

# THE PROBLEMATIC STRUCTURE OF THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

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## INTRODUCTION

This Article addresses the structure and organization of the September 11th Victim Compensation Fund of 2001. The Article is inspired by the extraordinary controversy that has attended the Fund and its operation. There is—in my view—a universal consensus that it was entirely appropriate for the Congress, on behalf of the American people, to create the Fund. All citizens sympathize with the thousands of victims of the September 11th attacks, and I have seen no serious commentary suggesting that a compensation program like the September 11th Fund should not have been created. Moreover, there is also general consensus that the person to whom widespread discretion for its implementation has been delegated, Special Master Kenneth Feinberg, has executed his duties, as much as he possibly can, with good judgment, commitment, and dedication to the victims whom the Fund aspires to compensate.

Nevertheless, the September 11th Fund has generated remarkable controversy. Virtually all of its individual components have been criticized in some form.<sup>1</sup> Although the very large majority (97%) of those eligible for compensation filed claims,<sup>2</sup> the Special Master has been sued by sets of families in federal court, chiefly, it appears, by families of comparatively high income victims (many from Cantor Fitzgerald). For months, the press reported heated complaints about the Fund on nearly a weekly basis.

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1. For examples of the criticism, see the discussion of comments on the Fund in September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,274 (Dec. 21, 2001), Final Rule, 67 Fed. Reg. 11,233 (Mar. 13, 2002). See also *infra* notes 24-32 and accompanying text.

2. David W. Chen, *Man Behind Sept. 11 Fund Describes Effort As a Success, with Reservations*, N.Y. TIMES, Jan. 1, 2004 at B1.

Perhaps the controversy should not be surprising, given that Congress “deliberated” for only three days over the Fund’s enactment.<sup>3</sup> But I believe that the controversy stems from other sources and will become more heated as the details of the Fund’s operation are subsequently revealed. The September 11th Fund fits not easily within the parameters of the four principal institutions that we possess in this society for dealing with the consequences of unintended loss: tort law; private market insurance; government insurance; and government welfare. Tort law is designed to deal with harms inflicted by some identifiable person who was in a position to have prevented the harm. Tort law shifts the costs of injuries to such persons in order to create incentives to reduce the level of harm suffered in the society. Insurance, in contrast, deals with those losses that cannot realistically be prevented. Private market insurance, financed by premiums collected from insureds, places individuals into self-supporting risk pools in ways that serve to reduce effective risks while amassing resources to compensate those who ultimately suffer losses. Somewhat differently, government insurance is provided for more generalized societal risks for which no, or less of a, market exists, such as the risks of unemployment or disaster. Finally, government welfare redistributes wealth from the general citizenry to persons whose unfortunate situation does not derive from the wrongful acts of specific individuals and who have not otherwise been in a position to protect themselves by savings or insurance.

As I shall describe, the September 11th Fund, in its design and its operation, comprises features resembling each of these four systems for dealing with adverse consequences. But the Fund departs from these four systems in two distinctive ways that I believe account now, and will continue to account for, the criticism leveled against the Fund and its operation and the dissatisfaction that many victim families feel about it. Each of the four societal systems for dealing with adverse consequences possesses an inner logic or rationale that defines and constrains the magnitude of awards to compensate for loss. Quite differently, the September 11th Fund does not. As we shall see, the definition of awards draws variously from tort law and government benefit programs. But its budget is basically unlimited. Further, the September 11th Fund is administered chiefly according to the discretion of the Special Master. The Special Master has explained, generally, the principles that he has adopted for determining awards, but he has (appropriately, given the context) declined to address individual

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3. For a description of the legislative history of the Fund, see the excellent article by Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92.

awards. These two features of the Fund's operation, however, mean that there does not exist—as there do for each of the four other systems—an effective rationale for delimiting the magnitude of compensation to any single family or to the families of the September 11th victims in aggregate. In my judgment, this lack of internal constraint will continue to generate criticism of the Fund long into the future.

Part II briefly describes the Fund's salient features and reviews some of the many criticisms of it. Part III briefly reviews our interacting system of tort law, market insurance, government insurance, and government welfare, as systems for dealing with unintended loss, explaining how the respective rationales of these systems serve to coherently define and constrain the magnitude of awards. Part IV then shows how the September 11th Victim Compensation Fund is different and how it lacks any internal rationale of definition or constraint.

## II. THE STRUCTURE OF THE SEPTEMBER 11TH FUND

The September 11th Victim Compensation Fund of 2001 aspires to provide a particular form of compensation to the victims or to the families of the victims of the September 11th attacks.<sup>4</sup> It provides recovery of a particular calculation of the economic and noneconomic losses to the victim's dependents. This sum is then reduced by a set of collateral sources of compensation. These amounts are to be paid by the federal government from general revenues without a budgetary limit. The Fund itself is administered by a Special Master who has been delegated the authority to define how these compensation elements will be calculated and, thus, “the amount of compensation to which the claimant is entitled” taking into account “the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.”<sup>5</sup>

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4. The largest set of victims comprises those that died as a result of the attacks, whose families are eligible for awards, and on whom this Article will focus. The Fund is also authorized to provide recoveries to individuals who suffered injuries from the attacks but did not die. The Special Master has announced qualification requirements for such awards, in particular, that the claimant have sought medical care within a limited period of time (first, twenty-four hours, later extended to seventy-two hours) following the attacks. *Cf.* Interim Final Rule, 66 Fed. Reg. 66,274; Final Rule, 67 Fed. Reg. 11,233. This category of claimants raises somewhat different difficulties.

5. Air Transportation Safety and System Stabilization Act, Pub. Law 107-42, § 405 (b)(1)(B)(ii), 115 Stat. 238 (2001). For the announcement of the Special Master's calculation methodology, see the Fund's Interim Final Rule, 66 Fed. Reg. 66,274 and Final Rule, 67 Fed. Reg. 11,233.

### A. *Economic Losses*

As defined by the Special Master, a claimant family's economic losses are to be measured by determining each victim's expected lost income from September 11, 2001, the date of death, through his or her expected retirement adjusted in several ways. Given general discretion to determine the means of calculating this amount, the Special Master has announced that he will rely upon the three years of the victim's income just preceeding 2001 in order to project expected earnings, at least "[g]enerally."<sup>6</sup> The Special Master has promulgated a table indicating expected workforce participation by age of the victim. Expected taxes are to be deducted (income, thus, is to be defined as after-tax income) and the value of employer benefits added. For estimating future income, the Special Master has set a two percent annual rate of inflation and a one percent annual rise in productivity, uniform across all victims. This amount then will be adjusted for a risk of unemployment and will be reduced by an estimate of household expenditure or consumption by the victim, generally inversely proportional to income. The final amount will be reduced to present value.

### B. *Noneconomic Losses*

The Special Master announced that noneconomic losses would be set at a fixed amount for all victims: \$250,000 per victim plus \$50,000—the Special Master later raised the amount to \$100,000—for a victim's surviving spouse and for each surviving child.<sup>7</sup>

### C. *Collateral Sources*

After the sum of a victim family's economic and noneconomic losses is determined, the sum is to be reduced—as compelled by Congress—by certain collateral sources of compensation. Those collateral sources are life insurance, pension funds, any death benefit programs, and any payments by the government on account of death. Though not required by statute—and, in my mind, basically inconsistent with Congress's collateral source reduction—the Special Master has announced that he will not consider personal savings, investments, or other assets, or receipts from private charity as collateral sources for the purpose of the reduction. After many complaints, the Special

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6. See U.S. DEP'T OF JUSTICE, EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS (Aug. 27, 2002), available at [http://www.usdoj.gov/victimcompensation/vc\\_matrices.pdf](http://www.usdoj.gov/victimcompensation/vc_matrices.pdf) (last visited Oct. 14, 2003).

7. See Final Rule, 67 Fed. Reg. at 11,233.

Master also announced that he would relax the collateral source reduction of life insurance and pension fund benefits by characterizing some proportion of premium payments or contributions as savings and, thus, not include them in the collateral source reduction. The Special Master is also authorized to consider any “individual circumstances” that might affect the collateral source reduction.<sup>8</sup> To this end, the Special Master has announced that he is not likely to allow the aggregate collateral source reduction to reduce any victim’s award below \$250,000.<sup>9</sup> In addition, at the Clifford Symposium, Mr. Feinberg’s principal assistant, Deborah Stevenson, described vividly adjustments made by the Special Master’s Office to individual family awards following extensive consultations with the families.

#### *D. Administrative Features of the Fund*

As mentioned, compensation awards from the Fund will be paid from general federal revenues without any predetermined limit.<sup>10</sup> The Fund is to be administered by a Special Master—currently Kenneth Feinberg—who is given sole discretion to determine Fund awards.<sup>11</sup> The Special Master’s award decisions are not appealable. Finally, families of victims filing claims against the Fund must agree to waive all civil liability claims with respect to the victim’s injury or death.<sup>12</sup> In practice, this provision was intended to shield suits against the airlines, airports, airport security companies, and various governmental entities, such as the City of New York and its municipal departments, the State of New York, the Port Authority, and all other parties who might be named as defendants. Very recently, a New York federal district court refused to dismiss victim family suits against American and United Airlines, Boeing (the airplanes’ manufacturer), the Port Authority of New York and New Jersey (which owned the World Trade Center), and other defendants.<sup>13</sup> Following this ruling, and just as the New York and Virginia statutes of limitation for wrongful death suits were expiring, scores of families filed suit against these defendants.<sup>14</sup>

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8. *Id.* at 11,234.

9. *Id.*

10. *Id.* at 11,236.

11. *Id.*

12. *Id.* at 11,235.

13. Diana B. Henriques & Susan Saulney, *Judge’s Ruling Opens Door for More Families To Sue Airlines and Port Authority*, N.Y. TIMES, Sept. 10, 2003, at A16.

14. Kara Scannelli & Jess Brauin, *Flurry of Lawsuits Mark Anniversary of Sept. 11 Attacks*, WALL ST. J., Sept. 11, 2003, at A3.

The next section briefly describes our society's basic system of accident compensation through tort law, private market insurance, government insurance, and government-provided welfare, against which the structure of the Fund will be compared.

### III. THE BASIC SYSTEMS FOR THE COMPENSATION OF ACCIDENTAL LOSSES IN OUR SOCIETY

Our society possesses four basic mechanisms for dealing with the consequences of unintended losses suffered by the citizenry. These respective mechanisms operate differently, though each possesses a distinctive internal logic that defines the contours of the mechanism. As we shall see, though the September 11th Fund borrows some features from each of the systems, it does so without an internal logic of its own, which, in my view, is the source of the controversy that the Fund has generated.

#### A. Tort Law

Our system of civil tort law addresses harms caused by an identifiable individual or entity who can be shown to have been able to prevent the loss. Although in traditional law it was necessary for a victim, before obtaining a tort law recovery, to show that the injurer possessed a duty to avoid causing the harm, the duty requirement has been diminished over the years by the implication of general duties to avoid causing harm. In general, however, the victim must show that the injurer could have prevented the harm in some way, but failed to take the harm-avoiding action leading to the injury.

Upon showing a right to recover, tort law measures awards by full compensation of both economic and noneconomic losses. Economic losses are measured by expected lost income, generally adjusted for taxes, expected productivity gains, and inflation. Noneconomic losses, in the form of pain and suffering or loss of the value of life, are awarded by a jury, which can set any amount, though with some constraint by subsequent judicial review. Collateral sources of compensation are generally not considered.<sup>15</sup>

Although it has been traditional to stress the compensatory features of the system, tort law is more adequately explained as a system for creating deterrence of harm-causing activities. Ignoring collateral compensation sources is a good example of the system's commitment

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15. There has been an effort in some tort reform circles to abrogate the collateral source rule, which provides that such compensation sources are to be disregarded. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1588 (1987).

to a deterrence rationale. If the concern of the system were only to guarantee that the victim of some accidental loss was able to restore some previous position, the availability of collateral sources would be highly relevant. Instead, collateral sources are ignored because the internal logic of the system of tort law recovery is one of charging the tortfeasor the full costs of the victim's injury on the belief that internalizing injury costs will lead the tortfeasor, or parties in similar positions, to take actions to avoid causing injuries in the future.<sup>16</sup> The tort law recovery, thus, becomes a form of price charged to the injurer as a consequence of causing the harm.

The deterrence rationale explains why tort law devotes the energy it does to calculating the full loss to the victim precisely. Where the ambition is to determine the appropriate price for harm-causing behavior, it is important to measure exactly the full economic and noneconomic losses that have been suffered. Awarding full loss is a means of setting the accurate price. Therefore, it is important to invest substantial resources to determine lost future income, inflated by the best estimate of future productivity gains, reduced by expected taxes (because the victim cannot lose amounts that would have had to have been paid as taxes though the tax loss to the government should not be neglected), reduced by expected inflation, all discounted to present value.

Sometimes, the collateral source rule—which disregards collateral sources—is explained as relating to a form of property right of the victim: because the victim has paid for the benefits, he or she deserves to retain them, at least as against the tortfeasor. But if the goal of the system were to assure compensation, in the sense of making sure that victims of accidental injury were able to restore themselves after the accident, the availability of collateral compensation sources would be highly relevant. The comparison of the victim's desert versus the obligation of the tortfeasor, however, reinforces the point about pricing. The system does not allow the tortfeasor to gain the benefit of the victim's collateral compensation sources because its logic is to charge the tortfeasor the full costs of the accident.

Note that there is no expectation, with respect to tort law recoveries, that different individuals are somehow deserving of equivalent awards, even if they suffer the same injury or even death, by definition equal. The logic of the system is to determine the accurate price for the harm. That price will differ as tortfeasors harm individuals with

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16. This was a central point made many years ago by Richard A. Posner. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

different levels of income; thus, high income individuals will recover more than low income individuals for an injury that results in exactly the same level of disability. Those individuals who purchase, or have access to, more expensive medical care will recover those full medical costs, more than the amount received by individuals who received inferior care. (Again, by the collateral source rule, medical expenses are recovered by the victim from the tortfeasor even if they were defrayed by insurance.) Furthermore, noneconomic loss awards may differ vastly across individuals because the implications of pain and suffering or interference with the enjoyment of life may differ substantially for different individuals. Individuals who lead and who were expected to continue to lead rich lives—both emotionally or in terms of amenities—receive comparatively higher awards because a debilitating injury or death imposes greater costs for which the tortfeasor must pay.

The common law of tort has faced complications with respect to determining an accurate price in the context of death. The common law itself—a conservative institution that did not generally encourage lawsuits—provided no recovery for death. That rule, however, has been supplanted in all U.S. jurisdictions by two forms of statutes: Survivor's acts provide for the award of losses suffered by a victim during the period from accident to death. These amounts can involve medical expenses and lost income and can involve pain and suffering experienced by the victim for even short periods in anticipation of death. Wrongful death statutes award benefits to the dependents of victims based upon what the victim would have provided them if the death had not occurred. These benefits include both pecuniary amounts, based upon the victim's expected future earnings, and nonpecuniary amounts, based upon the care and nurture that the victim would have provided. In practice, determining these amounts is very similar to the award of personal injury damages to nondecedents: expected future income will be calculated as precisely as possible, though there are often deductions for the amount the decedent could have been expected to spend on himself or herself. Because the damages measure is defined as benefits expected to be received from the decedent, receipts from the decedent's future income are commonly capped at the age of majority for surviving children. The calculation of nonpecuniary losses is similar: Evidence will be introduced concerning the decedent's emotional ties to the dependents. These measures approach, though they do not exactly duplicate, an economic calculation of the appropriate price to be charged a tortfeasor for inflicting death upon a victim.



## B. Insurance

As described, tort law provides awards in contexts in which a loss could have been prevented. Insurance, in contrast, is a means of dealing with all other losses that occur in society: those that cannot be prevented. As such, it is empirically a far more prominent form of recovery for accidental loss.

### 1. Private Market Insurance<sup>17</sup>

The ambition of private market insurance is not exactly to provide compensation for loss. Though insurance benefits are a form of compensation, the basic purpose of the institution of private insurance is to equalize financial positions over various states of the world—as between states in which the insured has not suffered an injury and states in which the injury has occurred. The insured pays premiums and reduces his or her financial wherewithal during all states in order to equalize financial wherewithal by recovering insurance benefits after an injury or loss occurs.

Because it is a mechanism of financial intermediation, private insurance deals only with economic losses. There is no insurance demanded or available for noneconomic loss. A good illustration of the absence of such demand is the empirical fact that no parent purchases life insurance for a child. Surely a parent will expect to suffer severe emotional loss if a child were to die. But insurance involves reducing one's financial position (by paying premiums) in one period in order to restore one's financial position at a subsequent period, after a loss occurs. It makes no general sense for a parent to reduce the family's financial position while the child is alive in order to enhance its financial position after the child dies; indeed, the reverse. Thus, there is no economic reason to purchase life insurance on a child.<sup>18</sup>

The economic function of insurance also explains why there is no market for insurance that provides “full” compensation. All insurance markets provide benefits that are below—sometimes substantially below—the amount necessary for full compensation. Obvious examples are the existence of deductibles and coinsurance provisions in common property insurance policies—home or auto, for example—or in medical policies. No one purchases what might be called full insurance, both because the costs are too high to do so (for moral hazard reasons), and because truly full insurance is inconsistent with

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17. See Priest, *supra* note 15, at 1539-50.

18. Some families purchase small amounts of life insurance on children to ensure that they will have sufficient financial resources to pay for an unexpected burial.

the ambitions of the insurance institution. First, as is well known, limitations on coverage, such as deductibles and coinsurance, serve to discipline claims made against the insurance (the moral hazard), vastly reducing total insurance costs and, conversely, increasing the availability of basic coverage. Thus, the structure of private insurance is best seen as maximizing basic coverage by excluding or limiting the coverage of unusual or extreme losses. Second, the concept of full insurance is inconsistent with the idea of spreading financial risks over time. Again, paying for insurance today reduces one's immediate financial ability to purchase other goods and services. The economic calculation regarding magnitude of insurance is how much one should sacrifice during uninjured periods in order to have greater resources if an injury or death were to occur.

It is this calculus, for example, that leads individuals to purchase life insurance for dependents only equal to some multiple of current income, not equal to full lost income until expected retirement. For many years, a common benchmark for determining the appropriate level of life insurance has been five or six times annual income, upon the expectation that, if the breadwinner were to die, the spouse and dependents would have sufficient resources to support themselves for several years at equivalent levels until they adjust their lives. Greater amounts might be purchased to deal with expected future college expenses. Conversely, often life insurance is allowed to lapse or loans are taken against the insurance as children leave dependency.

Collateral financial resources are relevant to insurance, at least over some range. Obviously, the extremely wealthy need less insurance than the rest of us, though there may well remain advantages to equalizing wealth over time even to the rich. In this respect, private savings are a potential alternative to insurance. Yet where the source of the potential future setback is probabilistic—a true risk—insurance is far less costly than savings because insurers can pool risks together, vastly reducing the level of reserves necessary to provide equivalent levels of protection. There are some forms of future loss, however, that are not insurable because they are largely in the control of the individual, such as a setback in one's career.<sup>19</sup> People must accumulate savings for forms of loss of this nature.

Note that there is no expectation of equality across citizens with respect to insurance. Individuals purchase insurance coverage based upon their financial needs and abilities to equalize resources over

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19. See George L. Priest, *Government Insurance Versus Market Insurance*, 28 GENEVA PAPERS ON RISK & INS. 71 (2003) (addressing issue of insurability).

time. Those with greater assets and income are likely to purchase greater amounts of insurance over some range, but it is worthwhile for the poor to insure—in some senses, more worthwhile. This point explains why it is a societal imperative to maintain a legal regime that maximizes the availability of basic insurance coverage.

The discipline of the system of private first-party insurance, however, results from the fact that it is entirely self-supporting: Insureds only receive insurance benefits for which they have paid in advance. These payments, of course, are a means of protecting for the occurrence of a risk which may not occur or, as in life insurance, may not occur at an early time. As a consequence, careful economic calculations are necessary with respect to how much to reduce financial resources in order to obtain insurance protection.

## 2. *Government-Provided Insurance*

Government-provided insurance is substantially different in structure and operation from private market insurance.<sup>20</sup> Government insurance is typically provided in contexts where no market insurance is available. In contrast to private market insurance, government-provided insurance is generally not self-supporting; if the provision of insurance could be self-supporting, the market would provide it, though there are contexts in which the existence of government insurance “crowds out” any market offering.<sup>21</sup> There are some contexts in which government insurance appears designed to be self-supporting. Typically, however—and often because of the structure of the insurance provided—the true economic cast of the program is revealed only when some crisis occurs. Federal deposit insurance and the savings and loan debacle is a good example.<sup>22</sup> Because government insurance programs require subsidization, however, all government supported regimes are subject to budget constraints.

A further important difference between market insurance and government-provided insurance derives from the fact that the benefits are provided by a political entity—the government—which is subject to different constraints on how it deals with the citizenry. First, government insurance programs are characterized by an ethic of universal availability, offered to all citizens who desire coverage, not carefully selected risks, as in private insurance. Second, provision by the gov-

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20. *See id.*

21. Medical insurance for the elderly is a good example. Basic medical insurance for the elderly was entirely crowded out by the enactment of Medicare.

22. Robert C. Merton & Zvi Bodie, *Deposit Insurance Reform: A Functional Approach*, 38 CARNEGIE-CONF. SERIES PUBLIC POL'Y 1 (1993).

ernment also implies an ethic of nondiscrimination among beneficiaries, both in terms of premiums charged and benefits provided. There is an ethic of equality in coverage or, at the minimum, restrictions on the extent of discrimination among beneficiaries, both with respect to premiums and insurance benefits. Private market insurance discriminates sharply among insureds in terms of risks: Premiums are set according to risk levels; thus, high risk individuals may pay premiums multiples higher than the premiums charged the low risk. In contrast, because of the nondiscrimination ethic of government programs generally, there is far less discrimination among insureds in government-provided insurance programs. A necessary implication of these facts is that government-provided insurance is generally extended more broadly, but with much lower benefit levels, than is characteristic of private market insurance.

Some commentators describe government-provided insurance as incorporating a principle of full restitution of a victim's losses,<sup>23</sup> but this is political rhetoric rather than reality. Crime victim insurance provides very low levels of recovery. Even more established government-insurance programs, such as unemployment insurance, incorporate multiple limitations—waiting periods, limited periods of coverage—and provide benefit levels at a fraction of workers' incomes. Other government-provided insurance programs are hardly insurance at all—Medicare is a good example. Other programs have some insurance dimension—disaster insurance is an example—but are better understood as benefit programs, rather than insurance.

### *C. Government Welfare*

The final and ultimate mechanism for dealing with losses in our society is public welfare. Welfare is provided by the government to those individuals who have suffered losses—or who are in economic positions that resemble the suffering of a loss—but who have no claim in tort law against another person on account of their position, and who have not adequately protected themselves through savings or private insurance. The internal logic of our public welfare systems is not compensation, it is basic need. Welfare provides a form of economic support based upon the need of the individual. The level of support provided, however, is constrained by that need and constrained by the source of the support. Welfare is a form of redistribution from citizens engaged in productive activities to individuals who, if only mo-

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23. See Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251 (2003).

mentarily, are nonproductive. (If they were productive, they would not need the welfare.) Thus, there is a constraint to provide only that level of support sufficient to provide minimal aid to an individual, that will hopefully enable the individual to resume workforce participation in order to become productive and self-supporting.

Based upon a logic of basic need, collateral sources of compensation—such as savings or assets—are centrally relevant to the institution. If a person possesses or has available collateral financial resources, welfare support will be denied because the requisite need is absent.

Because the ambition of the institution is to provide some minimal level of resources to support basic needs, there is a greater ethic of equality with respect to welfare than with respect to tort law or private insurance. The equality norm may stem, in part, from the fact that the support is provided by the government, broadly constrained to treat citizens equally, similar to the constraint motivating the structure of government insurance. But another part of the equality ethic derives from the notion that only basic needs are to be supported, needs that are not likely to differ greatly among individuals. Some differences are tolerated where they can be justified, such as greater food stamps to larger families or some special needs of the elderly. But, in general, the support available from government-provided welfare does not differ substantially across recipients.

#### IV. THE SEPTEMBER 11TH VICTIM COMPENSATION FUND COMPARED

The various elements of awards under the September 11th Fund resemble, but do not exactly match, elements of the four basic societal mechanisms for injury compensation. This section discusses the differences and explains what I believe to be the failings of the September 11th Fund. As mentioned, the Special Master has defined principles for the award of economic losses, noneconomic losses, and the adjustment for collateral sources. The principles defined possess a certain plausibility, but lack a defining logic and constraint.

##### A. *Economic Losses*

The definition of awards of economic loss under the Fund most closely resembles the measurement of wrongful death awards under tort law.<sup>24</sup> The Fund's awards, however, are in some respects more generous than tort law awards and, therefore, in excess of actual loss

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24. See *infra* Part IV C.

to dependants and, in other respects, less generous, and therefore, more characteristic of governmental aid programs. For example, under the Fund, economic losses are measured equal to lost income projected until retirement, less expected taxes and less an estimate of the decedent's personal consumption. For younger families, this measure is more generous than tort law awards, which cap the expected receipts of surviving children at the year of their majority, not at the year of the bread winner's retirement. Measurement under the Fund is different, however, and less generous than tort law, by its adoption of a standard one percent per year productivity increase, uniform for all victims. A uniform benefit measure of this kind, and a uniform measure at a low level, is common to government programs—government insurance and surely for government welfare—but it leads to differentially lower awards for the families of victims who died at early points in their careers relative to older victims for whom an annual one percent increase in productivity might be more realistic.

The definition of economic losses adopted by the Special Master, therefore, lacks an underlying rationale. Some parts resemble tort law, but are inexplicitly more generous<sup>25</sup>—the rate of expected increase of future income. The Special Master's adoption of a standardized schedule for reductions on account of the decedent's consumption is similar. The Master has not explained the basis for the schedule. Other parts, such as the assumption of a one percent productivity increase, are dramatically less generous than tort law awards, especially for younger families of well-educated victims. The one percent assumption may have been adopted on equality grounds—resembling government insurance or welfare—or, perhaps, on administrative grounds because of the difficulty of estimating future income increases person-by-person.<sup>26</sup> Given the other forms of personalization of awards under the Fund, however, the administrative burden concerns cannot be taken seriously. As a consequence, there is no coherent justification for the Fund's definition of economic loss.

### B. Noneconomic Losses

As described, the Special Master has set the noneconomic loss measure as equal for each victim family—\$250,000 per victim plus \$100,000 for a surviving spouse and for each surviving child. The Special Master's decision regarding noneconomic losses has proven extremely controversial, especially among young families with children

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25. *But see infra* note 30.

26. *See also*, Part IV. C.

who have claimed that the noneconomic loss awards should be much higher.<sup>27</sup>

There is a good explanation for why this element of the September 11th award is controversial: It is not consistent with any of our current societal conceptions of compensation. First, among the four compensation mechanisms described here, only tort law awards any amount whatsoever for noneconomic losses. Compensation for noneconomic loss is not available under government insurance nor, surely, under government welfare, and is not obtained under market insurance because it is not purchased in any form. The award of noneconomic losses under tort law can be easily defended as an important additional element of deterrence: Our society wishes to deter the infliction of noneconomic losses just as much as of economic losses. The September 11th Fund, however, has no deterrent purpose.<sup>28</sup> Here again, therefore, the amounts awarded for noneconomic loss possess no coherent rationale. They are less than tort law awards and do not pretend to measure individualized loss, but are vastly greater than any form of insurance benefit—generally zero in both private and government insurance contexts. The awards are defined as equal to equally-sized families, but the magnitude of the equal amount possesses no justification.<sup>29</sup>

Furthermore, under tort law, awards for noneconomic losses are individualized. In wrongful death cases, large families, young families, families that are emotionally close and in which the decedent was a caring and devoted parent, will receive larger awards for noneconomic loss than families that do not share these characteristics. Under the September 11th Fund, in contrast, these differences are minimally taken into account by the \$100,000 per spouse and child additions. The uniformity of the fixed sum of \$250,000 per victim and \$100,000 per spouse and child is characteristic (though surely not at such a high level) of government insurance and welfare programs, which commonly offer equalized benefits, but the conception of equalized

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27. Earlier complaints of this nature led the Special Master to increase the spouse and per child award from an initially announced \$50,000 to \$100,000. 67 Fed. Reg. 11,233 (Mar. 13, 2002).

28. This point is slightly complicated. Though surely not serving as a direct deterrent, one Congressional aim in establishing the Fund was to deflect private tort actions that might be filed against a failing airline industry or against the federal and state governmental agencies implicated in the attacks. Toward that end, awards under the Fund had to resemble tort awards to some degree. Given that a court has recently held that victim family lawsuits may proceed against various defendants, there may be additional pressures to amend Fund awards to more closely resemble tort law awards.

29. See *infra* Part IV. C.

noneconomic loss awards is totally alien because these government programs never provide compensation for noneconomic losses.

### C. Collateral Source Reductions

As mentioned, awards under the September 11th Fund are to be reduced by the availability of collateral benefit receipts by order of Congress.<sup>30</sup> In his discretion, the Special Master decided to define this reduction as applying only to life insurance, pension fund, and death benefit funds, and not to savings, investments, and assets. Later, after substantial complaint from victim families, the Special Master announced that he would characterize other portions of the collateral sources as savings, diminishing the expected reduction.<sup>31</sup>

Though the awards under the Fund for economic losses and, to a lesser extent, noneconomic losses bear some resemblance to tort law awards, there is no reduction for collateral benefit sources under tort law. Collateral benefits, such as life insurance, are relevant under private market insurance: Their existence reduces demand for additional private insurance because there is no economic purpose in insuring twice for the same loss. Moreover, there is a public policy and insurer interest in preventing excessive coverage. Collateral insurance benefits and the possession of assets is relevant to the provision of both government insurance and government welfare. If alternative insurance sources are available, typically no government insurance will be provided. Somewhat differently, though similar to a government program, if an individual possesses insurance or assets, no government welfare will be available in any form. The limited reductions under the September 11th Fund for collateral benefits, therefore, is a total oddity. Because the only reason for ignoring collateral sources is deterrence, there is no rationale whatsoever for the various distinctions now effected under the Fund.<sup>32</sup>

As can be seen, the various elements of awards under the September 11th Fund do not fit easily into any of our current societal systems for providing compensation for loss. September 11th Fund awards are less than awards under tort law, appropriately because there is no deterrent ambition of the Fund, but inexplicably, because many of the

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30. 67 Fed. Reg. at 11,239.

31. The Special Master also determined that private charitable donations would be disregarded for purposes of the collateral source reduction. *Id.* at 11,234. This is a highly significant decision because each victim family has received seven figure sums from private charities and some families—especially those of fallen firefighters—have received even greater amounts. See Robert A. Katz, *Too Much of a Good Thing: When Charitable Gifts Augment Victim Compensation*, 53 DEPAUL L. REV. 547 (2003).

32. *But see supra* note 28.



Fund award elements only resemble awards under tort law and are entirely different from awards under any other compensation system. Various elements of Fund awards resemble government benefit programs, chiefly by the uniformity or equality of benefit measures or amounts, but government programs never provide the levels of benefits—as tort law, in contrast, does—that are awarded under the Fund. These various differences surely have generated grounds that victim families or others could fail to understand and, thus, cause complaints about the design of the Fund.

There are two deeper differences, however, between the principles for determining awards under the Fund and the four societal mechanisms for providing compensation for loss that I believe have generated, and will continue in the future to generate, controversy concerning the Fund. First, awards under the Fund have no defining or constraining logic; second, the definition of awards has been placed entirely in the hands of a Special Master. Both of these features of Fund administration are alien to our society's understanding of compensation.

First, each of the four systems of compensation—unlike the Fund—contains an internal logic that both defines and constrains the nature of awards. As explained, tort law seeks to set a price on causing harm by charging a tortfeasor the exact amount of the harm caused. This serves to define tort damages—they are to be measured exactly equally to harm caused—and it also serves to constrain those awards. By this logic, tort law awards should neither be too high nor too low; there is an exact figure appropriate for the award.

Private market insurance defines benefits according to what a policyholder has paid for, measured in terms of the policyholder's desire for coverage in relation to expected loss. Again, there is a private interest and public policy in not providing excessive insurance. But there is also a private interest in obtaining only basic insurance coverage, and not coverage of losses that can otherwise be controlled, because of the price restraint that results from the fact that policyholders pay premiums based upon coverage desired.

Government insurance and welfare programs are different yet. Typically, because offered by the government, there is an ethic of equality in coverage and benefits with a minimum of discrimination, among either policyholders in the case of government insurance, or among welfare beneficiaries. In addition, government insurance and welfare benefits are provided at much lower levels than available private market insurance or tort law. These lower benefit levels are understood as necessary because all government programs are

constrained by budgetary concerns. Given limited government resources, increasing benefits for one government program suggests the need to limit benefits to another. The general budget constraint of government limits the extent to which any single beneficiary or set of beneficiaries can demand greater benefits.

In contrast, for the September 11th Fund, there is no equivalent rationale and no equivalent ethic of restraint. As explained, there is no clear coherence in the definition of award elements under the Fund. Some elements resemble awards under tort law, more or less; some are entirely foreign to tort law awards.

Moreover, and perhaps most importantly, there is no principle that defines a constraint on awards under the September 11th Fund. Awards under tort law are constrained by the principle of awarding exactly the right amount. Recoveries under private market insurance are constrained by the principle that a beneficiary receives only what he or she has paid for. Benefits under government insurance or government welfare programs are constrained by general governmental budgetary limits. In contrast, there is no constraint on awards under the September 11th Fund. Its budget is unlimited, and its definitional principles vague. It is, therefore, not surprising that many victim families have argued for larger awards.

Finally, there is a second difference between awards under our society's four compensation systems and awards under the Fund that is worthy of notice. Our society's four compensation mechanisms are—in some form—democratically defined. The common law derives from time immemorial; adjustments to it—say, by the enactment of survivor's and wrongful death statutes—have been made by democratically elected legislatures. Private market insurance is not democratic in a political sense, but it derives from citizen choices and bears the legitimacy of any allocation of resources determined under conditions of competition. Obviously, government insurance and welfare are defined by democratically elected bodies.

In contrast, the definition of awards under the September 11th Fund has been delegated nearly entirely to a single person, the Special Master. This is not to derogate the decisions that the current Special Master, Kenneth Feinberg, has made. All agree, and I surely do with emphasis, that he has performed his duties with the greatest judgment and dedication. There is a sense, however, in which the awards granted under the September 11th Fund serve as a surrogate for a measure of the value of the lives of the victims who perished on September 11th. My colleague, Judge Guido Calabresi, in an important book published many years ago, described the necessity of selecting

particular types of bodies to make difficult—in his word, tragic—decisions, such as of the value of life.<sup>33</sup> The September 11th Fund will remain controversial because the source of the definition of its awards—however able and committed—is not in any sense democratic. Coupled with the lack of an internal rational or constraint, the awards granted by the Fund will continue to remain problematic.

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33. GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* (1978) (defending juries of randomly chosen laypersons sitting discontinuously and deciding aresponsibly—without explanation—as appropriate for tragic decisions).

