

**The September 11th Victim Compensation Fund
“An Unprecedented Experiment in American Democracy”
(forthcoming in *The Future of Terrorism Risk Insurance*,
published by Defense Research Institute (2005))**

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USC Legal Studies Research Paper No. 05-7



LEGAL STUDIES RESEARCH PAPER SERIES

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The September 11th Victim Compensation Fund

*“An Unprecedented Experiment in American Democracy”*¹

by Gillian K. Hadfield

¹ Kenneth R. Feinberg, “Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001” (Department of Justice, November 2004).

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Table of Contents

I. Introduction.....	5
II. Background.....	7
III. Evaluating the VCF: Compensation and Democracy.....	10
IV. The Democratic Function of the Civil Justice System.....	13
V. A Better Alternative: Preserving the Democratic Function of Law.....	18
VI. Conclusion	23

The September 11th Victim Compensation Fund

“An Unprecedented Experiment in American Democracy”

I. Introduction

One of the profound ironies of September 11 is that an attack widely perceived to be an assault on what America stands for—democracy and the rule of law—exposed Americans’ deeply rooted ambivalence towards their legal system. Many within our democratic institutions instinctively reached for ways to avoid entanglement with the legal system in responding to the crisis: attempting to house enemy combatants beyond the reach of American courts,² asserting that even American citizens held as enemy combatants in the United States are not entitled to access to judicial review and legal advice to challenge detentions,³ minimizing the judicial supervision of surveillance, search and preventive detention by relaxing warrant requirements.⁴ These are responses hostile to the legal system that have been highly visible in the years following the attacks.

Less visible has been the hostile response to the legal system embodied in the September 11th Victim Compensation Fund (VCF), created within days of the attacks. The urgency attached to the Fund’s creation stemmed from the perception that the American legal system *itself* posed an enormous threat to the financial viability of the United States air transportation industry and consequently to the stability of the U.S. economy as a whole. Senator John McCain, during the exceedingly brief debate on the Airline Transportation Safety and Stabilization Act in the Senate on September 21, 2001 (debate lasted for little more than an hour), referred repeatedly to the need for the creation of the VCF in order to avoid the “vast uncertainty of our litigation system,” “massive legal wrangling” and “the tangle of lawsuits that will ensue” and to put in place an alternative to the “arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort-system—awards from which up to one third or more of the victims’ award is often taken by attorneys.”⁵ Senator Orrin Hatch echoed Senator McCain’s worry about “massive punitive damage awards” with the concern that “if we do not limit outrageous jury awards of punitive damages, we run the risk of denying some plaintiffs their rightful share in award [because] if one plaintiff’s punitive damage award is excessive, it could very well deplete the amount of funds available to pay awards, leaving other plaintiffs out in the cold. Don’t we want to ensure that all legitimate plaintiffs receive compensation?”⁶ The measure passed, averting the specter of, in Senator McCain’s words, the danger that the “courts could order the liquidation of our biggest airlines if they are deemed liable for the catastrophic damage of September 11.” For him, keeping victims and their families out of the U.S. civil justice system was, paradoxically, essential to the achievement of justice: “It is regrettable, but perhaps inevitable, that the unity that this terrorist attack has wrought will devolve in the courts to massive legal wrangling and assignment of blame among our corporate citizens. It is my hope that the liability provisions we are adopting today

² See *Rasul v. Bush*, 124 S.Ct. 2686 (2004) (rejecting executive claim that enemy combatants held at Guantanamo Bay are beyond the jurisdiction of United States courts for purposes of challenging their detention under federal *habeas corpus* law).

³ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) (rejecting executive claim that American citizen held as an enemy combatant in South Carolina is not entitled to challenge his detention under federal habeas corpus law).

⁴ For a discussion of the provisions of the U.S.A. Patriot Act, see Erwin Chemerinsky “Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement,” 51 U.C.L.A. L.Rev. 1619 (2004).

⁵ 147 Cong. Rec. S9589-01, 2001 WL 1703925 (Cong. Rec.).

⁶ *Id.*

will serve, to some extent, to reduce this and produce as fair a result as possible in light of the gross injustice of these events.”⁷ Justice, it seems, was equated in the creation of the VCF with the avoidance of the justice system.

Deep distrust and dissatisfaction with the U.S. civil justice system is currently widespread. It ranges from the “tort reform” criticisms articulated by Senators McCain and Hatch and splashed across the cover of weekly newsmagazines,⁸ to the “alternative dispute resolution” movement that has gained momentum in American courts over the past two decades.⁹ Indeed, the very people who embody the American justice system—its judges—are among the system’s harshest critics:¹⁰ Throughout the judiciary, the idea that litigation is to be avoided at all costs is reflected in the expanding doctrinal support for methods of avoiding litigation (through arbitration, mediation, and settlement) and in the oft-heard refrain that even a “bad settlement is better than a good trial.”¹¹ Even plaintiffs’ lawyers instinctively rejected the idea that an event so grave as September 11th should be demeaned by contact with the civil litigation system, imposing on themselves a moratorium on civil filings in the days following the attack. As the President of the Association of Trial Lawyers of America (ATLA) expressed this sentiment, “[i]t is not, as some would have it, a time for finger-pointing among our own people. . . . There are greater needs that must be served at this time.”¹² Many lawyers refused to accept the cases the families of those killed in the attacks sought to bring.

That September 11 could be so easily assimilated into the disparaging picture of the American justice system should give us all great pause. That picture is usually composed of litigious plaintiffs filing frivolous lawsuits seeking “outrageous” compensation for petty injuries, goaded on by greedy ambulance chasing lawyers.¹³ That is not a picture anyone would have painted of the families of those killed or injured in such a horrific, publicly witnessed event; an attack experienced by a nation as an attack on all Americans, on American democracy itself. How is it, then, that Congress felt it so urgent to keep the claims of those families away from one of the central institutions of American democracy?

The link, I believe, lies in a fundamental erosion of our understanding of courts as institutions of democratic accountability, participation, and governance. The critique of the legal system inherent in the creation of the VCF—and arguably the source of the dissatisfaction of many families who participated in it—reflects an increasingly widespread view that courts, at least with respect to tort law, are merely compensation and insurance mechanisms. The idea that litigation is about money, and not about democracy, runs through the design and administration of the VCF, the legal tests for the constitutionality of the VCF, and the criteria against which the VCF has thus far been evaluated as a policy response to terrorism. This is a misconception spawned by the

⁷ *Id.*

⁸ See *Newsweek*, Dec 15, 2003.

⁹ Deborah R. Hensler, “Our Courts, Our Selves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System,” 108 *Penn.St.L.Rev.* 165 (2003).

¹⁰ Judith Resnik, “Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III,” 113 *Harv.L.Rev.* 924 (2000).

¹¹ *In re Warner Communications Securities Litigation*, 618 *F.Supp.* 735, 740 (S.D.N.Y. 1980) (“In deciding whether to approve this settlement, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.”).

¹² Quoted in Robert S. Peck, “The Victim Compensation Fund: Born From a Unique Confluence of Events Not Likely to Be Duplicated,” 53 *DePaul L.Rev.* 209, 215 (2003).

¹³ See, e.g., <http://www.occala.org/> (Orange County Citizens Against Legal Abuse), which includes this description: “Too often when people get hurt—no matter what the reason—they hire a certain kind of personal injury lawyer who looks for someone to sue. Under our legal system, it costs nothing for irresponsible people to file frivolous lawsuits hoping to get a large money award or settlement.”

brute economics of modern litigation: put bluntly, if there isn't a lot of money to change hands, there's no way to pay the lawyers who are by and large necessary for the costly process of adjudicating complex legal claims.

Litigation is indeed, therefore, increasingly driven by economic incentives and evaluated in terms of dollars. But to accept this redefinition of the function of our legal system poses a real danger to our protection of this critical instrument of democratic governance. The VCF, cobbled together quickly after the attacks and swept up in the criticisms of the tort system and the dominant anti-litigation norms that have taken hold within the legal profession and judiciary itself, throws into sharp relief the democratic losses associated with this flight from the courts. Like so much else about September 11, it reveals the profound implications of the erosion of American confidence in the legal system. To evaluate the VCF merely in terms of its success as a compensation or insurance mechanism is fundamentally to give credence to the view that money is all that's at stake in the claims citizens seek to press in the civil justice system.

II. Background

The Victim Compensation Fund was created in the swirl of lawmaking that followed in the weeks after the September 11th attacks. On September 21, Congress debated and passed the Air Transportation Safety and System Stabilization Act (ATSSSA)¹⁴. The Act itself was perceived as an essential, emergency, response to the threat that airline carriers, initially grounded for safety reasons, would stay on the ground indefinitely because their insurers would refuse to continue their coverage and capital markets would refuse to provide funds to the airlines in the face of potentially "unlimited" liability. As explained by Rep. Bentsen during the brief House debate on the bill that became the ATSSSA, "[s]ince the terrorists attacks, many insurance companies have either dramatically revised premiums or refused to renew such necessary insurance. Without such insurance, the capital markets have indicated that they will not provide liquidity to airlines."¹⁵

The ATSSSA took several steps to address the financial risks facing the airlines including:

- Providing for loans up to \$10 billion and compensation of up to \$5 billion for losses incurred by air carriers.
- Providing federal reimbursement to air carriers of increased insurance premiums for the year following September 11, 2001.
- Limiting air carrier liability for injuries to third parties caused when the air carrier is a victim of an act of terrorism occurring in the 180-day period following September 11, 2001 to \$100 million and eliminating punitive damages.
- Limiting the liability of air carriers for all claims arising from the attacks to the limits of the insurance maintained by the air carrier.¹⁶

For purposes of the original Act, an "air carrier" was defined as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." This definition was understood by some to include aircraft manufacturers and aircraft components and parts manufacturers.¹⁷ Uncertainty about

¹⁴ P.L. 107-42.

¹⁵ 147 Cong. Rec. H5894-02, 2001 WL 1703878 (Cong. Rec.). These views were expressed by, for example, airline executives who testified before the House Committee on Transportation and Infrastructure on September 19. See Janet Cooper Alexander "Procedural Design and Terror Victim Compensation," 53 DePaul L.Rev. 627, 692-94 (2003), for a history of the legislation that culminated in the ATSSA.

¹⁶ The airlines carried \$1.5 billion coverage per plane. Peck, *supra* n.12, at 217.

¹⁷ See remarks of Rep. Tiahrt, 147 Cong. Rec. H5894-02, 2001 WL 1703878 (Cong. Rec.)

the extent of the liability protection offered and concerns about “loopholes,” however, led to amendments in November 2001, which explicitly extended the limitation of liability to those engaged in airline security, aircraft and aircraft parts manufacturers, and airport owners and operators.

The November 2001 amendment also extended the liability limitation to anyone with a property interest in the World Trade Center and to New York City. This was a significant move beyond the original rationale of the Act—protection of the American economy from the fallout of severe dislocation in the air transportation sector—and underscored the hostility to the legal system manifested in the original legislation.

The limitations on liability in the ATSSSA created the potential that in the event the airlines (and, subsequently, any other participant in the air transportation industry such as airline security firms) were judged to have been negligent and to have contributed to the losses experienced by individuals, corporations, and property owners on September 11, there would not be sufficient funds available to pay all compensatory and, possibly, punitive damages awarded by the courts. One response to the possible gap between the liability limitation and the damages determined through civil litigation could have been the creation of a fund to make up this difference for personal injury and wrongful death claimants. Control over the possibility of “unlimited liability” due to “arbitrary and outrageous punitive awards” could have been exercised by prohibiting the award of punitive damages.¹⁸ Congress did not take this approach.

The approach Congress did take again evidences the goal of diverting individuals out of the legal system. Congress created the Victims Compensation Fund as a source of compensation for those physically injured by the attacks or who lost family members in the attacks. But it conditioned that compensation on a waiver of all rights to bring *any* claims for damages—against anyone, not merely those entities for whom liability had been limited. The families of firefighters, for example, who had brought claims against Motorola Corporation alleging that the radios Motorola supplied to the New York City Fire Department—which failed to transmit the order to evacuate the towers—contributed to the firefighters’ deaths, were held to have waived those claims when they filed for “compensation” from the VCF, despite the fact that Motorola was not among the entities for which liability was limited by the ATSSSA. As explained by the court that refused to stay dismissal of the families’ claims, the ATSSSA had two separate purposes: one was to provide an alternative to litigation for compensation for families of those killed in the attacks, and another was to limit the liability of particular entities against whom lawsuits might be filed. Thus, the court held, there was no basis for finding that the waiver provision applied only to claims against those entities for which liability had been limited. The court recognized that limiting liability *alone* would have been sufficient to protect potential defendants against the risk of bankruptcy caused by September 11th claims, and that creating the VCF *alone* would have been sufficient to provide potential plaintiffs with an alternative to the uncertainties of litigation. That Congress chose to do both, the court reasoned, indicated that Congress had dual purposes. The VCF was not merely a *quid pro quo* for the limitation of liability; nor was it part of an effort specifically to protect the air transportation industry against crippling economic dislocation. It was a separate effort to provide an alternative to litigation for compensation.¹⁹

As construed by the courts, then, the Victim Compensation Fund is a form of alternative dispute resolution, part of the multi-pronged effort by judges, court administrators, and legislatures over the past two decades to divert dispute resolution out of the courts and into non-judicial settings. What the families of those

¹⁸ The ATSSSA created an exclusive federal cause of action for damages arising from the September 11th attacks. Presumably it could have limited that cause of action to compensatory damages. I discuss in Section IV, below, the possible constitutional limitations on limiting damages.

¹⁹ *Virgilio v. Motorola, Inc.*, 307 F.Supp.2d 504 (S.D.N.Y. 2004). See also, *Virgilio v. Motorola, Inc.*, 2004 WL 433789, 2004 U.S. Dist. LEXIS 3636 (S.D.N.Y.).

killed on September 11th got when they filed claims with the VCF was an exclusive administrative procedure for the collection of a sum of money. The procedure itself was designed by a single person, Kenneth Feinberg, who was appointed as Special Master on November 26, 2001, and who administered the fund *pro bono* from the fund's inception to his final report, issued in November 2004.

The ATSSA provided few details for how the VCF was to operate. It specified that compensation was to be provided for both economic and non-economic losses, and it prohibited any awards based on an assessment of punitive damages. It specified that, unlike the ordinary rule in tort law, amounts awarded were to be offset by collateral sources of compensation such as insurance payments and pensions. It specified that only one claim could be made on behalf of any person killed or injured in the attacks, that claims had to be filed within two years of the date on which the Special Master issued regulations governing the Fund, that the Special Master had to determine an award within 120 days of the filing of a claim, and that there was to be no judicial review of the Special Master's determination of an award. No limits were otherwise placed on the amount that could be awarded, either individually or in the aggregate. Importantly, the VCF limited compensation—and the corresponding waiver of civil claims—to individuals who suffered physical injury or wrongful death. There was no effort to divert property damage, business disruption, or insurance subrogation claims out of the legal system.

The actual administration of the VCF thus fell to the Special Master and his regulations. The Special Master issued interim regulations for notice and comment on December 21, 2001. This date established the beginning of the two-year statutory limitation period on the filing of claims with the Fund. The final rule was promulgated on March 13, 2002.

Under the regulations, the Special Master established several procedures for streamlining and simplifying the process of determining awards, which, under the ATSSA, were to be determined based on the “individual circumstances of the claimant.” The Special Master developed a grid of presumed economic loss for decedents arising from lost earnings or economic opportunities based on past years' earnings, age, number of dependents, and marital status. The Special Master also established a rule that non-economic losses would be presumed to be \$250,000 plus \$100,000 per spouse and each dependent. No presumptions were made about losses suffered by those filing claims for physical injuries, although the Special Master reserved the right to use the methodology for presumed economic awards for claims on behalf of decedents as a starting point for developing awards for economic losses suffered by physical injury claimants.

Claimants were given the choice of filing their claim under one of two tracks. Track A allowed claimants to receive notification of a presumed award within 45 days of filing and then decide whether to proceed to a hearing for review of whether there was an error in the calculation of their award or extraordinary circumstances not adequately addressed by the presumptive award. Track B allowed claimants to proceed directly to a hearing without the initial determination of a presumed award; at the hearing “the Special Master or his designee [was to] utilize the presumptive award methodology set forth [in the Regulations] but [could] modify or vary the award if the claimant [presented] extraordinary circumstances not adequately addressed by the presumptive award methodology.” There was no further appeal following the hearing.

Ultimately, 97 percent of those eligible to file a claim on behalf of those killed in the attacks did so, a total of 2880 claims.²⁰ Another 2,680 people filed claims for injuries sustained in the attacks.²¹ Total entitlement was calculated at \$8.5 billion for death claims and \$1.5 billion for injury claims; offsets reduced the total

²⁰ *Final Report of The Special Master for the September 11th Victim Compensation Fund of 2001* (Volume I) (November 2004), p. 1.

²¹ *Id.*

amount distributed by the VCF to \$6.0 billion and \$1 billion respectively.²² Total administrative costs for the Fund were \$87 million,²³ the great bulk of which (\$77 million) went to PriceWaterhouseCoopers, the firm selected to manage the claims processing and payment procedures, operate the claims assistance sites, staff and coordinate Special Master town hall meetings, develop economic loss models, compile initial claims information, calculate presumed awards, and coordinate hearings.²⁴ The Special Master's Office, which estimated it spent in excess of 19,000 hours valued at more than \$7.2 million, provided all services free of charge.²⁵

Approximately half of all claimants who filed on behalf of someone killed in the attacks chose to proceed directly to a hearing on Track B, while 90 percent of those filing personal injury claims chose to pursue Track A, potentially avoiding a hearing.²⁶ Ultimately, 69 percent of death claims and 47 percent of injury claims involved a hearing.²⁷ Hearings were conducted informally, according to the Special Master, before a variety of hearing officers including 47 administrative law judges borrowed from other agencies of the federal government, 11 Assistant United States Attorneys, 4 private sector attorneys (working *pro bono*), attorneys in the Special Master's office and the Special Master himself.²⁸ Hearings rarely exceeded two hours in length.²⁹

In the end, awards for deceased victims ranged from a minimum of \$250,000 to a maximum of \$7 million, with an average of \$2 million and a median of \$1.7 million. Awards for injury victims ranged from a minimum of \$500 to a maximum of \$8.6 million, with an average of \$390,000 and a median of \$110,000. According to the Special Master, departure from the presumed amount of \$250,000 (plus \$100,000 for a spouse and each dependent) for the non-economic portion of death awards was rare, amounting to an increase of the amount in 75 cases (3 percent of awards).³⁰ 60 percent of death claims were made on behalf of those who earned less than \$100,000 per year and 43 percent of the total amounts awarded went to these claimants. Approximately 15 percent of death claims were on behalf of those who had made over \$200,000 per year; 32 percent of the amounts awarded went to these claimants.

III. Evaluating the VCF: Compensation and Democracy

In order to evaluate whether the Victim Compensation Fund was a "success" we have to know what the VCF was intended to accomplish and whether those goals accord with broader objectives within American democracy. And these are tricky questions. The VCF was established with two arguably distinct goals in mind. One was to provide "compensation" to the families of those killed in the attacks and those who suffered physical injuries. The other was to provide an alternative to civil litigation with the goal of avoiding lawsuits.

²² *Id.* at 10.

²³ *Id.* at 114.

²⁴ *Id.* at 75.

²⁵ *Id.* at 114.

²⁶ *Id.* at 110.

²⁷ *Id.* at 111.

²⁸ *Id.* at 72.

²⁹ *Id.* at 17.

³⁰ *Id.* at 42–43. These deviations "included cases where multiple family members were killed on September 11, where other members of the nuclear family unit died shortly before or after September 11, where children were left with no parents, where victims survived the attacks but subsequently died as a result of injuries sustained (for example, burn victims who later died from complications), where victims were pregnant at the time of death and where spouses of deceased victims lost an unborn child due to the trauma of September 11."

There have only been a few assessments of the performance of the VCF since it was wound up in 2004. By and large, however, these assessments have conflated the compensation and “alternative to lawsuits” goals of the Fund. The conclusion of the Special Master is telling in this regard:

I am pleased to report that, in my view, the Fund was an unqualified success: 97 percent of the families of deceased victims who might otherwise have pursued lawsuits for years have received compensation through the Fund. The Fund provided generously for those directly affected by the attack.³¹

In this assessment, the success of the Fund is equated with its success as an alternative to litigation for transferring dollars to the victims of the attacks and their families. This conflates the “compensation” and “alternative to litigation” goals of the VCF by treating litigation as if it were nothing *but* a means to compensation. More particularly, since the payments through the VCF were out of federal tax dollars, it treats the payment of “compensation” by taxpayers as equivalent, from a justice perspective, to payment of “compensation” by those judged to be responsible for *causing* those losses.

Similarly, a study conducted by the RAND Institute on Civil Justice evaluated the VCF exclusively in terms of the success of the Fund in transferring dollars.³² This is a detailed assessment of the extent to which the amounts calculated by the VCF methodology accurately captured the dollar value of the losses associated with injury or death. Although the RAND study purports to assess whether the VCF accomplished goals of “corrective justice” and “distributive justice,” both of these assessments were confined to the question of whether the *amount* of money given to claimants accurately reflected losses. The study defined “corrective justice,” for example, as a requirement “that benefits for those killed or seriously injured match economic and noneconomic losses.”³³

Other studies, mostly appearing in law reviews, have also focused on the amounts awarded by the VCF as the criterion for evaluating the Fund as an alternative to litigation and the traditional tort system. In particular, these studies examine how the amounts awarded by the VCF compare to the amounts that would be awarded in tort cases and the extent to which the principles of compensation implicit in the VCF’s design accord with the principles underlying recovery in tort.³⁴

In all of these settings, the assessment of the Victim Compensation Fund is disconnected from what is distinctive about the civil justice system as a democratic institution, namely its fundamentally *normative* function as a branch of government available to private citizens to participate in resolving disputes and adjudicating rights and wrongs. We do not consider the civil justice system to be indispensable to democratic social orders because it provides cash to those who suffer losses; that is the function of a social insurance system, whether funded by tax revenues or charitable gifts.

In a social insurance system we seek to share losses suffered by some among the community as a whole, often specifically because we consider some losses to be non-normative, not the result of blameworthy conduct. People grow old and we share in the loss of income associated with an economic system in which older people cannot earn the income of younger people. Accidents happen—at work, at home, in the street—and we share

³¹ *Id.* at 1.

³² Lloyd Dixon and Rachel Kaganoff Stern, *Compensation for Losses from the 9/11 Attacks*, RAND Institute for Civil Justice (2004).

³³ *Id.* at 31.

³⁴ See, e.g., Symposium, “After Disaster: The September 11th Compensation Fund and the Future of Civil Justice,” 53 DePaul L.Rev. (2003) 205 (multiple papers); Martha Chamallas, “The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law,” 71 Tenn.L.Rev. 51 (2003); Robert L. Rabin, “The Quest for Fairness in Compensating Victims of September 11,” 49 Clev.St.L.Rev. 573 (2001).

in the cost of accidents and disability. Markets shift and jobs are lost and we share in the burdens imposed by an adaptive and dynamic economy on those who find themselves out of work. In a social insurance scheme we transfer more or less funds to those who suffer losses because we judge such transfers to be kind or fair.

But in the civil justice system, if dollars are transferred from defendant to plaintiff it is, specifically, because of a prior determination, made at the behest of the plaintiff, that the defendant is *accountable* for the loss suffered by the plaintiff. It is incomplete to say, as the RAND study does, for example, that “corrective justice requires that benefits for those killed or seriously injured match economic and noneconomic losses.” Corrective justice requires that payments—which are not construed as “benefits”—be transferred from the defendant who caused the injury to the plaintiff who suffered it. The “correction” is not in the distribution of losses; it is in the moral relationship between plaintiff and defendant.

It is the normativity of what the civil justice system does in response to losses, and its availability to private citizens who may seek the application of normativity to their losses, not the amounts of money that it transfers, that is critical to its place in a democratic society. Indeed, the normativity of the civil justice system as a democratic institution transcends any role it may play in transferring dollars from one to another. Courts may issue, and may be asked to issue, declaratory judgments: pure statements that one has wronged another or owes another a duty. Courts may issue injunctive orders, preventing one from harming another or requiring that an obligation be fulfilled. The amounts of money that courts transfer are, to a significant extent, of secondary importance to the judgments it makes about legal rights and wrongs. Courts admit and hear evidence about complex models for the assessment of damages—but if juries ignore or make mistakes about these calculations, judges will intrude on the damages awarded only if they fall far outside the bounds of those calculations.³⁵ Moreover, juries may award damages for which there is no calculation—non-economic damages, punitive damages—within broadly defined boundaries.³⁶ Once liability is established, courts are often heard to say that a defendant will not be heard to complain if damages are not assessed with precision, and the rules of joint and several liability—which hold a defendant responsible for the full amount of damages even when liability is shared with insolvent defendants—bring home the message that liability is the primary concern of the courts.

To say, then, that the VCF should be evaluated as an alternative to the civil justice system in terms of the extent to which it provided generous amounts of cash to the victims without litigation, as the Special Master does, or the extent to which it matched the amounts of money that would have been awarded in litigation, as the RAND study and other legal commentators do, is to treat as irrelevant the fundamental normative functions of the civil justice system. It is to treat the civil justice system as if its role were to share losses without regard to responsibility for them. Ultimately, it is clear, this is how the Special Master viewed the VCF: as an act of generosity on the part of the American people that “expressed a shared national grief, horror and revulsion in response to the terrorist atrocities.”³⁷

³⁵ As articulated by the United States Supreme Court, “Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.” *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

³⁶ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (punitive damages may not be grossly excessive).

³⁷ *Final Report of the Special Master*, *supra*, n.20, at 80.

But if we are going to assess the desirability of a fund such as the VCF as a means of distributing losses without regard to accountability, then we need to recognize that such an assessment is separate and distinct from an assessment of the VCF as an alternative to litigation. To perform the latter assessment we have to attend to the fundamentally normative function of litigation, the role of the civil justice system not as a compensation mechanism but as central institution in American democracy.

IV. The Democratic Function of the Civil Justice System

Law serves multiple functions in a market democracy. Some of these are essentially economic: structuring the contract and intellectual and real property rules that undergird markets and providing a mechanism for the regulation of markets to correct imperfections in the competitive environment. Law also, however, performs important democratic functions. We recognize this, of course, when law steps in to ensure the protection of civil rights or constrain the exercise of government authority—whether in turning back executive efforts to hold enemy combatants beyond the reach of the courts or limiting the power of government to modify voting laws or regulate speech. But law also plays an important democratic role by being available to participate in the resolution of civil disputes, disputes between private citizens, whether individuals (such as the families of those killed on September 11, 2001) or organizations (such as airlines, security agencies, and building owners and operators).

One of the key attributes of a democratic social order is that relationships are ultimately governed not by power or wealth but by law. Theoretically, it is a condition of the social contract: we give up our rights to get what we can for ourselves through brute force and bargaining and submit to a regime in which democratically chosen representatives create laws and control the state's monopoly over coercive force. Power and wealth, brute force and bargaining, still operate in the democratic state, but they do so within the bounds set by law and policed by the power of the state. We may gain access to resources by buying them but not by stealing them or extorting them from others. We may make others behave in ways we prefer by hiring them or persuading them or holding them to their legal obligations but not by terrorizing them or deceiving them or violating their rights. We may take actions that pose risks to others but only if we are acting in accordance with laws that balance the freedom to act against the obligation not to harm others.

The capacity to activate a claim with the state that an individual or an entity has transgressed the bounds imposed on their use of power or wealth or position to get what they want gives meaning to the very idea of the democratic social order. If we cannot call upon the state to respond to such a claim, then the democratic limitation on the use of brute force and bargaining to control the distribution of resources or freedom may be no limitation at all and our social order not, in fact, a democratic one. For the very thing we give up in that democratic order is our power to secure these things for ourselves; we rely on the state's power to secure them for us. Courts are institutions by which we as private citizens gain access to the power of the state to regulate our relationships with others.

A democratic state could choose to limit the extent to which relationships among citizens are regulated by laws enforced by citizens themselves through courts. The infliction of physical harm on another, for example, could be regulated exclusively through criminal and administrative law, enforced by the state's prosecutor and executive agencies; there might be no private right to enforce limitations on the power to injure through a civil cause of action. We could be required to rely exclusively on our right to vote for legislators and an executive that bears full responsibility for monitoring and regulating conduct. But whether the *American* conception of democracy would allow the elimination of a citizen's private right to raise a claim that they have been unlawfully injured is a hard question, one that American courts have been reluctant to answer and American legal scholars have rarely asked.

The courts have been asked this question in a variety of cases involving limitations on tort recoveries: workers compensation laws, no-fault automobile insurance schemes, alternative dispute resolution requirements, and liability caps. In the leading case, *Duke Power Co. v. Carolina Environmental Study Group*, a case referred to by those who drafted the Victim Compensation Fund legislation,³⁸ the United States Supreme Court was asked whether the Price-Anderson Act—which in 1978 limited liability for nuclear accidents to \$560 million—was invalid under the due process and equal protection clauses of the Fifth Amendment to the U.S. Constitution because it abrogated the common law right to tort recovery of full compensation for injury.³⁹ The Court observed that it is “not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonably just substitute.”⁴⁰ It then held that the statute met constitutional muster because, even *if* the Constitution required a reasonably just substitute, the Price-Anderson Act provided such a substitute. The Court reasoned that the recovery allowed under the limitations of the Act was a reasonably just substitute for the amount of money that a claimant might recover in tort—in light of the problems of proving negligence and then collecting a judgment from a potentially insolvent nuclear operator.

Other courts have continued to leave ambiguous the question of whether a reasonably just substitute for common law rights is required when a legislature abrogates those rights. In 1985, Justice White urged the Supreme Court to take up the question.⁴¹ As yet, it has not done so. The *Duke Power* skepticism about the need for a reasonably just substitute has persisted (and some courts have concluded that *Duke* implicitly found that such a substitute was not required⁴²), but so too have the observations in Supreme Court decisions that some limits may exist. These include an early workers compensation case that first ducked the question but with the suggestive observation that it was not necessary “to say that a state might, without violence to the constitutional guaranty of ‘due process of law,’ suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute.”⁴³ More recently, Justice Marshall observed that

I do not understand the Court to suggest that . . . there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms “life, liberty and property” do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish “core” common law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.⁴⁴

State courts have been more expansive about the requirement of a reasonably just substitute for the abrogation of common law rights of action, many finding limitations on tort actions unconstitutional under their state’s constitution. The particular provisions used to reach the conclusion that limitations on tort

³⁸ Peck, *supra*, n.12, at 219.

³⁹ *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

⁴⁰ 438 U.S. at 88.

⁴¹ *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985) (White, J. dissenting from dismissal of appeal for want of federal question.)

⁴² *Keeton v. Mansfield Obstetrics & Gynecology Associates, Inc.*, 1981 WL 36207 (N.D. Ohio 1981).

⁴³ *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917).

⁴⁴ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980).

actions—such as workers compensation laws, medical malpractice damage caps, and no-fault automobile statutes—are unconstitutional vary. Some track the equal protection and due process provisions of the United States Constitution (but applied at the state level with a higher degree of scrutiny⁴⁵), some rely on the right to a jury trial, and others rely on provisions prohibiting “special legislation.” Many of the state cases, however, are decided on the basis of a unique provision of state (as opposed to the U.S.) constitutions, namely an “open courts” clause.⁴⁶ The constitutions in Florida, Oregon and Texas, for example, state (respectively)⁴⁷

The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.⁴⁸

No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay and every man shall have remedy by due course of law for injury done in his person, property or reputation.⁴⁹

All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law.⁵⁰

Whether grounded in the (uncertain) U.S. Constitution or the more definitely interpreted “open courts” provisions of state constitutions, however, most legal analysis reflects a focus on the *quantum* of recovery in deciding whether a statutory remedy is an adequate or “reasonably just” substitute for common law tort rights. That is, courts tend, as the evaluators of the Victim Compensation Fund tend, to assess a substitute for litigation in terms of how much compensation it provides. Few courts consider the question of whether a reasonably just substitute requires that payments be made by the person or entity that caused an injury as opposed to a public fund; nor do they consider whether there are *other* procedural attributes of the capacity to bring a cause of action in open court that are lost when the right to bring an action is “substituted” for by a mere payment of compensation. That is, most courts apply the reasonably just substitute test to the compensation aspect of litigation, but not to the normative procedural aspect of litigation: the capacity of a citizen to bring to bear the power of the state to demand an accounting for allegations of wrongdoing in open court.

One court has suggested that an open courts constitutional guarantee requires an adequate “remedial process” but does not go into detail about what process might be required.⁵¹ In other cases the nature of the statutory “substitute” was such that the procedural attributes of litigation—the right to subpoena witnesses and present testimony for example—were in place.⁵²

⁴⁵ See, e.g., *Carson v. Maurer*, 120 N.H. 825, 424 A.2d 825 (1980).

⁴⁶ 39 states have such clauses. See David Schuman, “The Right to a Remedy,” 65 *Temple L.Rev.* 1197, 1201 (1992).

⁴⁷ The similarity in these provisions—all of which have been used to strike down state legislation limiting tort recoveries—derives from their common source in Chapter 40 of Magna Carta (which stated “To no one will we sell, to no one will we refuse or delay right or justice”) as restated by Sir Edward Coke, an important influence on the drafters of early state constitutions. For a full discussion of the history, see Jonathan M. Hoffman, “By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions,” 74 *Or.L.Rev.* 1279 (1995), and Schuman, *supra*, n.45.

⁴⁸ Florida Const. Art. 1, §21.

⁴⁹ Oregon Const. Art. 1, §10.

⁵⁰ Texas Const. Art. 1, §13.

⁵¹ *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001).

⁵² See, e.g., *New York Central Railroad v. White*, *supra*, n.42. Indeed, the Court in *New York Central v. White* explicitly observed that “[n]o question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th Amendment.” 243 U.S. at 208.

The claims that legislatures have full power to modify or eliminate common law causes of action or that any constraint requiring the provision of a reasonably just substitute is merely a requirement that an injured person receive an amount of money comparable to what they would have received in litigation, reflect the view that litigation is primarily a means to compensation, a form of social insurance. Moreover, as a form of social insurance, the question of how losses are to be distributed is treated largely as a distributive matter for political determination through legislatures. Citizens participate in this determination through their election of representatives. This is, of course, a plausible version of a democratic state.

American democracy, however, arguably is based on a much higher degree of participation by individual citizens in governance than the election of representatives who then assume responsibility for ensuring that laws are followed and losses are distributed. As historians of the “open courts” provisions in state constitutions have concluded, “one of the notable features of all state constitutions that were drafted in the mid-nineteenth century was the mistrust of legislative power.”⁵³ An independent judiciary as a check on legislative power is, of course, central to American democracy, the third branch of government. In terms of American democracy, access to courts is more than just a means of obtaining insurance payments. It is, fundamentally, the means by which private citizens are able to call upon the power of the state to compel others to account for their performance of their legal obligations. It is a means by which private citizens participate directly in governance and the enforcement of laws, not leaving these functions exclusively to the exercise of the discretion of elected officials in the political branches.⁵⁴

Instinctively, some of the families of those killed on September 11, 2001 have characterized the “choice” they were required to make between filing a claim for money with the Victim Compensation Fund and pursuing a claim in court as a denial of their civil rights.⁵⁵ For them the “choice” required giving up something the VCF did not provide at all, something having nothing to do with an amount of money they might receive. That “something” included the ability to demand, in open court, explanations and answers from those who may have contributed to the deaths of their family members; to draw upon the subpoena power of the state to produce information about why people died and what steps were taken or not taken to help prevent those deaths; and to ultimately obtain from a fact-finder, be it a jury or a judge, an authoritative and publicly declared judgment about whether legal duties were violated that contributed to their deaths of the people they loved.⁵⁶ This they did not wish to leave to elected politicians; this they wished to do for themselves. In their understanding of “civil rights” American democracy grants to the people the right to participate in governance in this way and to call upon the courts as the institution by which they are able to step into the shoes of an official and in effect exercise the power of the state. This had nothing to do with the size of an “award” they might receive for the deaths of those they loved. And for this there was no “reasonable substitute,” indeed, there was no substitute at all, provided by the VCF.

Indeed, the failure of the VCF to provide any substitute for the democratic opportunities afforded by litigation likely contributed to the deep despair some families felt about having their loss converted, for purposes of their relationship with the public sphere, into a monetary event, and to the conflict that emerged over

⁵³ Amasa M. Eaton, “Recent State Constitutions,” 6 Harv.L.Rev. 109 (1892) (as quoted in *Smothers v Gresham Transfer, Inc.*)

⁵⁴ For an extended discussion of the role of litigation in American conceptions of government, rooted in mistrust of government power, see Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (2001).

⁵⁵ This observation is based on confidential discussions with family members.

⁵⁶ For an excellent discussion of the psychological need for a moral accounting, and not merely compensation, in response to harms such as September 11th inflicted, see Tom R. Tyler and Hulda Thorisdottir, “A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund,” 53 DePaul L.Rev. 355 (2003).

the amounts distributed by the VCF and their calculation.⁵⁷ The absence of any capacity for would-be plaintiffs to take up the role of participating in governance and the enforcement of legal duties meant that participating in the VCF required that they reduce their interest in their loved ones' death to money. Many, however, felt the need not for compensation but for accountability.⁵⁸ They saw taking up that role—participating in the process of finding out what happened and why and ensuring that any failures in legal duties were made public and corrected—as a way to give meaning to the deaths of their family members. The VCF left them with no way to give meaning to these deaths other than through the currency of dollars and cents. It required them to give up what American democracy treasures: the capacity of ordinary citizens to respond to perceived wrongs with righteousness and to activate the state to respond, through the institutions made available for the dignified and orderly adjudication of those claims. Instead, it required them to be passive, non-participants, mere recipients of the charitable amounts the Special Master deemed, as they saw it, to be the worth of the lives that were lost.

The Special Master did allow for individual hearings on claims, but these hearings were not a substitute for the process of litigation. Rather, they were an opportunity for claimants to talk about their injuries or the person they lost, a response, in the view of the Special Master, to the claimants' "strong need to advise the Fund personally of their circumstances." The Special Master concluded that "the hearing process was integral to the success of the Fund," and that attorneys and claimants had "expressed the view that the hearing process provided a degree of closure, and in some cases, a cathartic experience."⁵⁹ Psychological research, indeed, finds that people are deeply concerned about the fairness of the procedures by which compensation is determined and that fairness perceptions are influenced by the opportunity a victim has to participate through the presentation of evidence and arguments about the harm done.⁶⁰ The compensation frame for the hearings, however, confined the hearings (which, the Special Master reports, rarely lasted more than two hours) to efforts by claimants to use the only currency available to them—money—to demonstrate the "value" of the loss they had suffered.⁶¹ These hearings were specifically *not* an opportunity for claimants to exercise state power and participate in governance, demanding explanations from those they felt could be responsible for contributing to their loss. No judgments were made about responsibility or the failure to observe legal duties.

The Victim Compensation Fund's reduction of the interests of those injured and bereaved by the September 11th attacks to monetary terms is linked to the reduction of "law," particularly tort law, to "greed" and "outrageous and arbitrary" jury awards. It is only if we frame litigation as a money grab that we can think that the only issue at stake in the choice between the VCF's payments and pursuit of a legal action is, which produces more (appropriate) money more quickly? That both critics and participants in the legal system have come to this view of litigation is reflected in the striking fact that the ordinarily disparaging picture of tort plaintiffs as those who frivolously pursue litigation for trivial injuries⁶² as if it were a lottery ticket⁶³ clearly does not apply to

⁵⁷ The Special Master discusses this conflict in his *Final Report*, *supra*, n.20, at 80.

⁵⁸ See Tyler and Hurisdottir, *supra*, n.57.

⁵⁹ Report of the Special Master, at 17.

⁶⁰ Tyler and Hurisdottir, pp. 375–381.

⁶¹ For a discussion of the effort to attach meaning to lives and justice through money in relation to the VCF, see Deborah R. Hensler, "Money Talks: Searching for Justice Through Compensation for Personal Injury and Death," 53 DePaul L.Rev. 417 (2003).

⁶² For a study of the popular culture (including the landscape of jokes) that tort claimants overclaim for minor or non-existent injuries, see Marc Galanter, "The Conniving Claimant: Changing Images of Misuse of Legal Remedies," 50 DePaul L.Rev. 647 (2000).

⁶³ Hensler has observed that the "lottery" metaphor has been popularized by litigation critics. Hensler, *supra*, at 417, n. 3.

those injured or bereaved by the events of September 11th. These potential plaintiffs suffered grievous and public losses. Even highly deserving claimants who turn to law, this view reveals, are turning there only for money. Critics of the system see litigation as an expensive, slow, complicated and irrational system for distributing money—quite apart from whether it accurately identifies appropriate recipients—and so perceive a rationalized administrative scheme such as the VCF as a reasonable substitute. In this view, the function of litigation as an instrument of participatory governance central to American conceptions of democracy is a dead letter.

V. A Better Alternative: Preserving the Democratic Function of Law

Critics of the litigation system are right: although most of the stories told by tort reformers are distorted or flat out false⁶⁴, the system *is* expensive, slow, opaque, and complicated, although not clearly irrational.⁶⁵ Moreover, if we think about the process by which litigation happens—through the purchase of specialized legal services on a market in which attorneys, despite plentiful numbers, still seem able to garner substantial returns on their efforts⁶⁶—it is no surprise that litigation, and law, have become heavily focused on the financial compensation aspects of litigation. Without substantial money at stake, it is simply impossible to pay lawyers to pursue a case on behalf of a client who lacks, as almost all do, substantial private wealth: litigation has become exceedingly expensive.⁶⁷ The families of September 11 victims reportedly faced significant difficulty in finding any lawyer who would take on their cases; they felt channeled into the Fund by the very people they expected to help them pursue their claims in court.⁶⁸ This was, in fact, the rationale for a liability limitation in the Air Transportation Safety and System Stabilization Act: with liability capped at the limits of insurance coverage (\$1.5 billion per plane, \$350 million for the City of New York), it was accurate for lawyers to advise potential clients that the money was not there to pay everyone, including them for their services.

Lawyers needed only to point to the fate of the litigation over the first World Trade Center terrorist attack, the bombing in the parking garage in 1993, to prove to September 11th victims that the law is slow, expensive, and uncertain. That litigation, alleging that the Port Authority failed to take appropriate safety precautions to protect against a foreseeable terrorist attack and brought in New York state court by the families of the six people killed in the attack and those injured in the fire and chaos that ensued—as well as the businesses that lost property and profits due to business interruption and the insurance companies that paid out on insurance claims—was, as of the end of 2004, *still* in pre-trial, some 11 years later. The case had by then already spawned four appellate court decisions addressing disputes over discovery, particularly consulting reports

⁶⁴ Marc Galanter has debunked many of the most notorious cases, including the infamous “McDonald’s Coffee Spill” (in which a woman received third-degree burns from coffee that was served super-heated well beyond industry norms and about which McDonald’s had received 700 earlier complaints). See Galanter, “An Oil Strike in Hell: Contemporary Legends about the Civil Justice System,” 40 *Ariz.L.Rev.* 717 (1998).

⁶⁵ See Galanter, “Real World Torts: An Antidote to Anecdote,” 55 *Maryland L.Rev.* 1093 (1996), for a survey of the empirical work on the tort system that demonstrates that, contrary to popular belief, jury decisionmaking in tort cases tracks the decisions judges and professional arbitrators would reach, scrutinizes plaintiffs’ claims closely, and does not systematically produce arbitrary and capricious awards.

⁶⁶ For a discussion of the market for lawyers, see Gillian K. Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System,” 98 *Mich.L.Rev.* 953 (2000).

⁶⁷ *Id.*

⁶⁸ This is based on private conversations with family members. The Report to Congress by Trial Lawyers Care (TLC) also indicates that the legal profession concluded that the VCF was the best route for most plaintiffs to take. Association of Trial Lawyers of America, *Report to Congress: Thousands of Heroes, The Rest of Us Could Only Help*, at 30 (2004). TLC played an instrumental role in encouraging increased participation in the Fund. TLC Report, at 34–36.

showing that the Port Authority was advised, by anti-terrorism experts it hired in the 1980s, that the underground parking garage was “highly vulnerable to a terrorist attack.”⁶⁹

The delay in the 1993 case presents a tremendous problem from the point of view of the compensation function of the law: those seriously injured and the families of those killed in 1993 have received nothing for their losses; there was no federal fund established to serve the social insurance function that their private insurance may have left unmet. But the democratic function of the case, while clearly severely diminished by delay, has clearly not been rendered pointless. Triggered by the action of private citizens to investigate the nature of the Port Authority’s obligation to protect the occupants of the World Trade Center against harm, the New York court, even at this still preliminary stage, has made important findings about the nature of those duties and the non-frivolous nature of the claim that it may have violated those duties and contributed to the deaths and losses resulting from the bombing. The power of the state—to require the disclosure of documents and testimony revealing what the Port Authority knew about the risks to occupants and what it did about those risks—was marshaled at the behest of private citizens acting through litigation. These are important political determinations in a democratic state, central to the concept of the rule of law and the idea that we are all bound to live within our legal duties to one another. In the American system of government, the private citizen’s capacity to trigger these public determinations is considered vital to the practice of self-government.

We see this function playing out in the litigation that has gone forward with respect to the September 11th attacks. The litigation in the New York federal court involves approximately 70 cases brought by victims and survivors against the airlines, the owners and operators of the World Trade Center, and Boeing, the manufacturer of the airplanes that crashed into the Pentagon and the field in Pennsylvania. Almost two years to the day after the attacks, Judge Hellerstein held that each of these entities had legal duties to the plaintiffs—to provide adequate security screening, to maintain adequate fire safety, including adequate fireproofing and evacuation routes in the event of fire, and to manufacture cockpit doors able to adequately withstand forced entry. Although the specific nature of the attacks might not have been foreseeable, Judge Hellerstein concluded, the nature of the harms that could come from terrorist hijackings, airplane crashes involving injuries on the ground or large-scale fires could be shown by the plaintiffs at trial to be foreseeable.

These are important determinations about the rule of law as it applies to the events of September 11th. Judge Hellerstein, indeed, makes the explicit observation that “while the specific acts of the terrorists were certainly horrific, I cannot find that the WTC Defendants should be excused of all liability as a matter of policy and law on the record before me, especially given the plaintiffs’ allegations regarding the defendants’ knowledge of the possibility of terrorist acts, large-scale fires, and even airplane crashes at the World Trade Center.”⁷⁰

The private citizens who pursued this litigation, through their participation in this democratic institution, are directing state power to a public declaration about what the law requires and where responsibility lies that differs from that expressed in the political branches. Senator McCain urged passage of the ATSSSA to avoid the specter of “regrettable . . . assignment of blame among our corporate citizens.”⁷¹ The 9/11 Commis-

⁶⁹ *In re World Trade Center Bombing Litigation*, 3 Misc.3d 440, 776 N.Y.S.2d 713, 738 (2004), *aff’d*, 2004 N.Y.App.Div. LEXIS 14720. The case survived a summary judgment motion decided in January 2004, affirmed on appeal in December 2004, in which the court concluded that “[t]he Port Authority’s claim that this bombing was unforeseeable strains credulity. . . . The predicted scenario, eerily accurate, in the Port Authority’s security reports, of a vehicle bomb in the garage, and the evidence of bomb threats in the complex, are sufficiently similar in nature to the bombing to raise a triable issue as to foreseeability.” 776 N.Y.S.2d at 736.

⁷⁰ *In re September 11th Litigation*, 280 F.Supp.2d 279, 302 (S.D.N.Y. 2003) (emphasis added).

⁷¹ 147 Cong.Rec. S9589-01, 2001 WL 1703925 (Cong.Rec.).

sion, belatedly established under pressure from many of the same family members who chose to participate in the September 11th litigation, declared that “our aim has not been to assign individual blame.”⁷² Moreover, the Commission’s focus was decidedly not on what private entities—airliners, airplane manufacturers, building owners and managers—might have or should have done to reduce the likelihood and scope of injuries and deaths from the attacks; every recommendation made by the Commission focuses on what government, particularly the federal government, should do differently with respect to foreign policy, counterterrorism efforts, security, intelligence, and immigration control. The attention of the state to the obligations of private entities has been directed not by political efforts but by the litigation efforts of private citizens. This is an important attribute of the American system of self-government. If the judicial branch never reached conclusions or focused on issues at variance with those addressed by the political branches, the judicial branch would not in fact be operating as an independent means of governance.

The fact that there are important democratic functions performed by private civil litigation does not mean that these functions should be as deeply intertwined with the compensation or social insurance function as they are. Nor does it mean that civil litigation should be as complex, opaque, and drawn out as it is, or as dependent on large dollar awards to finance the legal services necessary for the institution to operate. Nor does it mean that there are not potentially significant problems with the nature and type of decisions made in the courts. But it does mean that a serious effort to devise alternatives to the (current) civil litigation system, such as the Victims Compensation Fund, needs to attend separately to both the social insurance function and the democratic function of litigation, and to the way in which the two are linked through the reliance on privately funded litigation services.

As the Special Master and the RAND study conclude, the VCF performed reasonably well as an insurance scheme: it provided benefits to 97 percent of those who lost a family member and thousands of people who were injured in the attacks, at levels that far exceeded the private life or disability insurance many carry. (Recall that any such payments were subtracted from the amount actually distributed to a claimant.) Tort litigation is driven in part by the inadequacies of social insurance, particularly the inadequacies of health insurance for covering the cost of medical care to treat injuries and disability, life and workers compensation insurance to cover earnings lost to injury or death. Moreover, tort litigation as an insurance scheme is highly inefficient, with a large share of the dollars distributed by this “insurance,” possibly more than half, going to the costs of the system, particularly the services of lawyers.⁷³ Gaps in coverage and the costs of using the legal system to obtain insurance benefits motivated in part the establishment of the VCF. Some of the most contentious questions raised about these payments concerned the very fact that they are not available to many who suffer injuries and loss.⁷⁴ Certainly with respect to coverage for economic losses—lost income and medical costs—the VCF provided substantial benefits to a large number of people in a relatively short period of time at low administrative costs.

But this does not mean that the VCF functioned well as a *compensation* scheme. The payments from the Fund are better understood as insurance payments because they were disconnected from the moral accounting that grounds the concept of compensation in payments from injurer to victim. This moral accounting is part of the democratic function of law. The VCF did not provide any substitute for this democratic function: it did not empower those who had been injured to pursue claims against those they believe may have violated their legal duties and contributed to the losses they suffered. Indeed, it required victims and families

⁷² The 9/11 Commission Report: *Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004), at xvi.

⁷³ For a discussion, see Kagan, *supra*, n.53, at 135–38.

⁷⁴ See *Final Report of the Special Master*, *supra*, n.20, at 78–80.

who were otherwise entitled to receive the benefits of social insurance payments through the Fund to relinquish this right in order to participate in democratic self-governance.

There were two methods by which the designers of the VCF could have avoided tying a right to benefit from insurance payments through the Fund to relinquishment of the right to pursue civil claims against those who may have contributed to their losses. One was simply to not require Fund claimants to forego their right to pursue litigation. This could have been achieved without diminishing the success of the goal to protect the airlines and other entities (such as the owners and operators of the World Trade Center and New York City) from “arbitrary and outrageous” punitive damages and bankruptcy-inducing liability. The Air Transportation Safety and System Stabilization Act accomplished most of this goal by limiting liability to the insurance coverage held by these potential defendants. Indeed, the Court has held that the Act’s goal of limiting the financial impact of the attacks on the airlines is “entirely separable” from the goal of providing plaintiffs with an alternative to litigation to obtain compensation: “Limiting liability would have, of itself, provided ample protection for potentially vulnerable defendants.”⁷⁵ Further, the ATSSSA controlled for the risk of a large number of inconsistent legal findings, the “tangle of lawsuits” Senator McCain feared, by establishing that all claims had to be filed in a single, federal, court: the Southern District of New York. The lawsuits filed by approximately 70 victims who did forego the Fund are consolidated in a single case (*In re September 11th Litigation*) in that court.

Overlapping damage awards, for those plaintiffs who chose both to file with the Fund and to pursue litigation could have been easily dealt with. Payments received from the Fund could have been excluded from amounts awarded in litigation, modifying the traditional “collateral source” rule in tort law as applied in the litigation much as the ATSSSA modified the rule for the calculation of payments from the VCF.⁷⁶ Alternatively, amounts received from a tort award could have been taxed to reimburse the Fund (more generally, taxpayers) to avoid double recovery. In this way, the Fund would have operated specifically to fill gaps in coverage provided by other sources of insurance and shortfalls created by the liability limitation of the ATSSSA.

The ATSSSA could also have allowed claimants to go forward with litigation so long as the actions brought did not seek damages as a remedy. Indeed, it is arguable that the ATSSSA, whether deliberately or not, provided precisely this option. Section 405 of the Act states only that “[u]pon the submission of a claim under this title, the claimant waives the right to file a civil action . . . for *damages* sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.”⁷⁷ This would appear to leave the door open to actions for declaratory or other equitable or injunctive relief. The Declaratory Judgments Act specifically authorizes federal courts “in a case of actual controversy within its jurisdiction, . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the full force and effect of a final judgment or decree and shall be reviewable as such.”⁷⁸ Such a remedy clearly serves the democratic function of civil litigation, giving those injured and bereaved by the September 11 disaster the opportunity, separate from monetary considerations, to marshal the power of the state to call those they believe contributed to their losses to account, requiring testimony and documents to be

⁷⁵ *Virgilio v. Motorola, Inc.*, 307 F.Supp.2d. 504, 515 (S.D.N.Y. 2004).

⁷⁶ The “collateral source” rule requires that juries not take into account other sources of compensation or insurance received by the plaintiff in calculating its award. For a discussion of the collateral source rule and the VCF, see Kenneth S. Abraham and Kyle D. Logue, “The Genie and the Bottle: Collateral Sources Under the September 11th Victim Compensation Fund,” 53 DePaul L.Rev. 591 (2003).

⁷⁷ Public Law 107-42, §405(c)(3)(B)(i) (emphasis added).

⁷⁸ 28 U.S.C. §2201(a).

produced that might reveal the failure to observe legal duties and to obtain, if appropriate, a public authoritative statement that legal duties were violated.

The connection to money in such a suit remains, however, through the market for legal services. Without the capacity to offer an attorney a share of a possible damages award, declaratory plaintiffs face the problem that most individuals face in exercising their right to pursue civil litigation: paying for it.⁷⁹ It is possible that the outpouring of *pro bono* legal assistance offered to September 11th victims and families (Trial Lawyers for Care, for example, reports that 1,100 lawyers working *pro bono* assisted 1,700 families to “seek justice” through the Fund⁸⁰) might have extended to legal assistance in filing declaratory judgment suits.

The difficulty that families wishing to pursue claims for damages faced in finding even contingency-fee legal representation, however, suggests that it may have been hard in fact to obtain the legal services necessary to bring a declaratory judgment action. Even if legal services were provided *pro bono*, the non-attorney fee costs of pursuing such litigation would likely have been very substantial. For those purposes, plaintiffs would have needed to pool their resources in a collective class action. It is an open question, one that would have been answered by the victims and families themselves instead of pre-empted by Congress, whether they would have considered this a proper use of the funds they received from insurance, charities, and the VCF.

A second method of preserving the democratic function of civil litigation while crafting an alternative to the cost and complexities of the legal system would have been to provide for an alternative forum that, in addition to insurance payments, provided victims and families with a streamlined version of the essential powers of a civil lawsuit. Judges with subpoena power and the capacity to issue declaratory judgments could have convened public mini-trials. Plaintiffs and their lawyers—perhaps operating through a steering committee (as is common in large class or consolidated actions)—could have been authorized to seek limited testimony and documents relevant to the declaratory judgments sought.

The unwieldy nature of modern litigation stems largely from the fact that it is incapable of standing back and determining what is an appropriate amount of time and cost to devote to the airing of an issue; it must follow, in large part without regard to such considerations, the dictates of procedure established in accordance with the principle that there is an infinite value on increased accuracy in legal findings.⁸¹ But the VCF, particularly as implemented through the Special Master’s regulations, reflected a judgment that compromises have to be made in determining how to provide fair and generous payments to the injured and the families of victims while remaining true to the needs for fiscal responsibility, uniformity, simplicity, speed, and so on. So too could an alternative litigation regime have been crafted to balance the goals of allowing private citizens to challenge the conduct of those who might have failed to live up to their legal obligations with the need to keep the cost and time devoted to such an effort within reasonable bounds. These are, for example, the same judgments that had to be made by Congress in establishing the terms of reference and budget (originally set at \$3 million⁸²) for the 9/11 Commission.

⁷⁹ Thirty years ago, legal scholars (in a headier time for socially progressive policies) argued that access to legal services was an essential requirement of a just society that operated a legal system sufficiently complex to require expert services to effectively obtain the rights they held. See Frank Michelman “The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights,” 1974 *Duke L.J.* 527 (1974), and, more recently, David Luban, *Lawyers and Justice: An Ethical Study* (1988).

⁸⁰ Association of Trial Lawyers of America, *Report to Congress: Thousands of Heroes, The Rest of Us Could Only Help*, at 6 (2004).

⁸¹ Hadfield, “The Price of Law,” *supra*, n.65, at 964–68.

⁸² P.L. 107-306, §611(a). This amount was later increased to \$15 million.

Opposition to such solutions would only have revealed the more fundamental hostility to civil litigation, precisely in its democratic function, that the ATSSSA embodied. An underlying question in the tort reform debate is whether the critics of the tort system truly are concerned about the “arbitrary and outrageous” amounts of money it allegedly awards⁸³ and the “greed of trial lawyers” who have made a business out of pursuing low-value class actions that guarantee them high fees even when the benefits obtained for class members are small; or whether the real objection to civil litigation is the democratic opportunity that civil litigation gives to ordinary, private citizens to participate in investigating and evaluating the conduct of others, particularly large otherwise powerful institutions such as corporations and governments. The ATSSSA did not, it is important to note, seek to stem the flood of *business* litigation that the attacks would precipitate, although research shows that most punitive damages outside of the intentional tort area are awarded in business litigation.⁸⁴ As of the end of 2004, over 40 written decisions in business (mostly insurance) litigation had been issued by courts hearing cases involving the attacks. Numerous business entities have filed tort actions (for property damage and business interruption losses, as well as subrogation of these claims and personal injury claims on which insurers may pay out) against precisely the defendants the ATSSSA proponents said they sought to protect against litigation, including the airlines, airline manufacturers, security screening firms, and the entities that built, owned, and operated the World Trade Center, etc.⁸⁵

Civil litigation, especially in the United States, with its broad rights of discovery and broad discretion to judges, is an extraordinary democratizing instrument. It extends to ordinary citizens the capacity that powerful entities can exercise, and to which tort reform concerns appear not to extend, to hold others to their legal duties. It is the only way that a housewife from New Jersey, for example, can make the President of American Airlines or the owner of the World Trade Center show up and answer questions about her husband’s death, demanding information about what security screening procedures were followed or not and why, what fire safety measures were taken or not and why. In doing so, she does not rely on elected politicians to ask these questions for her: they may be uninterested, too busy, or face political penalties. Rather, she does it for herself. The ATSSSA did not have to deny her this opportunity in extending to her the insurance benefits of the VCF.

VI. Conclusion

The events of September 11, 2001 laid bare the foundations not only of the Twin Towers in downtown Manhattan but also of American ambivalence about a central democratic institution: the civil justice system. American democracy is built on the idea that ordinary individuals can participate in governance, taking action to ensure the laws are followed by activating and indeed to some extent directing, the power of the state through the judicial branch. American businesses have relied on the availability of the courts to resolve their disputes about how their losses caused by the terrorist attacks should be distributed. But Congress sought to divert non-business entities out of the courts, rushing to provide an “alternative” source of “compensation” which it would make available to anyone who waived their right to litigate their disputes with those who may have contributed to their losses. In collapsing the “compensation” (actually insurance, for “compensation”

⁸³ Nearly all studies find that punitive damages awards are in fact rare and generally fairly predictably correlated with compensatory damages. See Theodore Eisenberg, “The Predictability of Punitive Damages,” 26 *J. Legal Studies* 623 (1997).

⁸⁴ *Id.* at 623.

⁸⁵ See, e.g., *Aegis Insurance Services, Inc. v. 7 World Trade Center Co., L.P.*, No. 1:04-cv-07272-AKH (S.D.N.Y.) (negligence, product liability and breach of warranty claims for property damage and other losses, jury trial demanded.); *Industrial Risk Insurers v. AMR Corp.*, No. 1:04-cv-07234 (S.D.N.Y.) (suit for property and other damages filed by subrogees of World Trade Center owners).

implies a payment from one who caused an injury to a person harmed by that injury) function of the civil justice system with its democratic function—requiring access to one be purchased through disavowal of the other—Congress contributed to the erosion of democratic commitment to litigation as an important means by which the “rule of law” is honored.

The Victim Compensation Fund was, as the Special Master concluded, a generous expression of shared loss by the American public and served well to fill the gaps in other sources of social insurance. But by tying access to that insurance to the waiver of civil litigation, the VCF went farther than it had to and farther than it should have.

The problems with civil litigation—its extraordinary cost, complexity, and slowness—are real, and require real solutions. But closing off the courts is not among the solutions a democratic society should entertain. Congress had the opportunity, and still does, to devise a democratic response to the problems of civil litigation. An alternative in cases of mass tragedy such as September 11th could well provide both for democratic commitments and a reasonable and contained process. “Reasonably just substitutes” for civil actions should, perhaps constitutionally must, provide a substitute not only for the money plaintiffs might recover through this means, but also for the opportunity civil litigation gives ordinary citizens to participate in the institutions that give meaning to the rule of law.