

WHOLE AGAIN? STATUTORY COMPENSATION SCHEMES AS A TORT ALTERNATIVE IN THE AFTERMATH OF TERROR ATTACKS

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I. INTRODUCTION

Acts of terrorism committed by Al-Qaeda upset the traditional tort system in many common law countries. Terrorist attacks can make both criminal repercussions and civil recovery nearly impossible. So, who assumes the role of tortfeasor in a terrorist attack? Is it the airline that owned the airplane the terrorists crashed into a tower, the public entity that owns and operates the trains that carried the victims when the bomb exploded, or the company that created the security system that failed to detect the explosive devices?

Typical tort regimes refrain from assigning liability to these less blameworthy parties in light of the horrendous, deliberate acts of the terrorists who actually caused the harm.¹ However, Al-Qaeda is a faceless entity without any coherent legal structure that can sustain liability.² Without any information on the group's solvency or accountability, recovery in civil suits against the organization is virtually impossible. In the wake of Al-Qaeda attacks, Spain,³ the United Kingdom

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1. See Kenneth S. Abraham, *United States of America: Liability for Acts of Terrorism under U.S. Law*, in 11 TORT & INSURANCE LAW, TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 176, 183 (Bernhard A. Koch ed., 2004) (explaining that liability is less likely to be imposed on a negligent third party because the actions of an intentional wrongdoer are more blameworthy).

2. See Lloyd Dixon & Rachel Kaganoff Stern, *Compensation Policies for Victim's of Terrorism*, RAND CORPORATION, <http://www.rand.org/pubs/periodicals/rand-review/issues/rr-08-02/compensation.html> (last visited Oct. 8, 2016) (explaining the difficulty of terrorism compensation through the tort system, as the parties primarily responsible for the damages are beyond U.S. courts).

3. Immediately after the attacks, Spanish officials speculated that Euskadi Ta Askatasuma (ETA), a separatist group known to conduct terrorist campaigns throughout Spain, had committed the attacks in Madrid due to the attack's close proximity in time to the upcoming election. Although Al-Qaeda was eventually designated as the group responsible for the attack, many still speculate whether ETA was behind the attacks after all. See Giles Tremlett, *ETA or al-Qaida? 192 Killed and 1,400 Injured in Train Bombings*, GUARDIAN (Mar. 12, 2004, 5:51 AM), <http://www.theguardian.com/world/2004/mar/12/spain.gilestremlett2> (quoting Spanish officials as targeting ETA as a prime suspect in the Madrid bombings); see also Mathieu Miquel, *March 11, 2004 in Madrid: Was it Really an Islamist Attack?*, VOLTAIRENET (Nov. 28, 2009), <http://www.voltairenet.org/article163076.html> (explaining that even five years after the attacks there is still a deep divide among journalists and media outlets in Spain as to whether ETA or Al-

(U.K.), and the United States (U.S.) have each dealt with victim recovery through varied compensation schemes. After the Madrid bombings on March 11, 2004 (Madrid Bombings), Spain used a combination of legislation and publicly subsidized government insurance to compensate victims and their families.⁴ Following the bombings in London (London Bombings) on July 7, 2005, the U.K., through a government entity, utilized a claim system and used traditional tort principles to assess damages, which were disbursed from a compensation fund.⁵ Lastly, victims of the September 11, 2001 attacks (9/11 attacks) in the U.S., as well as victims' estates, received compensation through a congressionally-created compensation fund; funds were dispersed through informal claims hearings administered by a neutral arbiter.⁶ Unlike those in the U.K. and Spain, the U.S. compensation scheme received harsh criticism⁷ for its lack of congressional guidelines⁸ and the apparent unhindered power of the sole arbiter.⁹

This comment argues that the U.S. should implement a compensation scheme utilizing rules akin to the detailed statutory guidelines provided for in Spain's civil system.¹⁰ These guidelines should then be administered by a neutral agency with government accountability, similar to the agency in the U.K.'s civil compensation

Qaeda was responsible for the Madrid bombings); *see also* Elaine Sciolino, *Spain Struggles to Absorb Worst Terrorist Attack in Its History*, N.Y. TIMES (Mar. 11, 2004), <http://www.nytimes.com/2004/03/11/international/europe/11CND-TRAI.html> (reporting that counterterrorism officials in Spain and the U.S. held open the possibility of Islamic terrorism for the Madrid bombings).

4. *See* Mikel Buesa and Javier González-Gómez, *The Economic Cost of 3/11*, in THE ECONOMIC REPERCUSSIONS OF TERRORISM 62, 70 (Mikel Buesa & Thomas Baumert eds., 2010) (detailing the amount of compensation paid to victims by the state of Spain after the Madrid bombings in 2004).

5. *See* LAW LIBRARY OF CONGRESS, DIRECTORATE OF LEGAL, LL FILE NO. 2008-00084, UNITED KINGDOM: COMPENSATION FOR VICTIMS OF TERRORISM (2007) (examining two similar programs in Great Britain and Northern Ireland that offer compensation for victims of terrorism.).

6. *See* Peter H. Woodin, *The September 11th Victim Compensation Fund of 2001*, in 11 TORT AND INSURANCE LAW, TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 197, 197–200 (Bernhard A. Koch ed., 2004) (outlining the creation, implementation, and reaction to the compensation fund for victims of the Al-Qaeda attacks on September 11).

7. *See* George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 527 (2003) (“[T]he September 11th Fund has generated remarkable controversy. Virtually all of its individual components have been criticized in some form.”).

8. *See* Tracy Hresko, *Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund*, 42 GONZAGA L. REV. 95, 128 (2006) (“Had Congress provided clearer guidelines, many of the problems in the administration of the Fund probably could have been avoided.”).

9. *See* Josh Meyer, *Veteran Mediator to Oversee Fund for Attack Victims*, L.A. TIMES (Nov. 27, 2001), <http://articles.latimes.com/2001/nov/27/news/mn-8666> (naming Kenneth R. Feinberg as the sole arbiter of the September 11th compensation fund).

10. *See* Regulations on Benefits and Compensation to Victims of Terrorist Crimes art. 1.2 (B.O.E. 2003, 5455) (Spain) [hereinafter RAVT] (noting the factors upon which compensable damages will be based); Solidarity with the Victims of Terrorism (B.O.E. 1999, 20063) (Spain) [hereinafter LSVT] (proclaiming that in recognition of the suffering endured by victims of terrorist acts, the State will provide compensation that is due to them).

scheme.¹¹ By doing so, the U.S. can utilize the stability and neutrality of these combined systems to overcome the criticism of its first attempt at compensating victims of terror for future compensation schemes.

Although much of the information about such compensation funds is gathered through comparative surveys on states' tort responses to terrorism, this comment will specifically compare the responses of Spain, the U.K., and the U.S. after the terrorist attacks conducted by Al-Qaeda in each of the respective countries.¹² Part II will discuss Spain's tort system and its response in terms of compensation to the victims of the March 11, 2004 Madrid Bombings. Part III will then turn to the U.K., discussing its tort system and response to the London Bombings. Both Parts II and III will discuss the successes, failures, and public reception of the respective compensation schemes. Part IV will look to the September 11th Victims Compensation Fund enacted by the U.S. government to compensate victims of the 9/11 attacks orchestrated by Al-Qaeda. Finally, Part V will discuss my contention that a combination of all three tort responses is necessary for future civil recovery for the victims from domestic and foreign terrorist attacks in the U.S. This section will also examine the potential issues of such a compensation scheme. I will conclude that a legislatively-created compensation fund (similar to Spain's)¹³ administered by a neutral agency (similar to the U.K.'s)¹⁴ is necessary to achieve the tort goals of compensation and distribution of losses in the wake of domestic and foreign terrorist attacks in the U.S.

II. SPAIN'S CIVIL SYSTEM AND RESPONSE TO TERRORISM

The Spanish civil law system aims to compensate the victims of civil wrongs. Wronged individuals can seek compensation from statutory provisions in the Civil and Penal Code, social insurance, funds created by legislation, and civil litigation.¹⁵ For example, Spain utilized a combination of awards from social insurance, funds created by litigation, and awards from civil litigation to compensate the victims of the Madrid Bombings of 2004.¹⁶

11. *See What We Do*, CRIMINAL INJURIES COMPENSATION AUTHORITY, <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority> (last visited Nov. 16, 2015) (describing the role of the U.K.'s compensation authority in compensating victims of terrorism).

12. For a more in-depth comparative survey of post-9/11 European tort law, *see generally* 11 TORT & INSURANCE LAW, TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY (Bernhard A. Koch ed., 2004).

13. *See Buesa & González-Gómez, supra* note 4, at 69 (describing Spain's terrorism compensation scheme).

14. *See UNITED KINGDOM: COMPENSATION FOR VICTIMS OF TERROR, supra* note 5 (describing the U.K.'s terrorism compensation scheme).

15. *See Buesa & González-Gómez, supra* note 4, at 69 (describing the Spanish compensation system).

16. *Id.*

A. *Statutory, Social Insurance, Legislation and Litigation*

In Spain, civil wrongs are classified into three categories: obligations imposed by law, obligations that arise from contractual or quasi-contractual relations, and obligations arising from the general duty not to harm anyone—whether they arise from crimes or not.¹⁷ Article 1902 of the Spanish Civil Code (Código Civil or Civil Code) acts as the basis for actions arising from civil obligation: “the person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damage caused.”¹⁸ When this act or omission is criminal in nature, Article 1092 of the Civil Code dictates that the action is governed by the Penal Code.¹⁹ In turn, Article 109 of the Penal Code (Código Penal or C.P.) provides that every person criminally liable for a crime or misdemeanor is also civilly liable.²⁰ The rest of the chapter in the C.P. details the extent of liability established by Article 109,²¹ the availability of compensation to relatives of the victims and third parties,²² as well as mitigation of damages in accordance with the comparative fault of the victim.²³

Chapter II of Title V of the C.P. discusses civil liability in more detail.²⁴ Article 116.1 provides that every person who is criminally responsible for a crime or a misdemeanor is also civilly liable for an act which gives rise to damages.²⁵ Furthermore, all principals and accessories are held jointly and severally liable for their portion of the damages as well as the other responsible parties’ portions.²⁶ When addressing civil liability arising from a criminal act, a Spanish court will determine civil liability at the same time that it delivers the verdict for the criminal

17. See Clyde A. DeWitt, *The Position of the Law of Torts in the Spanish System*, 6 MICH. L. REV. 136, 139 (1907) (providing a framework of various provisions of Spanish codes in order to convey the law of private wrongs in the Spanish system).

18. THE RECOVERY OF NON-PECUNIARY LOSS IN EUROPEAN CONTRACT LAW 124 n. 44 (Vernon V. Palmer, ed., 2015) (citing C.C. art. 1902 (B.O.E. 1889, 4763) (Spain)).

19. Article 1092 of the Civil Code reads: “Civil obligations arising from crimes or misdemeanors shall be governed by the provisions of the Criminal Code.” C.C. art. 1902 *translated in* SPANISH CIVIL CODE 131 (Ministerio de Justicia: Secretaría General Técnica ed., Sofía de Ramón-Laca Clausen trans., 2009) (emphasis added).

20. “In all cases, the party damaged may opt to sue for civil liability before the Civil Jurisdiction.” C.P. art. 109.2 (B.O.E. 1995, 25444) (Spain) *translated in* CRIMINAL CODE 39 (Ministerio de Justicia: Secretaría General Técnica ed., Clinter Traducciones e Interpretaciones S.A. trans., 2011).

21. See C.P. art. 110 (B.O.E. 1995, 25444), *supra* note 20, at 39 (“The liability established in the preceding Article includes: 1) Restitution; 2) Repairing the damage; 3) Compensation of material and moral damage.”).

22. See C.P. art. 113 (B.O.E. 1995, 25444), *supra* note 20, at 39 (“Compensation of material and moral damages shall include not only those caused to the victim, but also those caused to relatives thereof or third parties.”).

23. See C.P. art. 114 (B.O.E. 1995, 25444), *supra* note 20, at 39 (“Should the victim have contributed to causing the damage or loss suffered with his conduct, the Judges or Courts of Law may mitigate the amount of reparation or compensation.”).

24. See *generally* C.P. art. 116–122 (B.O.E. 1995, 25444), *supra* note 20, at 40–41.

25. C.P. art. 116.1 (B.O.E. 1995, 25444), *supra* note 20, at 40.

26. C.P. art. 116.2 (B.O.E. 1995, 25444), *supra* note 20.

charges.²⁷ However, prosecutors are able to waive the determination of civil liability within the criminal proceeding and allow the individual to pursue the civil litigation within the civil jurisdiction.²⁸ Spanish legislation addresses terrorism in several ways.²⁹ For example, “[t]he Penal Code . . . punishes as ‘crimes of terrorism’ those criminal offences that aim to ‘subvert the constitutional order or to seriously disturb the public peace’ . . . or to ‘contribute to these ends by terrorizing the population or part of it . . .’³⁰ Articles 576–579 of the C.P. were amended by the Organic Act of 2000³¹ to deal with specific acts of “urban terrorism”³² conducted by the armed Basque nationalist and separatist organization, Euskadi Ta Askatasuna (ETA).³³ The Organic Act of 2002 “extend[ed] crimes of terrorism to [include acts that do] not involve a risk to life or physical integrity . . . even if fire or destruction have not been brought about by means of explosives or weapons.”³⁴

Before the passage of the Organic Act of 2002, innocent citizens repeatedly were unintended victims of the attacks meant to further the political goals of ETA, and were often left without recourse for damage to their property and person.³⁵

27. See Carlos Gómez-Jara Díez & Luis E. Chiesa, *Spain*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 488, 495 (Kevin Jon Heller & Markus D. Dubber eds., 2011) (describing how and why Spanish courts typically adjudicate civil and criminal liability in the same proceeding).

28. See *id.* (indicating that, although uncommon, prosecutors have the option to waive the combination of criminal and civil proceedings). Unlike the U.S. criminal adjudication system where only the state may prosecute the alleged offender, in Spain, victims and their families may hire a private prosecutor to represent their interests in the criminal proceeding. For the sake of judicial economy, the Spanish system allows the victims of the crime to pursue their civil claim through the criminal proceeding. *Id.*

29. See, e.g., C.P. art. 571–580 (B.O.E. 1995, 25444), *supra* note 20.

30. Miquel Martín-Casals & Jordi Ribot, *Spain: Liability for Acts of Terrorism under Spanish Law*, in 11 TORT AND INSURANCE LAW, TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 88, 88 (Bernhard A. Koch ed., 2004) (citing C. P. art. 571–580, 577 (Spain)).

31. Organic Act of 2000 (B.O.E. 2000, 308) (Spain).

32. Martín-Casals & Ribot, *supra* note 30, at 88 n.1.

33. ETA grew out of the Basque Nationalist Party and uses terrorism as part of its campaign for an independent Basque nation. For finances, ETA relies primarily on robberies, kidnappings and “revolutionary taxes” extorted from businessmen. Continued violence led to reaction by the Spanish government to suppress the group. See *generally* ETA, ENCYCLOPAEDIA BRITANNICA <http://www.britannica.com/topic/ETA> (last visited Oct. 17, 2016).

34. Martín-Casals & Ribot, *supra* note 30, at 88 n. 1. Article 9 of the Organic Act “declar[es] a political party as illegal and dissolve[s] it if it ‘complements and gives political support to the activity of terrorist organisations . . . to attain their ends of subverting the constitutional order or seriously disturb the public peace.’” Martín-Casals & Ribot, *supra* note 30, at 88–89. See Organic Act of 2002 (B.O.E. 2002, 12756) (Spain) (providing for the dissolution of an illegal political party).

35. Although “civil claims may be exercised in Spain within . . . criminal proceedings,” it is costly and unpredictable as to whether victims will ultimately receive compensation through the criminal justice system should the prosecutor waive the right to pursue the civil claim within the criminal proceedings. See Díez & Chiesa, *supra* note 27, at 495 (describing the combination of civil and criminal proceedings).

Against the backdrop of ETA, the Spanish Penal Code evolved to allow public prosecutors to tie civil liability to repeated attacks of terrorist organizations.³⁶ A public prosecutor could decide whether to pursue civil liability—either through the criminal trial or civil litigation—and the victims and their families could then turn to social insurance to seek compensation.³⁷

1. Social Insurance Compensation

Social insurance is a type of social security, whereby citizens of a state or nation make compulsory monetary contributions to a government assistance program that insures against economic harm.³⁸ The Consortium for Insurance Compensation (Consortio de Compensación de Seguro or the Consortium) is a public corporation within the Ministry of the Economy.³⁹ The Consortium boasts that it is “the central figure in a system for indemnifying catastrophic losses that is unique in the world.”⁴⁰ Before 2001, insurance companies in Spain barely accounted for the risk of attacks in their cost of insurance—after the 9/11 attacks, insurance companies changed how they assessed the probabilities and exclusions for victims of terrorism.⁴¹ However, direct damage to persons or property that occurred as a result of a terrorist attack falls under the gamut of the Consortium.⁴² As with most other insurances, the Consortium’s maximum compensation is for the insured amount.⁴³ Although this is better than relying solely on private insurance, which does not cover direct damage at all, third parties, such as rescue personnel, are left without coverage.⁴⁴ Those who have suffered permanent injury or the families of the deceased can pursue compensation through the social security program.⁴⁵

After victims have utilized social insurance options, victims can turn to compensation from the Regulations on Benefits and Compensation to Victims of

36. See, e.g., C.P. art. 109 (B.O.E. 1995, 25444); see also Díez & Chiesa, *supra* note 27, at 495 (describing the combination of civil and criminal proceedings).

37. See Martín-Casals & Ribot, *supra* note 30, at 95 (noting the establishment of government compensation schemes for victims that do not require a finding of fault).

38. See generally, *Social Insurance*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/social-insurance> (last visited Oct. 17, 2016).

39. See Martín-Casals & Ribot, *supra* note 30, at 90.

40. *Historical Background*, CONSORCIO DE COMPENSACIÓN DE SEGUROS, www.conorseguros.es/web/le_ic_pd_th (last visited Sept. 20, 2015).

41. See Joost Heijs & Thomas Baumert, *Direct and Sectorial Impact of the 3/11 Attacks on the Economy of the Community of Madrid*, in *THE ECONOMIC REPERCUSSIONS OF TERRORISM* 129, 162 (Mikel Buesa & Thomas Baumert eds., 2010) (analyzing the economic effects of the Madrid bombings and concluding that they were limited in quantity and time).

42. *Id.*

43. See *id.* at 91 (indicating that the Consortium only covers insured persons and therefore limits recovery to the insured amount).

44. See *id.* (indicating that coverage extends only to direct events caused by terrorism).

45. See *id.* at 94 (“[E]very permanent disability or death resulting from a terrorist attack gives rise to the entitlement to an extraordinary pension for terrorist attacks from the social security.”).

Terrorist Crimes (RAVT).⁴⁶ Applicants can receive compensation from the State for personal injury (both bodily and mental), property damages, expenses for provisional accommodation, and damage caused to private vehicles.⁴⁷ RAVT references the duty of the State to its citizens to safeguard peace and public safety.⁴⁸ By enacting the RAVT through legislation, Spain has codified the relationship in terms of civil liability towards its citizens. In theory, the State is imposing the duty towards its citizens upon itself “as an act of solidarity with its victims.”⁴⁹ However, this could also be a guard against Spanish citizens bringing suit against their government. With these protections in place, the public funds that would be used to finance the administration of numerous suits against the government can be diverted to rebuilding public property. Furthermore, the risk becomes distributed amongst the forms of social insurance, such as the Consortium, along with compensation funds comprised of taxpayer money.

2. Legislation

Along with the public benefits from RAVT, the law on Solidarity with the Victims of Terrorism (LSVT) essentially makes the Spanish government a guarantor of the damages for which the terrorists are responsible.⁵⁰ Pursuant to Art. 2.1 LSVT:

The victims of terrorism or of acts perpetrated by one or more persons pertaining to armed gangs or groups or who act with the aim of seriously disturbing social peace and public safety will be entitled to obtain compensation from the State, which as a way of an exception will pay the corresponding damages awards on account of tort liability and according to the provisions of this Act.⁵¹

Again, the Spanish government does not see this as an assumption of what it deems “subsidiary liability” under the Penal Code.⁵² Instead, it labels the legislation as an act of solidarity with the victim.⁵³ By doing so, it satisfies the compensatory aims of tort law without admitting further liability or any breach of duty on the part of the government.⁵⁴ This tactic also has a deterrent effect, but not in the traditional sense of tort law. Instead of deterring future terrorist actors, the Spanish government deters further litigation through the LSVT. Rather than using funds for unpredictable civil litigation, it can divert the funds into a definitive

46. *Id.* at 95 (indicating that the government’s obligation to pay compensation is not dependent on any assumption of liability).

47. RAVT art. 2 (B.O.E. 2003, 5455) (Spain), *supra* note 10.

48. *Id.*

49. Martín-Casals & Ribot, *supra* note 30, at 94.

50. *Id.* at 95 (citing LSVT (B.O.E. 1999, 20063) (Spain)).

51. *Id.* (translating Solidarity with the Victims of Terrorism art. 2.1 (Spain)).

52. *See id.* (“The grounds of the State’s payment obligation are not to be found in any assumption of subsidiary liability of the State, but in the principal of solidarity towards the victims. . .”).

53. *Id.*

54. *Id.*

award for the victims and then use any excess funds towards rebuilding the public infrastructure.⁵⁵

3. Litigation and Subsidiary Liability of the Spanish Federal Government

Despite the social insurance and public benefits offered by the State, individuals can still seek compensation through civil litigation against the public administration they allege is subsidiarily responsible for damages. A seminal case, *Sentencia Audiencia Nacional* (S.A.N.) June 22, 1999 (R.J. 1999, No. 4137), set the precedent that the Consortium can subrogate the claims of the victim against the tortfeasor.⁵⁶ In this case, the armed forces of Spain engaged in a controlled detonation of a car bomb that was initially planted by ETA.⁵⁷ The controlled detonation caused over €18,000 worth of damage to a neighboring property.⁵⁸ The property damage was covered by the Consortium, governed by Article 6.1 of the *Estatuto Legal del Consorcio de Compensación de Seguros*,⁵⁹ “which . . . also has the legal duty to cover the extraordinary risks resulting from ‘action of the armed forces or of the security forces of the State in peacetime.’”⁶⁰ This decision acknowledges that the victim may instigate legal action on top of seeking compensation from the Consortium, with the Consortium subrogating any recovery that results from the legal action.⁶¹ Apart from the S.A.N. case, there is limited case law finding the State liable for acts of terrorism.⁶²

In traditional Spanish tort law, the Spanish State has a duty to guarantee public safety.⁶³ However, this does not make the State a guarantor against any and all harm.⁶⁴ When a terrorist attack occurs, it is the terrorist’s actions, and not the State’s, that directly causes the harm.⁶⁵ A terrorist takes on the role of an intervening actor and breaks the chain of causation.⁶⁶ However, if the State or public entity acted as an “enabler” in that its actions caused the danger of damage,

55. Countless scholars have attempted to calculate the economic impact of terrorism on nation states. For a comprehensive estimate of this impact, see ANDREW STANIFORTH, *THE ROUTLEDGE COMPANION TO UK COUNTER-TERRORISM* 201 (Fraser Sampson, ed., 2013) (estimating Spain’s total cost of compensation for the victims of the Madrid bombings at €1.34 million).

56. Martín-Casals & Ribot, *supra* note 30, at 97 (citing S.A.N., June 22, 1999 (R.J. 1999, No. 4137) (Spain).

57. *Id.*

58. *Id.*

59. (B.O.E. 2004, 18910) (Spain).

60. Martín-Casals & Ribot, *supra* note 30, at 97.

61. *Id.*

62. *See id.* (“Spanish case law specifically related to the topic of tort liability on the occasion of terrorist attacks is very scarce and is confined to the very few judgments in which the Spanish courts have held that the public bodies are liable for not having taken the measures required in order to prevent the terrorist attack itself or that it caused damage to the citizens.”).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

then the law holds them responsible for the subsequent damage suffered.⁶⁷ In the three Spanish Supreme Court cases addressing this issue, the court determined that there was a possibility that the public body was capable of preventing or reducing the harm.⁶⁸

In 1988, the parents of a child brought a tort liability claim against the Ministry of the Interior for failing to secure a backpack bomb.⁶⁹ During the night of June 25, 1982, a mysterious backpack was placed in front of an electric company's offices.⁷⁰ Although local police were alerted and notified the National Police, the National Police deactivation service failed to respond.⁷¹ "[I]n the early hours of the morning . . . the son of the plaintiffs saw the backpack and kicked it . . . causing it to explode."⁷² The Spanish Supreme Court found the National Police directly liable for the boy's death.⁷³ The justices explained this by stating:

[T]he security forces of the State (i.e. the National Police), which were the forces that had the technical means to prevent such crimes from happening within reach, despite having been alerted in time, did not act as could have been ordinarily required of them.⁷⁴

In the court's view, the National Police's lack of a timely response to a real threat of terrorism substantially contributed to the boy's death, despite the actual placement of the backpack constituting an act of terrorism.⁷⁵

The Spanish Supreme Court followed this reasoning in two subsequent judgments against the Spanish Ministry of the Interior in 1996 and 1997.⁷⁶ Both cases arose out of the 1987 shopping center bombing in Barcelona conducted by ETA,⁷⁷ known as the Hipercor bombing.⁷⁸ After taking responsibility for the act,

67. See Martín-Casals & Ribot, *supra* note 30, at 97–98 (indicating that if public authorities could have prevented or reduced an existing harm, the public administration also becomes directly liable).

68. *Id.* at 98.

69. *Id.*

70. *Id.*

71. *Id.* This was during the time that ETA was launching a terrorist campaign against the electrical company. *Id.*

72. *Id.*

73. *Id.*

74. Martín-Casals & Ribot, *supra* note 30, at 98 *translated in* S.T.S., Dec. 27, 1988 (R.J. 1988, No. 9706) (Spain).

75. See S.T.S., Dec. 27, 1988 (R.J., No. 9706) (Spain) (finding liability on behalf of the security forces for not acting reasonably).

76. See Martín-Casals & Ribot, *supra* note 30, at 98 *translated in* S.T.S., Jan. 31, 1996 (R.J., No. 474) (Spain); S.T.S., July 18, 1997 (R.J., No. 6083) (Spain) (discussing rulings on tort liability claims by victims of the 1987 Hipercor bombings against the Ministry of the Interior).

77. *Id.*

78. See Richard Warnes, *Hipercor Supermarket Bombing*, in 1 *ENCYCLOPEDIA OF TERRORISM* 306, 306–07 (Peter Chalk, ed., 2013) (labeling the Hipercor bombing as ETA's deadliest and most indiscriminate attacks in its history). Three ETA operatives parked a stolen car containing a bomb in a parking garage of a crowded shopping center in Barcelona. The bomb blew a hole through the ground floor of the shopping center and started a fire, killing twenty-one

ETA claimed that they had called police with a bomb threat, detailing the time and place of the attack.⁷⁹ However, the police failed to take the threat seriously and did not evacuate the supermarket.⁸⁰ When the victims of the bombing brought suit against the Ministry of the Interior, the Spanish Supreme Court again followed the reasoning of the S.A.N. court and found that the police were subsidiarily responsible due to their lack of a reasonable response.⁸¹ The Spanish Supreme Court stated that because the police doubted the warning of the attack, they failed to enact the precautionary measures required that could have avoided the massacre.⁸² This failure to act led to the government's subsidiary responsibility despite the terrorist bombing being an intentional tort.⁸³

As a final example of finding subsidiary liability, the Spanish Supreme Court held the Spanish government liable for “the explosion of a letter-bomb addressed to the 1992 General Commission of the World Exhibition in Seville [Spain].”⁸⁴ The bomb exploded in the headquarters of the Exhibition⁸⁵ and the court “held that the State [should have had] technical security equipment for the detection and inspection of explosive objects . . . because both the 1992 Barcelona Olympic Games and the Seville World Exhibition were known targets for . . . terrorist gangs.”⁸⁶

B. The Madrid Bombings

On March 11, 2004, ten near-simultaneous bombs exploded in four trains in and around Atocha Station in Madrid's city center.⁸⁷ The attack serves as the deadliest terrorist attack in Spain's history, killing 191 people and wounding more than 1,800.⁸⁸ The attack occurred just days before the general election, leading the

civilians and injuring over thirty. *Id.*

79. *Id.*

80. *Id.*; see AP, *Barcelona Bomb Kills 15 Civilians*, N.Y. TIMES (June 20, 1987), <http://www.nytimes.com/1987/06/20/world/barcelona-bomb-kills-15-civilians.html> (“A spokesman at the store said police officers and private security guards began searching the store minutes before the blast.”).

81. See Martín-Casals & Ribot, *supra* note 30, at 98 (describing how police were considered passive due to the fact that they could have mitigated the terrorist threat but did not perform reasonably to do so).

82. *Id.*

83. See *id.* (indicating that the court decided against the government because the police did not react properly).

84. See *id.* (citing S.T.S., March 27, 1998 (R.J., No. 2942) (Spain)) (stating that a post office employee was injured when a bomb intended for the General Commissioner of the World Exhibition exploded in 1992).

85. See *id.* at 98–99 (indicating the court found the government negligent for not having security equipment to detect explosives at the Exhibition headquarters).

86. *Id.* at 99.

87. *Madrid Train Bombings of 2004*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/event/Madrid-train-bombings-of-2004> (last visited Oct. 18, 2015).

88. *Id.*; see also Miguel-Anxo Murado, *Madrid Bombings, 10 Years On: The Lack of a Backlash Has the Power of a New Guernica*, GUARDIAN (March 11, 2014, 5:20 AM), <http://www.theguardian.com/commentisfree/2014/mar/11/madrid-bombings-guernica-conspiracy-islamists-eta> (remembering the Madrid Bombings and the political backlash that still remains

country and many government officials to believe that ETA was responsible.⁸⁹ However, there was strong evidence that a jihadist group, loosely connected to Al-Qaeda, was behind the attacks.⁹⁰

1. Compensation for Victims

Twenty-nine defendants were criminally tried before Spain's National Court for the Madrid train bombings; the court acquitted seven suspects, dismissed one defendant during trial due to lack of evidence, and found eighteen guilty of lesser charges.⁹¹ Four of the seven acquitted were the top suspects for the attacks and the three alleged masterminds with direct involvement were not convicted.⁹² The three men who received the harshest sentences—Moroccans Jamal Zougam and Othman el-Gnaoui, and Spanish national Suarez Trashorras—each received about 40,000 years in prison.⁹³ In accordance with 116.1 C.P.⁹⁴ and 116.2 C.P.,⁹⁵ Spanish Judge Javier Gomez Bermudez announced that these three men were also civilly liable to the victims of the bombings, ranging from €30,000 to €1.5 million in liability per victim.⁹⁶ This left the three defendants jointly and severally liable for a combined compensation of €172.8 million.⁹⁷ The LSVT guaranteed that if the defendants were not able to pay the compensation, the Spanish government would step in to compensate the victims for the remaining amount.⁹⁸ Because of the defendants'

over a decade later).

89. See Tom Burrige, *Spain Remembers Madrid Train Bombings 10 Years On*, BBC NEWS (Mar. 11, 2014), <http://www.bbc.com/news/world-europe-26526704> ("It is true that the first reaction of many people in Spain, on hearing the news of bombings that morning, was that the Basque militant group [ETA] was to blame But from the beginning, there was strong evidence, including the type of explosives used, that Al Qaeda-inspired militants were behind the attacks.").

90. *Id.* After the detention of five individuals in connection with the bombing, Spanish Police discovered a tape near the main mosque in Madrid in which Al-Qaeda claimed responsibility for the attack. Giles Trimlet, *We Bombed Madrid, Says Al-Qaeda Tape*, GUARDIAN (Mar. 13, 2004), <https://www.theguardian.com/world/2004/mar/14/spain.terrorism3>.

91. See Victoria Burnett, *Mixed Verdict in Madrid Train Bombings Trial Unsettles Spain*, N.Y. TIMES (Oct. 31, 2007), <http://www.nytimes.com/2007/10/31/world/europe/31iht-spain.4.8133094.html> ("Counterterrorism experts said the verdict underscored the difficulty of building a solid case against suspected Islamists who are accused of providing inspiration or direction to foot soldiers and who belong to diffuse groups with no formal structure.").

92. *Id.*

93. AFP, *\$1.4m for Victims of Madrid Bombings*, ABC NEWS (Nov. 2, 2007, 6:13 PM), <http://www.abc.net.au/news/2007-11-03/14m-for-victims-of-madrid-bombings/714664>. Even though the defendants received 40,000 years' imprisonment each, each can only serve a maximum of 40 years imprisonment under Spanish law. *Id.*

94. C.P. art. 116.1.

95. C.P. art. 116.2.

96. Paul Hamilos & Mark Tran, *21 Guilty, Seven Cleared Over Madrid Train Bombings*, GUARDIAN (Oct. 31, 2007), <http://www.theguardian.com/world/2007/oct/31/spain.marktran>.

97. AFP, *\$1.4m for Victims of Madrid Bombings*, *supra* note 93.

98. See LSVT art. 2.1 (B.O.E. 1999, 20063) (Spain), *supra* note 10 (indicating that those who are injured by terrorist activity will be compensated by the state); see also AFP, *\$1.4m for Victims of Madrid Bombings*, *supra* note 93 ("If they are not able to pay the compensation

insolvency, the Spanish government acted as the guarantor of the civil judgment and paid a total of €134 million to victims and their families.⁹⁹ At this point, under the LSVT, the victims' civil actions against the terrorists directly responsible for the action were judicially satisfied.¹⁰⁰

Although it is difficult to assess the indirect economic impacts of the Madrid Bombings to the State, the total costs of compensation paid to the victims through the RAVT, LSVT and the Consortium were sizeable:¹⁰¹

The total sum of compensation is 134.12 million euros, of which 62.8 per cent is attributed to the compensation from the Law of Solidarity with victims of terrorist attacks (41.1 per cent) and also the general compensations (21.7 per cent) paid by the Spanish Interior Ministry, which is the main body responsible for the economic care of the victims of this terrorist event.¹⁰²

Overall, compensation to the victims of the attack accounted for a minimum of 64% of the total direct economic cost of the Madrid Bombings.¹⁰³ Studies also showed that the nature of the Consortium Compensation Fund had a limited impact on the insurance sector in Spain.¹⁰⁴ However, while the insurance industry felt only a slight economic impact, it nevertheless produced a “revolution” in the way the companies analyzed the risk of terrorist attacks.¹⁰⁵

2. Long Term Compensation Goals for Victims of Terrorism

In 2012, the Spanish government hosted a conference on victims of terrorism as a member of the Global Counterterrorism Forum (GCTF).¹⁰⁶ The GCTF is an international organization—which includes Spain, the U.K., and the U.S.—dedicated to preventing and combatting terrorist acts.¹⁰⁷ At the 2012 GCTF conference, Spain circulated a document entitled “Madrid Memorandum on Good

totaling 172.8 million euros, the Spanish state will cover the amount, a judicial source said.”).

99. See Buesa & González-Gómez, *supra* note 4, at 72 (citing the total estimated compensation to the victims of a terrorist attack).

100. See LSVT art 2.1 (B.O.E. 1999, 20063) (Spain) (providing for victim compensation).

101. See Buesa & González-Gómez, *supra* note 4, at 71–72 (studying the payouts from legislation and insurance to victims of the Madrid bombings to calculate the total compensation cost of damages).

102. *Id.* at 70–72.

103. See *Id.* at 78–79 (“To interpret the final costs correctly it has to be highlighted that we used conservative criteria. . . . Therefore, these sums have to be considered as the minimum direct cost that the attacks have involved for the Madrilenian economy.”).

104. Heijs & Baumert, *supra* note 41, at 161.

105. *Id.* at 162.

106. The GCTF was launched as a result of the cooperative efforts of Turkish Foreign Minister Ahmet Davutoglu and U.S. Secretary of State Hillary Clinton in 2011. The GCTF adopted the Cairo Declaration on Counterterrorism and the Rule of Law and announced that it would develop a major rule of law capacity-building program to combat the growing threat of violent extremism. See *The GCTF Launch*, GLOBAL COUNTERTERRORISM FORUM (GCTF), <https://portal.thecftg.org/gctf-launch> (last visited Sept. 10, 2016) (providing background on the GCTF).

107. See *Members and Partners*, GCTF, <https://www.thegctf.org/About-us/Members-and-partners> (last visited Sept. 28, 2016) (outlining the member countries and partners).

Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings” (the Madrid Memorandum).¹⁰⁸ The document set forth non-binding, but internationally recognized, suggested measures that governments should take to assist victims of terrorism.¹⁰⁹ The nations that signed this document included Spain, the U.K. and the U.S.¹¹⁰

Within its suggestions on how to enact a legal framework for victims’ services and rights, the Madrid Memorandum advocated a system of compensation utilizing a combination of legislation, social insurance and litigation:

Compensation measures could be established through the appropriate national schemes and subject to domestic legislation, including, *inter alia*, financial assistance and compensation for victims of terrorism and their close family members. Depending on the provisions of the national legal system, [s]tates may wish to consider the establishment of a special state fund or an insurance model dedicated to the compensation of victims of terrorism independent of the course of the judicial process. Victims should be informed about and assisted with applications for any available financial assistance, including compensation.¹¹¹

This combination of victim compensation through statute, insurance, and civil litigation mirrors the Spanish system of compensation developed during ETA’s repeated terrorist attacks and was tested after the 2004 Madrid Bombings.

III. THE U.K. COMMON LAW SYSTEM AND TERRORISM RESPONSE

Tort law in the U.S. grew out of the U.K.’s common law tort system, and as such the two systems are very similar.¹¹² Both systems address civil wrongs between two private actors, with theories based in negligence.¹¹³ The U.K.’s common law system of judicial precedent guides its courts on how to interpret the facts of each case to determine whether the plaintiff has successfully proven his or her theory of negligence.¹¹⁴

108. *Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately after the Attack and in Criminal Proceedings*, GCTF 1 (Sept. 2013), https://www.thegctf.org/documents/10162/72352/13sep19_madrid+memorandum.pdf [hereinafter Madrid Memorandum].

109. The GCTF lists the Madrid Memorandum as one of its concrete actions on behalf of victims of terrorism. The Memorandum sets forth non-binding, but internationally recognized measures that states should take to assist victims of terrorism. *See Focus Areas*, GCTF, <https://portal.thegctf.org/web/guest/focus-areas> (last visited Sept. 10, 2016) (indicating the range of issues that the GCTF focuses on).

110. Madrid Memorandum, *supra* note 108, at 1.

111. *Id.* at 3.

112. *See Introduction to English Tort Law*, BRITISH INST. OF INT’L & COMP. LAW 1, http://biicl.org/files/763_introduction_to_english_tort_law.pdf (last visited Oct. 18, 2015) (describing the common law system of English tort law).

113. To prove negligence, a plaintiff must show that the negligent actor owed the plaintiff a duty of care, the actor breached that duty, that breach was the factual and proximate cause of the plaintiff’s injury, and that there were damages as a result of that injury. *Id.* at 1–4.

114. *Id.* at 1.

In the U.K., public bodies do not enjoy any specific immunity from private suits.¹¹⁵ If a statute outlines a person or corporation's duties, then that person or corporation can be sued for breaching that statutory duty.¹¹⁶ A statute may explicitly state this duty, or the court may use statutory construction to determine if the statute implies a duty.¹¹⁷ Where a statute is silent, civil action will be excluded in any case where a statute provides for a criminal sanction as a means of enforcing the duty, unless it is shown that the statutory duty was imposed for the benefit of a particular class of persons separate from the public at large.¹¹⁸ Statutory duties, in particular, have served as the basis for tort liability in the U.K. following terrorist attacks.¹¹⁹

A. Northern Ireland and Direct Legal Intervention after Domestic Terrorism

Irish nationalism historically served as the most prevalent source of terrorism in the U.K.¹²⁰ The Irish Republican Army (IRA) has a long history of violent acts directed at bringing together a united Ireland.¹²¹ However, the most violent conflict occurred in a thirty-year timeframe, occurring from 1968 to 1998—a time period labeled as “The Troubles.”¹²² In particular, the high number of car bombings in the 1970s and the property damage it caused had a large impact on the drafting of the first U.K. compensation legislation in 1977.¹²³ The Criminal Damage Compensation Order of 1977 (Criminal Damage Order) specifies that the U.K. Secretary of State is liable to pay compensation to those who have “suffered loss as a result of physical damage to property [from] looting,”¹²⁴ “the unlawful removal of property from a building in the course of a riot . . . [or where] three or more [persons] . . . unlawfully, maliciously or wantonly cause damage.”¹²⁵ Any person who has an interest in property and suffers a loss of £200 or more as a result of the actions listed in the Criminal Damage Order may apply to have that damage compensated by the Secretary of State.¹²⁶

115. *Id.* at 6.

116. *Id.*

117. *Id.*

118. *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* [1981] No.2 AC 173 (HL) at 183–85 (Eng.).

119. For example, statutory provisions allow for compensation when a loss arises from counter-measures taken by state agents. *See Introduction to English Tort Law, supra* note 112, at 6 (explaining the importance and functionality of statutory duties in U.K.'s tort system.).

120. Clive Walker, *Liability for Acts of Terrorism: United Kingdom Perspective*, in 11 TORT & INSURANCE LAW, TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 138, 140 (Bernhard A. Koch ed., 2004).

121. *The Troubles*, BBC HISTORY, <http://www.bbc.co.uk/history/troubles> (last visited Sept. 30, 2016).

122. *See id.* (outlining the thirty years of conflict between the Protestant, Unionist majority and the Catholic, Nationalist minority in Northern Ireland).

123. Walker, *supra* note 120 at 140.

124. Criminal Damage (Compensation) (Northern Ireland) Order 1977, SI 1247, art. 3 ¶ 1 (Eng.).

125. Walker, *supra* note 120, at 141 (citing Criminal Damage (Compensation) (Northern Ireland) Order 1977, SI 1247, art. 6 (Eng.).

126. *See* Walker, *supra* note 120, at 142 (“Where compensation of more than £ 200 is

The Order does not specify that compensation be provided only for commercial property.¹²⁷ Often, however, private insurance would cover the damage for domestic property, making it unnecessary to apply for statutory compensation.¹²⁸ Before the Criminal Damage Order, commercial properties damaged by IRA car bombs in the 1970s were left without any compensation for property damage or loss of profits.¹²⁹ After the Order, however, commercial agencies could recover their cost of damage directly from the Secretary of State.¹³⁰

Similarly to Spain's statutory compensation scheme, victims of terrorism in the U.K. cannot recover under the Criminal Damage Order if the loss incurred is recoverable under common law or under any other statutory provision, such as the Terrorism Act of 2000.¹³¹ For example, one possibility exists when the loss is related to terrorism but arises from countermeasures by state agents.¹³² In this circumstance, individuals can recover and therefore must apply for recovery under the terms of the Terrorism Act of 2000, and are therefore barred from receiving compensation from the Secretary of State under the Criminal Damage Order.¹³³

In 1988, the U.K. Parliament passed the Criminal Injuries Compensation Scheme Order, which was later replaced by the Criminal Injuries Tariff Scheme (Tariff Scheme) in 2002.¹³⁴ Under the 1988 Compensation Scheme, the U.K. again allowed victims of terrorism to receive compensation from the Secretary of State

payable a statutory deduction of £ 200 will be made from the total compensation due.”).

127. *Id.* at 143.

128. According to the Criminal Damage Order, owners of privately insured domestic property should make a claim to their insurance company as well as the Agency responsible for statutory compensation. The insurer would then have subrogation rights to any payment made to the individual by the Agency, and the Agency would direct any statutory compensation directly to the individual's insurance company. *See id.* (“If the damaged property is domestic and insured, a claim should be made to the relevant insurance company as well as the Agency. In this circumstances the insurance company makes payments to the applicant based on the insurance cover provided and compensation awards are paid by the Agency to the insurers.”).

129. *See id.* at 147–48 (stating that responsibility for property lay with the local community).

130. *See id.* at 143 (stating that the Order was most applicable to the category of commercial damage because insurance companies would not cover commercial property that arose from criminal acts.).

131. Criminal Damage (Compensation) (Northern Ireland) Order 1977, SI 1247, art. 10 ¶ 1(c) (Eng.); Terrorism Act 2000, c. 11 (Eng.). The Terrorism Act expanded the definition of terrorism to aid in the prosecution of domestic and international terrorism. It also established a schedule of compensation for citizens who had real or personal property damaged, taken, or destroyed as a result of terrorism. *See Terrorism Act 2000*, GUARDIAN (Jan. 19, 2009), <https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/terrorism-act> (outlining the main provisions and criticisms of the Terrorism Act 2000).

132. Walker, *supra* note 120, at 145.

133. *See* Terrorism Act 2000, *supra* note 131 at § 102, sch. 12 (detailing the process of receiving compensation under the terms of the Terrorism Act).

134. *See Inspection of the Compensation Agency (Northern Ireland)*, CRIMINAL JUSTICE INSPECTION NORTHERN IRELAND 7 (Jan. 2006), <http://www.cjini.org/CJNI/files/8d/8de9afd9-f785-49ad-81f9-a011957d1753.pdf> (reporting the positive impacts the Compensation Agency, created through the Compensation Scheme, has had on victim compensation in Northern Ireland).

for damages resulting from acts of terror.¹³⁵ The Compensation Scheme went beyond compensating just the direct victim, and provided compensation “to any person responsible for the maintenance of the victim” with regard to expenses and pecuniary loss resulting from the victim’s injury.¹³⁶ In particular, the 1988 Compensation Scheme applied to incidents before May 1, 2002 and to anyone who has suffered physically or mentally or who is a dependent or relative of a deceased victim.¹³⁷ Under the 1988 Compensation Scheme, U.K. courts had the ability to hear appeals against the Compensation Agency’s (the Agency) decisions and decide an appropriate monetary amount where an agreement could not be reached between the victim and the Agency.¹³⁸ This provided a flexible, individualistic approach to victims’ cases with the ultimate goal being adequate compensation for injury.¹³⁹ However, the discretionary model led to a huge backlog, with 4,500 claims still outstanding as of 2006—some cases going back all the way to the mid-1990s.¹⁴⁰

Parliament replaced the 1988 Compensation Scheme with the Tariff Scheme in 2002.¹⁴¹ The Tariff Scheme did away with the judicial discretion central to the 1988 Compensation Scheme, and instead set fixed amounts for particular injuries.¹⁴² This reduced the administrative costs, as the courts were not involved and solicitors were not paid by the government to process claims.¹⁴³ Instead, Victim Support assumed the government’s role and provided a free service to help victims with their claims.¹⁴⁴

Currently, all compensatory arrangements are dealt with by the Agency, the first executive agency under the Northern Ireland Office.¹⁴⁵ The Agency began processing claims in the early 1970s, and continues today.¹⁴⁶ The Agency administers four compensation schemes: the 1988 Order, the Tariff Scheme, the Criminal Damage Compensation Scheme and the Terrorism Act Compensation Scheme.¹⁴⁷ The courts are the final arbiters for Agency decisions for all but one of the compensation schemes; appeals from judgments arising out of the Tariff

135. These damages included expenses resulting from the injury, loss of wages, pain and suffering, and “certain consequences of rape.” The Criminal Injuries Compensation (Northern Ireland) Order 1988, SI 793, art. 3 ¶ 2(a) (Eng.).

136. *Id.* at art. 3 ¶ 2(b).

137. *See Inspection of the Compensation Agency*, *supra* note 134, at 7 (identifying the four separate compensation schemes administered by the Compensation Agency).

138. *Id.*

139. *Id.* at 6–7.

140. *Id.* at 7.

141. *Id.*

142. *Id.*

143. *Inspection of Compensation Agency*, *supra* note 134, at 7.

144. *Id.*

145. *See Walker*, *supra* note 120, at 147 (detailing the functionality and structure of the Compensatory Agency).

146. *See Inspection of the Compensation Agency*, *supra* note 134, at 11 (detailing the continued plans of the Agency to continue using consumer feedback to better the services to victims).

147. *See id.* at 7–8 (detailing the four compensation schemes administered by the Agency).

Scheme are heard by the independent Criminal Injuries Compensation Appeals Panel (CICAP).¹⁴⁸ This process is not without issue as some of the Agency staff criticized the denial of claims to genuine victims merely because they had not fulfilled the procedural requirements.¹⁴⁹

B. Great Britain and Indirect Legal Action

Once the IRA directed its efforts at large-scale attacks on commercial properties, Great Britain recognized its own need for a compensation network.¹⁵⁰ In 1992, the IRA was deemed responsible for the bombing at St. Mary Axe in which three people died and 100 were injured.¹⁵¹ Almost exactly a year later, a large bomb on a truck in Bishopsgate killed a photographer, injured ninety-four people, and resulted in damage to prestigious commercial buildings estimated at more than £300 million.¹⁵²

The combination of these two acts of terrorism resulted in the passing of the Reinsurance (Acts of Terrorism) Act in 1993 (Reinsurance Act).¹⁵³ The purpose of the Reinsurance Act was to support Northern Ireland's Criminal Damage Order¹⁵⁴ and to provide compensation to victims of terrorism, with the Secretary of State acting as the guarantor of such funds.¹⁵⁵ With the rising occurrence of terrorist attacks, providers in the insurance market began discussing the exclusion of coverage of injuries and property damage resulting from terrorism.¹⁵⁶ The

148. *See id.* at 10 (noting that inspectors of the Agency recommended that a more formal process of communication should be developed between the Agency and CICAP to avoid operational problems).

149. *See id.* at 11 (sharing the findings of staff members who were concerned about dealing with disgruntled applicants who became aggressive or emotional upon learning of their denial for compensation).

150. *See Walker, supra* note 120, at 150 (explaining that London's status as the financial heart of the country made it a prime target for the IRA's commercial attacks).

151. *See id.* at 151 (estimating the damage to the two most affected buildings to be upwards of £350 million); *see, e.g.*, COMMITTEE ON FEASIBILITY OF APPLYING BLAST-MITIGATING TECHNOLOGIES AND DESIGN METHODOLOGIES FROM MILITARY FACILITIES TO CIVILIAN BUILDINGS, PROTECTING BUILDINGS FROM BOMB DAMAGES: TRANSFER OF BLAST-EFFECTS MITIGATION TECHNOLOGIES FROM MILITARY TO CIVILIAN APPLICATIONS 15–19 (1995).

152. Walker, *supra* note 120, at 151.

153. Reinsurance (Acts of Terrorism) Act 1993, c. 18, § 1 (Gr. Brit.).

154. The territorial bounds of the act do not extend to Northern Ireland, as legislators reasoned Northern Ireland already had its own form of compensation in the Criminal Damage Order. *See Walker, supra* note 120, at 154 (“The coverage extends to the whole of the United Kingdom but with the exception of Northern Ireland, where other, more generous arrangements were already in place in the shape of the Criminal Damage (Compensation) (Northern Ireland) Order 1977.”).

155. *Id.*

156. *See id.* at 151 (describing the mechanism of reinsurance and how necessary it became in the wake of the 1992 and 1993 bombings in London); *see also* William B. Rice, *British Government Reinsurance and Acts of Terrorism: the Problems of Pool Re*, 15 U. PA. J. INT'L BUS. L. 441 (1994) (discussing the failures of the mutual reinsurance company formed by the British government—Pool Re—to provide reinsurance cover).

government, fearful of either over-inflated premiums in the face of coverage or a lack of coverage altogether, quickly offered to act as the reinsurer and “spread the risk.”¹⁵⁷ The Reinsurance Act establishes that capital from a Consolidated Fund would be used to help offset the risk of covering damages from terrorist attacks, effectively establishing a social insurance for damages arising from terrorist attacks.¹⁵⁸

Although Great Britain’s tort system allows direct action against the terrorists themselves, these terrorists have limited to no assets, and as such, victims rarely recover.¹⁵⁹ In the wake of a terrorist attack, if an individual’s personal insurance—backed by the reinsurance set up in the Reinsurance Act—does not cover all or any of the damages, victims and their families can apply to the Criminal Injuries Compensation Scheme (Scheme).¹⁶⁰ The Secretary of State created the Scheme under the Criminal Injuries Compensation Act of 1995.¹⁶¹ Under the Scheme, victims of violent crime and their families can apply for compensation for criminal injury too, regardless of whether the assailant is convicted.¹⁶² The Scheme covers mental or physical injury, sexual or physical abuse, loss of earnings, special expenses payments, and fatalities caused by a crime of violence.¹⁶³ The Criminal Injuries Compensation Authority (CICA) receives, processes, and administers

157. See Rice, *supra* note 156, at 444 (explaining that one way an insurer can count down on its risk without a reinsurer is to charge a high safety loading on the risk premium).

158. See Walker, *supra* note 120, at 153 (“But it is clear that if moneys are to be made available from the Consolidated Fund, this means that it is primarily the individual taxpayer who is providing the security for any financial liability incurred by the Secretary of State.”).

159. *Id.* at 167. Families of the victims of another 1998 bomb in Omagh instituted civil action against the suspected perpetrators of the attack. However, the desire for the civil case arose out of the lack of criminal charges rather than a desire for compensation—the families wanted to see some kind of justice, even if it was not within the criminal courts. See Ruth Dudley Edwards, *Shameless Betrayal: How Omagh Victims were Left to Confront Bombers Themselves After Blair Failed to Deliver Justice*, DAILYMAIL.COM (June 16, 2009), <http://www.dailymail.co.uk/news/article-1193257/A-SHAMELESS-BETRAYAL-After-Omagh-atrocity-Tony-Blair-promised-victims-families-justice-delivered-The-families-vowed-confront-evil-bombers-themselves.html> (detailing the immediate aftermath of the Omagh bombing, as well as the victims’ families’ desire for justice.).

160. MINISTRY OF JUSTICE, THE CRIMINAL INJURIES COMPENSATION SCHEME 2012, at 8 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf.

161. *Id.*

162. An award will not be made if the assailant or perpetrator of the criminal injury would benefit from the award. See *id.* at 9, 11 (stating that eligibility of compensation under the Scheme bears no relevance to whether the application resulted from the conviction of an assailant).

163. See *Criminal Injuries Compensation: A Guide*, CRIMINAL INJURIES COMPENSATION AUTHORITY & MINISTRY OF JUSTICE (Mar. 26, 2014), <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#what-payments-are-available-from-the-scheme> (“CICA is an executive agency, sponsored by the Ministry of Justice.”); see also *About Us*, CRIMINAL INJURIES COMPENSATION AUTHORITY, <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority/about> (last visited Nov. 16, 2015) (stating that the CICA handles up to 40,000 applicants for compensation annually and pays out up to £200 million to victims of violent crime yearly).

rewards for claims filed for compensation from the Scheme.¹⁶⁴

C. The London Bombings and Compensation Response

On July 7, 2005, four Islamist extremists separately detonated three bombs in quick succession on London Underground trains across the city.¹⁶⁵ An hour later, terrorists detonated a fourth bomb on a double-decker bus in Tavistock Square.¹⁶⁶ In one of Britain's worst terrorist atrocities, fifty-two civilians were killed and over 750 were injured in the attacks.¹⁶⁷

Immediately following the attacks, public contributions came flooding in to help the victims of the attacks.¹⁶⁸ London Mayor Ken Livingstone and the American Red Cross hurried to set up the London Bombing Relief Charitable Fund (LBRCF) to receive funds and process grants.¹⁶⁹ The LBRCF distributed £12 million to victims and their families following these terrorist attacks in London.¹⁷⁰

The LBRCF made its first payments to both the bereaved and the victims just two weeks after the terrorist attacks.¹⁷¹ The payments were separate from the funds distributed by the CICA.¹⁷² The CICA received criticism that its payments had been too slow, with the first checks coming three months after the bombings,¹⁷³ as contrasted to the couple of weeks it took for the LBRCF to distribute its funds. Immediately after the attacks, the CICA estimated that the victims of the London Bombings would receive approximately £5 million in compensation, ranging from £500,000 for the most seriously injured to £1,000 for those who suffered smoke inhalation.¹⁷⁴ In comparison, by 2010, a CICA spokesman stated that the scheme

164. See *What We Do*, *supra* note 11 (describing the roles and duties of the U.K.'s compensation authority).

165. See Esther Addley, Alexandra Topping & Caroline Davies, *UK Comes to Standstill to Mark 10 Years Since 7/7 Attacks*, *GUARDIAN* (July 7, 2015), <http://www.theguardian.com/uk-news/2015/jul/07/uk-comes-to-standstill-as-it-marks-10-years-since-77-attacks> (detailing the events of the 7/7 bombings on the 10-year anniversary).

166. *Id.*

167. See *The 7/7 Bombing - Survivors' Stories*, *ITV PRESS CENTRE* (June 30, 2015), <http://www.itv.com/presscentre/ep1week27/77-bombing-survivors-stories> (detailing survivors' accounts of the 7/7 bombings).

168. See *London Bombing Charity Shuts Down*, *BBC NEWS* (Oct. 25, 2006), http://news.bbc.co.uk/2/hi/uk_news/england/london/6081504.stm (reviewing the success of the charity one year later when it finally shut down).

169. *Id.*

170. See *id.* (detailing the separate levels of compensation for bereaved families with two dependent children, bereaved spouses, and the most severely injured).

171. See Vikram Dodd, *Compensation Rushed Through for Victims of July 7 Bombings*, *GUARDIAN* (Oct. 4, 2005) (contrasting the praise of the distribution of LBRCF funds with the criticisms of the CICA).

172. See *id.* (stating that starting in October 2005, the CICA made 22 compensation offers and had cut their first two checks to the victims of the bombings).

173. See *id.* (stating that victims did not receive payments from the CICA in the first two months after the attacks).

174. See *id.* (detailing that one woman who suffered burns received about £27,000 and

had paid only £11 million to the victims of the London Bombings over the course of 650 approved compensation claims, with seven people still awaiting settlement.¹⁷⁵ In addition to the criticisms for the CICA's delay in processing claims, others called on the government for higher amounts of compensation.¹⁷⁶ However, CICA chief executive, Howard Webber, defended the amounts of the payments, stating, "English law does not currently recognize grief. What we are doing, albeit a small token of public sympathy, is a larger token than is available through the courts."¹⁷⁷ Much like the Spanish LSVT, the CICA clearly labeled the scheme as one the government opted into as a showing of solidarity with the victims, rather than an admission of liability.¹⁷⁸

IV. THE U.S. COMMON LAW SYSTEM AND TERRORISM RESPONSE

A. Common Law and Statutory Law

Similar to the tort system in the U.K., the U.S. tort system is mostly a common law system grounded in theories of negligence.¹⁷⁹ Traditional tort law is almost exclusively state and common law.¹⁸⁰ Under a negligence regime, everyday actors generally have a duty "to exercise reasonable care to avoid causing foreseeable physical injury to other people and their property."¹⁸¹ This duty extends to an "enabling principle," which is when one whose negligence enables a tortfeasor or wrongdoer to commit the harm may be held liable for the harm caused by the primary tortfeasor or wrongdoer.¹⁸² Furthermore, common carriers—such as airline carriers and other transportation systems—usually have a duty to exercise the highest degree of care for the safety of its passengers.¹⁸³

another woman received £110,000 for the loss of her legs).

175. See *£11m Compensation Awarded to 717 Victims*, BBC NEWS (July 2, 2010), <http://www.bbc.com/news/10491295> (indicating that a CICA spokesman stated that it is often in the victim's best interests not to settle a claim too early).

176. See Dodd, *supra* note 171 (expressing the concerns of some victims' attorneys that the six-figure sums were not enough to cover all the expenses of the victims, such as the on-going care for the duration of their lives).

177. *Id.*

178. See *id.* (citing defenders of the Scheme who state that the payments are not an estimate of the monetary value of a lost life but a token of public sympathy); see also Martin-Casals & Ribot, *supra* note 30, at 94 (noting that the Spanish government acted as the guarantor of funds through LSVT and did not technically assume liability).

179. See Kenneth S. Abraham, *THE FORMS AND FUNCTIONS OF TORT LAW* 1–2 (2012) (outlining the elements of negligence in the U.S. system as duty, breach of duty, causation, and damages).

180. *Id.*

181. *Id.* at 51.

182. See Abraham, *supra* note 1, at 183 ("These so-called 'enabling torts' contemplate liability not only when the primary wrongdoer is merely negligent, but also when the wrongdoer intentionally causes harm.").

183. Kevin P. Hillard, *Civil Litigation Arising out of the WTC Attacks*, in 11 *TORT AND INSURANCE LAW, TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY* 189, 193 (Bernhard A. Koch ed., 2004); but see *Gallin v. Delta Air Lines*, 106 Misc. 2d 477, 480 (1980), *aff'd* 86 A.D.2d 782 (1982) (noting that appellate courts are split on the duty of care a common

Without statutory enactments, however, an injured party may not be able to bring suit against a government or nation-state actor under the enabling principle.¹⁸⁴ Until 1996, the foreign governments of perpetrators were immune from suit in U.S. courts when injury resulted from a terrorist attack conducted by foreign nationals.¹⁸⁵ In 1996, Congress enacted the Civil Liability for State Sponsored Acts of Terrorism Act (CLSSATA).¹⁸⁶ Under the CLSSATA, a foreign nation is not immune to suit in the United States when:

[M]oney damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.¹⁸⁷

Furthermore, the foreign state is rendered liable to the same extent and in the same manner as a private person.¹⁸⁸

Congress also enacted statutes that create liability for damage caused by terrorist attacks by an individual or a non-state entity.¹⁸⁹ The Racketeer Influenced and Corrupt Organizations Act (RICO), as amended by the Patriot Act of 2001, creates a broader right of action; it includes both civil and criminal causes of action for U.S. and foreign nationals.¹⁹⁰ The statute generally prohibits racketeering activity, which it defines as including terrorism.¹⁹¹ However, victims of terrorism often run into difficulties with filing a RICO claim because the burden of proof involves establishing a pattern of racketeering.¹⁹²

B. September 11, 2001 and the U.S. Compensation Response

On September 11, 2001, nineteen Islamic militants associated with Al-Qaeda hijacked four airliners.¹⁹³ The hijackers flew two of the planes into the towers of the

carrier owes to its passengers).

184. See Hillard *supra* note 183, at 176 (explaining that the U.S. federal government has enacted a number of special statutes governing liability in the event of a terrorist attack).

185. *Id.* at 177.

186. *Id.* The CLSSATA came about after the huge public outrage over Libya being immune from the suit commenced by the relatives of those killed in the explosion of Pan American Flight 103 over Lockheed, Scotland. See, e.g., Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996).

187. 28 U.S.C. § 1605(a)(5) (2016).

188. 28 U.S.C. § 1606 (2016).

189. Abraham, *supra* note 1, at 178.

190. See 18 U.S.C. § 2332b (2016) (describing acts of terrorism that transcend national boundaries).

191. See 18 U.S.C. § 2332b(g)(5)(b) (prohibiting a wide variety of activities under the term "racketeering," including acts of nuclear terrorism and acts against mass transportation systems on land, on water, or through the air).

192. To establish a RICO violation, the plaintiff must prove two or more acts constituting a "pattern" of racketeering activity, the defendant was associated with that enterprise, and the enterprise engaged in interstate commerce. Abraham, *supra* note 1, at 178.

193. *9/11 Attacks*, <http://www.history.com/topics/9-11-attacks> (last visited Jan. 25, 2016).

World Trade Center in New York City, the financial heart of the country.¹⁹⁴ Congress quickly reacted to indemnify the airlines, fearing that countless civil suits against the airlines would bankrupt the industry and cause catastrophic economic reactions.¹⁹⁵ The indemnification took the form of the Air Transportation Safety and System Stabilization Act.¹⁹⁶ The statute created an alternative compensation fund called the September 11 Victims' Compensation Fund of 2001 (VCF).¹⁹⁷ The fund was meant to provide compensation for the direct victims of the attack and also for the indirect victims such as rescue personnel.¹⁹⁸

In 2011, President Barack Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act), which extended compensation eligibility to individuals who took part in removing debris in the immediate aftermath of the attacks.¹⁹⁹ Because the VCF is classified as a "no fault compensation scheme," applicants to the fund need not demonstrate liability on the part of any party to receive compensation.²⁰⁰ If applicants choose to participate in the VCF, they are barred by the statute from bringing any lawsuits against the airlines for personal injury or wrongful death.²⁰¹ Like the Spanish and U.K. systems of compensation, any award from the VCF is subrogated by compensation from other sources, such as governmental benefits and insurance proceeds.²⁰²

The first installment of the VCF closed in 2004 after paying over \$7.049 billion to surviving families of victims and claimants who were injured in the attacks or in the rescue efforts conducted immediately after the attacks.²⁰³ Kenneth

194. *Id.*

195. *See* Priest, *supra* note 7, at 531 ("[The compensation scheme] was intended to shield suits against the airlines, airports, airport security companies, and various governmental entities").

196. Peter H. Woodin, *The September 11th Victim Compensation Fund of 2001*, in 11 TORT & INSURANCE LAW, TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 197, 197 (Bernhard A. Koch ed., 2004).

197. *Id.*

198. Sheila L. Birnbaum, *Third Annual Status Report September 11th Victim Compensation Fund*, VICTIM'S COMPENSATION FUND 2 (Oct. 2014), <http://www.vcf.gov/pdf/VCFStatusReportOct2014.pdf>.

199. *See id.* (noting that the Zadroga Act provides medical treatment and monitoring for 9/11-related health conditions).

200. The enabling legislation states that compensation should go to individuals who were "present" at the time of the airline crashes or in the "immediate aftermath" and who suffered "physical harm or death" as a result. The term "present" means those who were in the "zone of danger," meaning the geographical area around each of the airplane crashes where there was a danger of injury or death from the crashes or falling debris. The phrase "immediate aftermath" was interpreted to mean that a claimant must have suffered harm within twelve hours, or ninety-six hours for rescuers. Lastly, "physical harm" requires that the claimant sought medical treatment within seventy-two hours and it must have resulted in at least temporary disability. *See* Woodin, *supra* note 196, at 197–99 (providing an explanation on some of the key terms of the compensation legislation).

201. *Id.* at 197.

202. *Id.*

203. *See* Birnbaum, *supra* note 198, at 2 (noting that \$7.049 billion was paid out to 2,880 people who died in the 9/11 attacks and to 2,680 claimants who were injured in the attacks or

Feinberg, the Special Master appointed to the Fund, described the success of the first installment of the VCF:

The fund validated the congressional decision to divert potential tort claims away from a beleaguered airline industry. Fewer than ninety people ultimately opted to sue the airlines and other entities (the World Trade Center, the airports, Boeing, the airport security companies) rather than enter the fund.²⁰⁴

Feinberg calculated the payout for individual claimants, as stipulated by Congress, in a three-step approach: (1) determine the economic loss suffered as a result of the victim's premature death, (2) add that number to an estimate based on pain and suffering and emotional distress, and (3) subtract from that number any collateral source of income due to the survivors—like life insurance or government benefits.²⁰⁵ Individual awards ranged from \$250,000 to \$7.1 million.²⁰⁶

Despite the perceived success of the VCF, some victims and their families opted to pursue third-party legal liability through civil litigation.²⁰⁷ To keep airlines operating and limit the potentially devastating effects on the economy, the Air Transportation Safety and System Stabilization Act (ATSSSA) limited each airline's liability for all claims to the extent of their liability insurance coverage.²⁰⁸ To streamline and organize the influx of cases, the ATSSSA provided not only a federal cause of action for damages arising from the aircraft crashes, but also provided the United States District Court for the Southern District of New York with original and exclusive jurisdiction over such claims.²⁰⁹ In *World Trade Center Properties, LLC v. American Airlines*, Judge Hellerstein of the Southern District of New York held that lessees of the World Trade Center could not hold the defendants liable for allowing the hijackers through security screening:

It was not within United's range of apprehension that terrorists would slip through the PWM [Portland International Jetport] security screening checkpoint, fly to Logan, proceed through another air carrier's security screening and board that air carrier's flight, hijack the flight and crash it into 1 World Trade Center, let alone that 1 World Trade Center would therefore collapse and cause Tower 7 to collapse. For these reasons, I rule that United did not owe 7WTCO. [7 World Trade Company, L.P.] a

rescue efforts).

204. KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11*, 164–65 (Public Affairs 2005).

205. See Aaron Smith, *The 9/11 Fund: Putting a Price on Life*, CNN MONEY (Sept. 7, 2011, 9:38 AM), http://money.cnn.com/2011/09/06/news/economy/911_compensation_fund/ (explaining the method of deciding compensation and the overall success of the VCF fund).

206. *Id.*

207. See Hillard, *supra* note 183, at 189 (describing plaintiffs' pursuit of civil litigation rather than a claim through the VCF).

208. *Id.*

209. *World Trade Ctr. Props. LLC v. Am. Airlines, Inc.*, 905 F. Supp. 2d 547, 551 (S.D.N.Y. 2012); see also Hillard, *supra* note 183, at 189 (“The civil lawsuits arising from the September 11th terrorist attacks have been consolidated before Judge Alvin K. Hellerstein.”).

duty of care.²¹⁰

After ten years of protracted litigation, the last wrongful death suit of the ninety total lawsuits filed against the airlines settled in 2011 for a confidential amount.²¹¹

A civil suit also arose out of the VCF determinations themselves, as well. The plaintiffs were personal representatives of the estates of victims²¹² and challenged Feinberg's method of determining the compensation amount.²¹³ One of the controversial aspects of the VCF fund was that it tied compensation to the incomes of those killed or seriously injured in the attacks.²¹⁴ This led many to believe that it granted the Special Master far too much power in managing an "unlimited budget with no cap on expenditures."²¹⁵ Furthermore, critics argued, the ATSSSA provided no guidance as to the administration of the VCF, underscored by the fact that this was the first compensation program of its kind in the U.S.²¹⁶ This essentially left Special Master Kenneth Feinberg with unfettered power to create all guidelines and procedures for the VCF.²¹⁷ Some critics within the legal profession stated that the program focused purely on compensatory goals without actually abiding by traditional tort law methods of calculating monetary compensation.²¹⁸ If the fund has no deterrent effect other than to deter direct lawsuits, then the limitation on non-economic losses (i.e. pain and suffering) and deductions for government benefits received are an insufficient substitute for direct lawsuits.²¹⁹

210. *World Trade Ctr. Props. LLC*, 905 F. Supp. 2d at 554.

211. See Bella English, *Mass. Kin, Airline Settle Nation's Last 9/11 Suit*, BOS. GLOBE (Sept. 20, 2011), http://www.boston.com/news/local/massachusetts/articles/2011/09/20/bavis_family_airline_settle_last_911_wrongful_death_suit/ (detailing the Bavis family's resistance to settlement because family members wanted to hold the airlines accountable).

212. See FEINBERG, *supra* note 204, at 156 (describing that families of victims were seeking the compensation).

213. *Id.*

214. See Smith, *supra* note 205, at 3 (describing the oppositional response to the VCF fund, mostly by families with incomes above the 98th percentile).

215. Under the ATSSSA Fund, the Special Master singlehandedly controls all operations of Fund, including the ability to adjudicate claims exempt from judicial or administrative reviews. Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 2 (2006) (challenging both the legitimacy of the VCF and the underlying statute that created it, the ATSSSA).

216. See Lisa Belkin, *Just Money*, N.Y. TIMES MAGAZINE (Dec. 8, 2002) ("Nothing in the history of the country is comparable to the system of compensation set in place during those three hectic days.").

217. See FEINBERG, *supra* note 204, at 22 ("The congressional rush to enact the new statute in the wake of 9/11 left many open questions. I would become the point man to fill in the blanks.").

218. In addition to basing compensation on the income of the victim, the VCF capped pain and suffering damages at \$250,000 for the victim and \$100,000 for a spouse or child. See Priest, *supra* note 7, at 533-34 (criticizing the VCF for not having internal rationale of definition or constraint).

219. See *id.* at 541 (stating that the VCF's deterrent effects are practically nil since they severely decrease civil recovery for victims and their families).

V. A COMBINATION OF U.K., SPAIN, AND U.S. SYSTEMS IS THE BEST SYSTEM

Feinberg himself stated: “It is unlikely—and probably unwise—to establish a similar program for future implementation absent the profound conditions which existed immediately after the September 11 attacks.”²²⁰ Many of the criticisms of the VCF can be resolved by combining the statutory sources of compensation demonstrated by Spain²²¹ and the agency-distribution compensation demonstrated by the U.K.²²² Both the Madrid Bombings and the London Bombings occurred years after the 9/11 attacks.²²³ Their tort responses drew and expanded upon the successes and failures of the VCF.

Spain created the Consortium to insulate the insurance industry and prepare for the influx of compensation claims. This rigid statutory structure provides the exact criteria for coverage and the steps to take when seeking compensation. Contrasted to the VCF, Spain had the benefit of time and examination of the U.S.’s attempt to compensate victims of terrorism. With a statutorily prescribed set of criteria, any Special Master of a future compensation fund in the U.S. would not have to create the guidelines. Within the common law system, Spain and the U.S. share the same tort goal of deterrence.²²⁴ However, deterrence in the form of civil judgment will not—in and of itself—deter a civilian attack conducted by militant terrorists.²²⁵ Recognizing the difficulty in recovering from a terrorist actor, Spain not only established its duty to its citizens through the RAVT,²²⁶ but it also established subsidiary liability through the LSVT.²²⁷ With the duty and criteria clearly outlined through statute, Spain established a system that deters direct civil

220. David W. Chen, *Striking Details in Final Report on 9/11 Fund*, N.Y. TIMES (Nov. 18, 2004), <http://query.nytimes.com/gst/fullpage.html?res=9904E5D6133FF93BA25752C1A9629C8B63>.

221. See *Historical Background*, *supra* note 40 (establishing social insurance by statute); see RAVT (B.O.E. 2003, 5455) (Spain) (statutory duty imposed upon government towards its citizens); see LSVT art. 2.1 (B.O.E. 1999, 20063) (Spain) (providing for government subsidiary liability).

222. See *What We Do*, *supra* note 11, at 1–2 (serving as an example for the U.S. to improve its VCF system).

223. See *Madrid Train Bombings of 2004*, *supra* note 87 (describing Madrid train bombings of March 11, 2004); see also Addley et al., *supra* note 165 (recalling the London underground bombings of July 7, 2005).

224. See Ana Romero Porro, *Spain: Moving Towards a Fairer Tort System?*, AM. ASS’N FOR JUST. 7 (Feb. 7, 2015), http://www.cremadescalvosotelo.com/media/557472/spain_moving_towards_a_fairer_tort_system_the_american_association_for_justice.pdf (explaining that tort claims still serve the primary goal of deterrence in Spain).

225. See Uri Fisher, *Deterrence, Terrorism and American Values*, HOMELAND SEC. AFF. 1 (Feb. 2007), <https://www.hsaj.org/articles/152> (stating that traditional concepts of deterrence are meaningless against terrorist networks).

226. See RAVT (B.O.E. 2003, 5455) (Spain) (providing victims of terrorist acts a civil remedy against perpetrators of terrorist acts under the law).

227. See LSVT (B.O.E. 1999, 20063) (Spain) (requiring perpetrators responsible for terrorist acts to compensate victims under the law).

action.²²⁸ Under this logic, lawsuits against the Special Master of a compensation scheme established under a detailed statute will be similarly deterred if he or she follows the statutorily prescribed guidelines for the compensation scheme.

The U.K. also drew from the U.S. experience and used the pre-existing CICA to process claims and administer funds in the wake of the London Bombings.²²⁹ By delegating the task of examining claims to an organization rather than an individual, the U.K. established a system of review that was not available for those who disagreed with the Special Master's findings within the VCF. The CICA has multiple levels of authority, providing multiple viewpoints and points of review to a claim determination without taxing the courts with judicial review.²³⁰ Similar to the structure of CICA in the U.K., the U.S. would create an administrative agency subjected to government review.²³¹ Furthermore, the CICA hosts a Policy and Equality Forum where stakeholders can provide CICA with feedback in relation to the scheme.²³² Civil service rules would further insulate an official at the administrative agency from undue political pressure.²³³

The creation of a compensation system within the U.S. for victims of terrorism may also arise from a general duty of the state towards its citizens. Over the past two decades, the U.S. government has set up compensation funds outside of any tortious conduct, such as to those affected by natural disasters.²³⁴ For example, the Federal Emergency Management Agency (FEMA) provided upwards of \$10.5 billion to Hurricane Katrina victims and Congress provided more than \$6 billion in compensation for property damage after the 1993 floods in the American Midwest.²³⁵ Although no tortious conduct caused the significant damage to people

228. See Pablo Salvador Coderch et al., *Vicarious Liability and Liability for the Actions of Others*, INDRET 14 (2002), http://www.indret.com/pdf/079_en.pdf (explaining that the limitation in liability of intentional torts or grossly negligent actions of the civil servant deters direct lawsuits).

229. See *How 7 July Compensation Works*, BBC NEWS (Oct. 4, 2005), <http://news.bbc.co.uk/2/hi/uk/4307810.stm> ("The amount [awarded by the CICA] compares with an average \$2m for each death claim made by families of 11 September victims to the U.S. government.").

230. *Criminal Injuries Compensation Authority Business Plan 2013–17*, at 16 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288507/business-plan-2013-17.pdf (last visited Oct. 9, 2016).

231. See 5 U.S.C. §§801–808 (2016) (giving Congress the authority to review and veto any agency regulation).

232. See *Criminal Injuries Compensation Authority Business Plan 2013–17*, *supra* note 230, at 16 (establishing a means for stakeholders to provide feedback to CICA).

233. See Jonathan Turley, Opinion, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html (describing administrative agencies as a separate sphere of law that are protected from governmental interference).

234. See Lindy Rouillard-Labbé, *Justice Among the Ashes: How Government Compensation Facilities Can Bring Justice to Disaster Victims*, 38 FORDHAM INT'L L.J. 245, 246 (2015) (discussing a survey of a modest compensation program for the victims of the 2011 floods in Manitoba, Canada).

235. *Id.*

and their property, the U.S. government still acted in solidarity with the victims of the natural disaster without being liable for the damage. This mirrors the Spanish statutes, such as the LSVT, that provide compensation to victims of terrorism as an act of “solidarity” without admitting any kind of tortious liability.²³⁶ Because this philosophy of solidarity with victims of natural disasters already exists within the U.S., it is not an impossible leap to extend this solidarity to victims of man-made disaster.²³⁷

A combination of the Spanish, British, and American responses will also aide in the controversial protection of common carriers—a highly targeted forum for terrorist attacks.²³⁸ Railways are a particularly worrisome target.²³⁹ For example, more people pass through Penn Station in New York City than all three major airports servicing the region combined.²⁴⁰ Experts note that absolute security can never be achieved, and even extreme security measures cannot fully prevent an attack and would severely disrupt the efficiency of the transportation system.²⁴¹ The high volume of people paired with the difficulty of implementing strict security measures makes common carriers, such as railways, a prime target for terrorists seeking to inflict maximum damage.²⁴²

The VCF was an afterthought to the primary goal of protecting American airline carriers in the ATSSSA.²⁴³ A new compensation scheme combining strong statutory guidelines and an administrative agency would create a compensation

236. See LSVT (B.O.E. 1999, 20063) (Spain) (paying tribute to victims of terrorism by assuming payment of compensation without necessarily finding liability).

237. The United Nations has already recognized the importance of solidarity with the victims of terrorism worldwide. In 2008, the United Nations held the Secretary-General’s Symposium on Supporting Victims of Terrorism where members began a dialogue on how to best support the victims of terrorism. See Ban Ki-moon (Secretary-General), *Supporting Victims of Terrorism* (Sept. 9, 2008), http://www.un.org/en/terrorism/ctitf/pdfs/un_report_supporting_victims_terrorism.pdf (noting that over the past decade many people have suffered loss and injury due to terrorism).

238. See *Targets for Terrorism: Ground Transportation*, COUNCIL ON FOREIGN RELATIONS (July 13, 2006), <http://www.cfr.org/homeland-security/targets-terrorism-ground-transportation/p10198> (“Since September 11, U.S. authorities have issued several general warnings of possible terrorist attacks on parts of the ground transportation system, including subways, railroad trains, and bridges.”).

239. Eben Kaplan, *Rail Security and the Terrorist Threat*, COUNCIL ON FOREIGN RELATIONS (Mar. 12, 2007), <http://www.cfr.org/united-states/rail-security-terrorist-threat/p12800>.

240. See Caroline Bankoff, *More People Pass Through Penn Station Each Day Than Through LaGuardia, JFK and Newark Airports Combined*, N.Y. MAGAZINE: DAILY INTELLIGENCER (Nov. 24, 2013, 5:51 PM) (stating that over 650,000 people pass through Penn Station daily).

241. See Kaplan, *supra* note 239 (cautioning against severe security initiatives on passenger railways where complete safety is unattainable).

242. See *id.* (describing factors that render railways and other common carriers ideal terrorist targets).

243. See Belkin, *supra* note 216, at 3 (explaining how compensation for victims’ families was an afterthought to a bill Congress passed to save the airlines).

system that is more than an afterthought and that would also help to deter litigation against common carriers. Because a terrorist attack utilizing common carriers has already occurred, it logically increases the foreseeability of such an event occurring again.²⁴⁴ As such, if common carriers do not have adequate security enhancements to guard against such a horrific act occurring again, it may be a lower threshold to prove that they have violated their duty to passengers. By providing victims and their families with a more efficient and quicker way to access claim rewards through a compensation system, a statutorily prescribed compensation scheme could deter direct lawsuits against common carriers. Otherwise, Congress will find itself in the same position as it did in drafting the ATSSSA—with only three days to draft a controversial bill to keep a huge industry from being bankrupted by lawsuits.²⁴⁵

VI. CONCLUSION

Terrorist attacks make the concept of blame nebulous. Of course, the direct actors carry the majority of the blame, if not all of it. However, Al Qaeda and like-minded militant terrorist groups do not present a legal entity that is easily held accountable in U.S. courts. Victims and their families understandably turn to who can be held accountable—those who had a responsibility to protect the victims and failed to do so. The unprecedented nature of the 9/11 attacks produced a faulty compensation scheme that was successful in its circumstances, but is not sustainable for future attacks should they occur.

Spain's strong statutory system outlining social insurance and compensatory schemes provides a model for the U.S. If the U.S. were to pass laws now mirroring Spain's example, then it can avoid the criticism Special Master Kenneth Feinberg faced, including accusations of using his unfettered power without discretion. The U.K.'s pre-established administrative agency, CICA, acted immediately after the London Bombings, with the only criticism being that of a delay in awarding compensation claims.²⁴⁶ If the U.S. created a similar, pre-existing administrative agency to administer a compensation fund, it would be more prepared in the face of another attack. Structuring this agency to be accountable both to a public forum and internal authority, as well as the government, provides the judicial review that was lacking for the VCF. Unfortunately, the 9/11 attacks made any future large-scale terrorist attack far from "unprecedented." To aid in the healing of the victims, the families, and the country, the U.S. needs to have a competent compensation scheme prepared.

244. See *Bolton v. Stone* [1951] AC 850 (HL) 864 (holding that because a cricket ball had crossed a road adjacent to the park six times previously, it was entirely foreseeable that it would happen again and hit someone in the head).

245. See Hillard, *supra* note 183, at 189 (discussing passage of the ATSSSA on September 22, 2001).

246. See Dodd, *supra* note 171 (noting that victims of the London Bombings will receive an estimated £15 million in compensation from CICA).