to a constrained definition of eligibility tied to terrorism.⁶⁷

A more recent development has been targeted informal settlements; prominent examples in the realm of mass shootings are Virginia Tech (academic setting) and MGM Resorts Mandalay Bay (resort hotel).⁶⁸ But these are ad hoc resolutions and turn on mutable circumstances such as defendants' solvency and reputational concerns.

Arguably, the most effective strategies for compensating disaster victims are mixed, hybrid approaches that combine backstop public assistance—a more effective FEMA—with first-party public/private insurance in *natural disaster* scenarios (involving primarily property loss); and public assistance coupled with tort in scenarios of *responsible party disasters*. This brief account offers no more than a survey of the landscape. In the final analysis, there needs to be a wholesale, systematic reassessment and refinement of the existing patchwork system.

⁶⁷ While the 9/11 Fund appeared to operate well, enduring programs seem to function less well over time. See, e.g., the discussion of the National Childhood Vaccine Injury Act, in Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1685 (2015).

⁶⁸ See Jenna Johnson, *Report: Virginia Tech Massacre Cost \$48.2 Million*, WASH. POST (Apr. 13, 2012), https://www.washingtonpost.com/blogs/campus-overload/post/report-virginia-tech-massacre-cost-482-million/2012/04/13/gIQAdDmxET_blog.html [<https://perma.cc/LFQ5-R9H5>] (discussing the \$11.1 million settlement negotiated with the families of victims of the 2007 Virginia Tech shooting; the university paid \$3.3 million and the state paid the remainder); Richard A. Oppel, Jr., *MGM Agrees to Pay Las Vegas Shooting Victims Up to \$800 Million*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/mgm-las-vegas-shooting-settlement.html> [<https://perma.cc/H995-MMSN>] (describing an \$800 million settlement for victims of the 2017 Las Vegas shooting in which the killer attacked from a room in the Mandalay Bay hotel; the hotel owner's insurers will cover most of the settlement amount, and an independent claims administrator will decide how the settlement is to be split among the victims).