

# Victim Compensation Funds and Tort Litigation Following Incidents of Mass Violence

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## INTRODUCTION

How do victim compensation funds (VCFs) impact a victim's likelihood to sue using the tort system? This issue is of more than theoretical interest, as VCFs have become a seemingly ubiquitous feature of the policy landscape following high-profile tragedies. For example, following the September 11, 2001, terrorist attacks, Congress created a special compensation fund for victims who waived their right to sue.<sup>1</sup> After being swarmed with thousands of donations in the wake of the Virginia Tech massacre, Virginia Tech established the Hokie Spirit Memorial Fund to provide

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1. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(c)(3)(B)(i), 115 Stat. 230, 239-40 (2001).

monetary compensation to victims.<sup>2</sup> Victims of the Aurora, Colorado movie theater shooting received payments from a VCF,<sup>3</sup> as did victims in the Sandy Hook Elementary School shooting<sup>4</sup> and the Boston Marathon bombing.<sup>5</sup> BP paid out more than \$6.2 billion to over 220,000 claims through its Gulf Coast Claims Facility, a private compensation fund it established in the wake of the Deepwater Horizon Oil Spill.<sup>6</sup> Even prior to 9/11, funds were established for victims of the Columbine High School shooting and the Oklahoma City bombing.

VCFs exist in parallel to—or in some cases, as with the 9/11 Fund, as a substitute for—the tort system, which remains the apex source of compensation for victims of personal injury. While a small body of empirical scholarly research on VCFs has emerged in recent years, much of the foundational work regarding how such funds affect behavior of victims, their legal representatives, and current and potential tortfeasors remains undone.

One particular gap in scholarly understanding of VCFs concerns how such funds affect victims' attitudes towards, and their willingness to engage in, tort litigation. Because existing empirical research on VCFs has been primarily retrospective—focusing on the amount of compensation provided by funds and whether participants were satisfied with their experience—we know little about how the particular characteristics of a VCF contribute to its ultimate success or failure. For example, does the mere existence of a fund alter people's calculations about whether to pursue litigation, how much to seek in compensation, and from

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2. *We Remember*, VA. TECH., <http://www.vt.edu/fund> (last visited Oct. 19, 2015).

3. Kayla Arneson, *Feinberg Finalizes Payments from Aurora Victim Relief Fund*, COMMUNITY FIRST (Nov. 16, 2012), <http://communityfirstfoundation.org/news/news-releases/feinberg-finalizes-payments-from-aurora-victim-relief-fund>.

4. *Who We Are*, NEWTOWN-SANDY HOOK COMMUNITY FOUND., INC., <http://www.nshcf.org> (last visited Oct. 19, 2015).

5. *About the One Fund*, ONE FUND BOS., <https://secure.onefundboston.org/pages/about> (last visited Oct. 19, 2015).

6. BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY: EXECUTIVE SUMMARY 1 (Apr. 19, 2012), <http://www.justice.gov/iso/opa/resources/697201241917226179477.pdf>.

whom, or is a fund only as good as the amount of compensation it provides? Are there particular contexts where funds are more likely to shift attitudes towards tort litigation? Answers to these questions might help policymakers decide whether to establish a VCF following a particular event as well as guide fund structure and design. Nonetheless, empirical data illuminating these questions remains elusive.

In this Article, we provide novel evidence on the relationship between VCFs and tort litigation, drawing from a nationally representative survey of 1558 adult respondents. Our survey presents a hypothetical scenario where a mass shooting at a concert injures a friend or family member of the respondent. We experimentally vary whether a VCF exists following the shooting, the amount of loss, and the amount of compensation provided, allowing us to examine how these attributes of a situation affect decisions regarding whether to pursue litigation, and whom to sue. We also collected a substantial amount of qualitative information from our survey respondents, which permits us to better gauge the reasons why some respondents choose not to sue, and more clearly understand how VCFs shape attitudes towards tort recovery.

A key virtue of our survey approach is that it allows us to draw inferences about how changing characteristics of a VCF would alter behavior holding other factors constant. Obtaining such conclusions would be close to impossible with real-world data, since it would essentially require several factually identical mass shootings with different types of VCFs. To buttress our experimental findings, and to assess whether our experimental findings are likely to translate to the real world, we also carefully examined published accounts of victim behavior following a number of recent mass tragedies involving actual VCFs.

Our experimental survey reveals that VCFs can play an important role in shaping decisions to pursue litigation in the wake of a tragedy. In particular, we demonstrate that in our mass injury scenario: (1) litigation is less likely when a VCF provides compensation to victims, even when such compensation does not require waiving one's right to sue; (2) the amount of compensation provided by the VCF matters;

(3) adequacy of compensation is measured relative to economic loss, rather than in absolute terms; (4) a substantial fraction of the population would pursue a suit even when fully compensated for economic loss; and (5) VCFs affect decisions regarding whether to sue, but not whom to sue. We also show that a modest but non-negligible subset of the population express an unwillingness to pursue a suit even following a significant uncompensated loss, and that several demographic characteristics predict willingness to pursue a suit.

Our qualitative analysis reveals factors beyond compensation that can affect victims' willingness to pursue litigation. Many who receive partial compensation from the VCF cite the costs and hassles of litigation as a deterrent to further pursuing a suit. Others who receive compensation, but still want to sue, express concern about latent injuries or potential future unforeseen costs, or focus on ensuring that responsible parties are held accountable and adequately punished. These findings are consistent with prior theoretical work on tort that focuses on the variety of functions played by the tort system beyond simple provision of compensation. Ultimately, our findings suggest that VCFs are an imperfect substitute for litigation given that people see tort law as more than just a means to compensation. There are, however, certain circumstances where VCFs may be effective at reducing some litigation

Part I provides an overview of the existing research on VCFs, and briefly outlines some of the theoretical work on the tort system relevant for our Study. Part II discusses our survey platform, the American Life Panel, and considers the strengths and limitations of survey data in this context. Part III presents our results. We first provide a quantitative analysis of our survey responses, including an analysis of how VCF characteristics and respondent demographics influence decisions regarding whether and whom to sue. We next turn to the qualitative data to help us better explain respondents' decisions. Finally, we compare what we learned from the survey with actual observed behavior of victims receiving payments from VCFs. Finally, the Article concludes by discussing the policy implications of our findings.

## I. EXISTING RESEARCH ON VCFs AS AN ALTERNATIVE TO TORT LITIGATION

Although there has been considerable theoretical and empirical work examining administrative alternatives to tort such as workers' compensation,<sup>7</sup> vaccine compensation funds,<sup>8</sup> and no-fault auto insurance,<sup>9</sup> there has been less scholarly work examining the attributes and impacts of compensation funds established in the wake of one-time mass injury events such as terrorist events or shootings. Much of the recent scholarly work on VCFs has centered on the first 9/11 VCF, with a handful of studies providing some data on the interplay between the 9/11 Fund and the tort system.<sup>10</sup> In

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7. See, e.g., Richard J. Butler, *Lost Injury Days: Moral Hazard Differences Between Tort and Workers' Compensation*, 63 J. RISK & INS. 405 (1996); D. Han Chang, *Workers' Compensation for Occupational Disease: Prorating Liability Versus Last Employer Liability*, 60 J. RISK & INS. 647 (1993); Jean C. Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857 (1985); W. Kip Viscusi & Michael J. Moore, *Workers' Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses*, 69 REV. ECON. & STAT. 249 (1987).

8. See, e.g., Gemma Flamberg, *An Experiment in Tort Reform: The National Childhood Vaccine Injury Compensation Act of 1986*, 110 PUB. HEALTH REP. 635, 635 (1995).

9. See, e.g., JAMES ANDERSON ET AL., RAND CORP., *THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE* (2010); DAVID LOUGHRAN, RAND CORP., *THE EFFECTS OF NO-FAULT INSURANCE ON DRIVER BEHAVIOR AND AUTO ACCIDENTS IN THE UNITED STATES* (2001); Gary T. Schwartz, *Auto No-Fault and First Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000).

10. In addition to the empirical studies discussed here, there have been a number of theoretical studies of the 9/11 Fund and other VCFs. See, e.g., Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005); 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 (2006); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003); John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027 (2003); Erin G. Holt, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513 (2003); Stephan Landsman, *A Chance to Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL LAW REV. 393 (2003); Linda S. Mullenix,

assessing how victims view compensation, Deborah R. Hensler compared and contrasted comments made by 9/11 victims and members of the public in response to proposed and finalized rules of the 9/11 VCF.<sup>11</sup> She found that both members of the public and 9/11 victims preferred a tort-like compensation system based on economic loss, and not based on victims' needs or notions of equality.<sup>12</sup> However, the comments suggested victims compared their compensation to others, and that those who received the most felt the result was just, while those who received less felt morally slighted.<sup>13</sup>

Brian H. Borstein and Susan Posers' first study on the 9/11 VCF supports Hensler's results. Using a survey of 9/11 victims, Borstein and Poser used the novelty of the 9/11 VCF to test theories of distributive justice.<sup>14</sup> They found that the more compensation victims received, the more they felt compensation was fair, and that it was fair compared to what others received.<sup>15</sup> Overall, however, dissatisfaction among 9/11 VCF claimants was substantial.<sup>16</sup>

Two other studies share some similarities to our own, as they pertain to how 9/11 victims evaluated the tradeoff

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*Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819 (2011); Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315 (2004); George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527 (2003); Robert I. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769 (2003); Mike Steenson & Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524 (2008).

11. Deborah R. Hensler, *Money Talks: Searching for Justice through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 432-51 (2003).

12. *See id.* at 453-55.

13. *See id.*

14. Brian H. Borstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75, 76-77 (2007).

15. *Id.* at 93.

16. *Id.* at 90-91.

between compensation through a VCF and litigation. After surveying and interviewing 9/11 victims, Gillian K. Hadfield found the choice confronting 9/11 victims was not as easy as weighing the probability of winning a judgment in court against guaranteed, comparatively rapidly paid money from the VCF.<sup>17</sup> Many felt more were responsible than just the terrorists, blaming the airline security firms, the Federal Aviation Administration, intelligence agencies, and the Immigration and Naturalization Service.<sup>18</sup> Among respondents who chose the fund, many did so reluctantly. Twenty-five percent of respondents were unsure if they had made the right choice and 10% regretted their decision.<sup>19</sup> More than half the respondents who chose the fund found the decision to be difficult, often feeling as though they missed an opportunity to seek accountability.<sup>20</sup> Ultimately, Hadfield suggests that such funds may not necessarily be an adequate substitute for litigation.<sup>21</sup>

Bornstein and Poser offer several additional findings that more or less corroborate Hadfield's study. Using another survey of 9/11 victims, they found some lingering doubts amongst victims about whether taking compensation over litigation was the right course.<sup>22</sup> Twenty-nine percent of respondents who chose the fund were unsure if they had made the right choice and 7% felt they made the wrong decision.<sup>23</sup> Even among those who felt they made the right choice by going with the fund, more than half felt they

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17. See Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV., 645, 645 (2008).

18. *Id.* at 656-58.

19. *Id.* at 663.

20. *See id.* at 663-64.

21. *See id.* at 673-76.

22. Brian H. Bornstein & Susan Poser, *Victims, Lawyers, and Money: Legal Representation in the September 11th Victim Compensation Fund 15* (Mar. 2010) (unpublished paper), [http://works.bepress.com/brian\\_bornstein/1](http://works.bepress.com/brian_bornstein/1).

23. *Id.* at 20.

received less compensation than they would have if they had successfully sued.<sup>24</sup>

Although this research on the 9/11 Fund provides some indications as to how VCFs might affect attitudes towards litigation—for example, highlighting the significant role that the amount of compensation and the desire for accountability played in victims' decision-making process—it is unclear whether the findings from the 9/11 Fund are likely to generalize to other types of funds. The legislation creating the 9/11 Fund gave victims a choice: litigation or VCF compensation.<sup>25</sup> Those who chose the VCF were eligible for up to \$8.5 million in compensation,<sup>26</sup> but they waived their right to sue.<sup>27</sup> Those who chose litigation could only bring their claim to the federal court of the Southern District of New York, and damages were capped by the amount of insurance carried at the time of the attacks by the defendant airline.<sup>28</sup> The 9/11 VCF thus differs from many of the other VCFs that have arisen in the wake of mass injuries in that (1) victims were required to waive the right to sue, (2) those who did sue faced a tort process constrained by *sui generis* federal statute, and (3) there was a substantial pool of compensation money available relative to the number of victims. In all, less than a hundred victims litigated the matter<sup>29</sup> and the VCF paid over \$7 billion to 5562 people, which included families of the deceased and those who suffered physical injury.<sup>30</sup>

The present Study contrasts with this prior work in that we employ an experimental survey-based research design that allows us to measure how variations in the

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24. *Id.*

25. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(c)(3)(B)(i), 115 Stat. 230, 240 (2001).

26. KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 109 (2004), [http://www.justice.gov/final\\_report.pdf](http://www.justice.gov/final_report.pdf).

27. § 405(c)(3)(B)(i), 115 Stat. at 240.

28. *Id.* §408(a), (b)(3).

29. Hadfield, *supra* note 17, at 646.

30. KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at xi (2005).



characteristics of a VCF influence expected behavior, something that is not possible in the study of real-world funds since fund characteristics are fixed. For real-world funds, one cannot readily construct a counterfactual for how individuals would have behaved had a fund not existed or had different characteristics. In addition, our hypothetical uses a VCF that exists alongside traditional tort litigation. Unlike the 9/11 Fund, most of the VCFs that have been established following mass shootings or tragedies supplemented, rather than substituted for, tort litigation.

These prior studies on VCFs are embedded within a larger theoretical literature examining the tort system that is also relevant for the present Study. Although legal scholars have advanced numerous competing approaches to understanding the aims of tort law, two approaches currently stand at the forefront of debate.<sup>31</sup> The first portrays the purpose of tort law as primarily a means to deter economically wasteful activity.<sup>32</sup> Damages are imposed to incentivize potential wrongdoers to, in the future, “weigh the costs of injury against the benefits of productive activity.”<sup>33</sup> The second “corrective justice” perspective posits that tort law’s aim is to “enforce[ ] duties of repair that arise in response to wrongdoing.”<sup>34</sup> Thus, where one party harms the interests of another, the injurer must compensate the injured in order to restore her to her pre-injury position.<sup>35</sup>

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31. Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 193 (2000); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

32. Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469, 469 (2013); Schwartz, *supra* note 31, at 1828.

33. Hensler, *supra* note 11, at 421.

34. Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 108 (2011); *see also* Culhane, *supra* note 10, at 1069.

35. Culhane, *supra* note 10, at 1033. For additional examples of the framing of tort law goals, consider George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. L. REV. 1, 8 (1987) (“The goals of modern law are reduction of the accident rate and the provision of compensation to the injured. . . . [T]hese goals should command widespread acceptance.”); Steven D. Smith, *The Critics and the “Crisis”: A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 765 (1987) (“Tort law’s primary function, this essay proposes, is not to compensate,

While these theoretical perspectives shed some light on the potential role of VCFs within the larger tort system, more directly relevant for this Study is the following question: What is the purpose of tort law from the viewpoint of actual and potential consumers of the system? While the literature on plaintiffs' perception of tort goals is modest compared to the volumes of legal scholarship on theories of tort, some research and discussion on this topic exists.

In studies where plaintiffs are interviewed or surveyed about their litigation objectives, they share narratives that reflect their desire to pursue litigation on the basis of strongly-held principles that are separate from, or exclusive of, any desire for a financial recovery.<sup>36</sup> For example, in a study that evaluated plaintiffs' motivation behind litigation in medical malpractice cases, Tamara Relis indicated that "It's not about the money!" was a common theme throughout virtually all plaintiffs' discourse. The issue of 'principle' was prominent for plaintiffs as revealed in the various objectives they passionately spoke about.<sup>37</sup> Apart from compensation, plaintiffs may express a desire for acknowledgement of their loss;<sup>38</sup> wrongdoers to be held accountable for harm they have

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deter, or punish, but rather to resolve disputes arising from perceived breaches of important social norms, thereby reducing conflict and reaffirming those norms.").

36. Tamara Relis, *"It's Not About The Money!": A Theory on Misconceptions of Plaintiff's Litigation Aims*, 68 U. Pitt. L. Rev. 342, 361 (2006).

37. *Id.* Even where money is an explicit objective of a plaintiff, money might be viewed as a secondary rather than primary goal. *See id.* at 363. Compensation can also symbolize "a means towards . . . nonmonetary ends," Hensler, *supra* note 11, at 429, such ends being, for example, a signal that the plaintiff was "heard and acknowledged or as a deterrent to future conduct." Relis, *supra* note 36, at 378.

38. Relis, *supra* note 36, at 364 (describing a study where medical malpractice plaintiffs' objectives included obtaining physician acknowledgement of harm); *see also* Liesbeth Hulst & Arno J. Akkermans, *Can Money Symbolize Acknowledgement? How Victims' Relatives Perceive Monetary Awards for Their Emotional Harm*, 4 PSYCHOL. INJ. & L. 245, 252, 258 (2011).

caused;<sup>39</sup> an apology or admission of guilt from wrongdoers;<sup>40</sup> information and answers;<sup>41</sup> policy changes that would prevent re-occurrences of the harm;<sup>42</sup> and retribution or

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39. Tom Tyler discusses a powerful example of plaintiffs' desire for accountability:

In 1990, Tom Durkin conducted a study that included in-depth interviews with asbestos victims who already were involved in the civil justice system[ . . . Durkin found that . . . victims repeatedly expressed a preference for adjudication. This preference was distinct from a desire for compensation, however. It stemmed from a desire to face the asbestos companies in court where the litigants could present evidence about their harm and the court could make official findings of wrongdoing.

Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 L. & CONTEMP. PROBS., 199, 202-03 (1990) (citing Tom Durkin, *The Settlement of Asbestos Claims in the United States and United Kingdom* (1990) (working paper) (Am. Bar Found.); see also Hadfield, *supra* note 17, at 661 (quoting one 9/11 plaintiff who framed the decision to pursue litigation as a "duty to pursue those responsible for [her] loss in court."); Hensler, *supra* note 11, at 427-28; Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984) (arguing that by the time parties turn from interpersonal discussion and negotiation to third party or court intervention, "the grievant wants vindication . . . , an advocate to help in the battle, or a third party who will uncover the 'truth' and declare the other party wrong."); Relis, *supra* note 36, at 364.

40. Relis, *supra* note 36, at 363-64, 379. For example, one plaintiff whose mother was injured in a fall at a hospital described the decision to sue: "The whole reason for all of this is, as we said to our lawyer was '[m]y mother needed an apology.' 'That' is what this is about: the mistakes and no apology, nothing." *Id.* at 378; see also Hulst & Akkermans, *supra* note 38, at 252, 258.

41. In Relis' 2006–2007 study, "obtaining answers or explanations' about what happened was the second most repeated litigation objective of plaintiffs" in her dataset of claimants who filed medical malpractice suits. Relis, *supra* note 36, at 365. Similarly, in deciding whether or not to accept payment from the September 11th Victim Compensation Fund or file a lawsuit, respondents in Hadfield's study who decided to sue identified as a consideration their desire for information obtainable through the litigation process. Hadfield, *supra* note 17, at 661-62; see also Hensler, *supra* note 11, at 417 (depicting victims' "need to understand why this happened" as a familiar refrain); Merry & Silby, *supra* note 39, at 153 (describing grievant's desire to "uncover the 'truth'"); Tamara Relis, *Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants*, 25 STUD. L. POL. & SOC'Y 151, 155 (2002).

42. In fact, preventing the wrong from happening again ranked at the top (along with admission of fault) among the respondents in Relis' 2006–2007 study examining medical malpractice plaintiffs' litigation objectives. Relis, *supra* note 36, at 363 fig.4. Similarly, in Hadfield's study, respondents who faced the decision

punishment.<sup>43</sup> These varied goals reflect the fact that “litigants are propelled into litigation as a result of not only material but also psychological and emotional needs to alleviate the effects of distressing experiences. Hence, their aims often include non-monetary elements.”<sup>44</sup>

A VCF’s impact on a victim’s willingness to sue might depend, at least in part, on the VCF’s ability to meet the non-monetary goals of plaintiffs. Therefore, our research, along with other studies on VCFs, should be understood within the context of the broader literature addressing the purpose of tort law and plaintiffs’ perception of tort law’s aims. Such scholarship is instructive as we analyze the responses received through our survey.

## II. DATA

To better measure how VCF payments affect attitudes towards litigation, we fielded an original experimental survey of a nationally representative group of U.S. adults. The survey was conducted in August 2013 using the American Life Panel (ALP), an Internet-based survey platform developed by the RAND Corporation. ALP participants include about 6000 individuals over the age of eighteen who are compensated for regularly participating in web-based research surveys.<sup>45</sup> RAND recruits ALP participants in a variety of ways, most notably from among participants in other prominent national surveys involving

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between payout from the September 11th Victim Compensation Fund or pursuit of litigation believed that suing could give them the chance to promote change through the courts. Hadfield, *supra* note 17, at 649, 662.

43. Relis, *supra* note 36, at 363 fig.4. “Only rarely do these accounts show us vengeful plaintiffs. But occasionally plaintiffs . . . describ[e] their desire to hurt defendants, as they have been hurt.” Hensler, *supra* note 11, at 429 (footnote omitted). Parties also may seek to “use litigation as a coercive weapon.” Relis, *supra* note 41, at 156.

44. Relis, *supra* note 41, at 193; *see also* Relis, *supra* note 36, at 341, 360-61, 382-83.

45. RAND CORP., RAND AM. LIFE PANEL 1 (2015), [http://www.rand.org/content/dam/rand/pubs/corporate\\_pubs/CP500/CP508-2015-05/RAND\\_CP508-2015-05.pdf](http://www.rand.org/content/dam/rand/pubs/corporate_pubs/CP500/CP508-2015-05/RAND_CP508-2015-05.pdf) (last visited Oct. 19, 2015).

random selection.<sup>46</sup> To further minimize selection bias, laptops and internet access are provided to those who lack such capabilities.<sup>47</sup> Since panel members are paid, response rates are usually high.<sup>48</sup> For this Study, the survey was completed by 1558 randomly selected participants from the ALP.

Our experimental survey incorporates two particular features that allow us to better assess how the existence and characteristics of VCFs affect attitudes towards pursuing litigation following a mass-injury event. First, we randomly assign respondents to different versions of the survey, altering across survey versions the amount of loss experienced during the injury, whether a VCF exists to provide injury compensation, and the amount of compensation provided by the VCF. A key virtue of randomization in this context is that it allows us to attribute differences in expressed attitudes towards litigation to variation in the particular situations presented across variants of the survey, rather than other factors. For example, it seems reasonable to expect that answers regarding whether to pursue litigation are influenced by unobservable individual characteristics such as attitudes towards the legal profession, prior experience with litigation, or assumptions regarding information not explicitly provided in the text of the question. However, randomization provides confidence that these unobserved factors are unlikely to differ systematically across respondents to the different versions of the survey. Second, we allow participants to provide free-form explanations for their answers regarding whether and whom to sue. These responses provide a wealth of qualitative information about attitudes towards litigation and how these attitudes change based upon the available forms of compensation.

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46. See *id.*; *Recruitment*, RAND AM. LIFE PANEL, <https://alpdata.rand.org/index.php?page=panelcomposition> (last visited Sept. 11, 2015). ALP members were recruited from the University of Michigan's Survey Research Center's Monthly Survey and the "Abt" SRBI's National Survey Panel. *Id.*

47. RAND AM. LIFE PANEL, *supra* note 45, at 1.

48. See *id.*

Although the survey approach helps us better isolate the effects of particular features of a situation on decision making, experimental surveys are not without drawbacks. One key limitation of the present survey is that survey responses may exhibit hypothetical bias, or a tendency for choices on the survey to deviate from the actual choices respondents would make when faced with real-life decisions with financial and emotional consequences. Hypothetical bias is a well-documented problem of surveys,<sup>49</sup> and may be particularly likely when questions involve unfamiliar or highly emotionally charged situations, as in the present example. It seems reasonable to expect, for example, that some individuals who profess unwillingness to pursue litigation under any circumstances might feel differently if faced with the actual emotional and financial toll of a serious injury.

We must also be cautious about extrapolating from these survey responses to litigation attitudes more broadly. The survey describes a particular situation involving an injury sustained from a gunman in a stadium; whether the patterns in these data would persist across other settings or other forms of injury remains unknown. While it seems plausible that similar responses would arise if we examined attitudes towards mass shootings in similar locations, such as shopping malls, whether these results can guide thinking about other types of attacks, such as limited-scale violent actions by terrorists, is unclear.<sup>50</sup>

Appendix A provides the complete text of the survey. Respondents were initially presented a scenario in which a gunman opens fire at a concert, injuring numerous spectators. Respondents were then asked whether they would advise a friend or loved one injured in the shooting to sue, and, if the answer was yes, were given a choice of five possible parties and asked to indicate which of those parties

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49. See James J. Murphy et al., *A Meta-Analysis of Hypothetical Bias in Stated Preference Valuation*, 30 ENVTL. & RESOURCE ECON. 313, 313-15, 323 (2005).

50. This problem of external validity, however, is not unique to the survey approach. This problem would also present itself, if, for example, we chose to study the actual decisions of individuals in a specific setting where there was a VCF.

they would sue.<sup>51</sup> Multiple responses were permitted. Finally, all respondents were offered an opportunity to explain their answer in text box.

We fielded five versions of the survey. The first version indicated that the injured party had sustained \$5000 in medical and economic losses from their injury, while the second version makes the amount of the losses \$55,000. Version 3 includes additional text describing a VCF established by charitable organizations, corporate contributions, and private donations, and indicates that the victims suffering a \$5000 loss had also received a \$5000 payment from the fund. Versions 4 and 5 also include a VCF, but vary the amount of loss and recovery. Table 1 summarizes the five versions of the survey.

Version	Is there a victim fund?	How much is the loss?	How much does the fund pay?	Amount of uncompensated loss
1	No	\$5000	N/A	\$5000
2	No	\$55,000	N/A	\$55,000
3	Yes	\$5000	\$5000	\$0
4	Yes	\$55,000	\$5000	\$50,000
5	Yes	\$55,000	\$50,000	\$5000

Table 1: Survey Variants

Because we are focusing on the role of compensation in shaping attitudes towards litigation, we have chosen to frame the losses in monetary terms without precisely specifying the nature of the injury. Clearly, one factor that can drive litigation is differences between plaintiffs and defendants in their views regarding the appropriate level of compensation for a particular injury. We have, to some degree, abstracted from such differences by specifying losses

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51. Because the survey scenario involved violent victimization, we used a third-person framing as a means of distancing the respondent from the situation.

in dollar terms. Nevertheless, because we do not provide any information about non-economic losses, even with this narrower framing there remains some scope for individual interpretation regarding what constitutes adequate compensation. Nonetheless, had we identified particular types of injuries in the survey, it is possible that responses may have differed.

Table 2 presents summary statistics describing the survey population for each of the five versions of the survey, along with p-values from a joint test for statistically significant differences in average characteristics across the five variants. With the exception of marital/relationship status, none of the demographic differences are statistically significant at conventional levels, and the practical differences are minor. These patterns suggest randomization was implemented successfully. An omnibus test for randomization fails to reject the null of successful randomization ( $p=.945$ ).<sup>52</sup> The apparent success of our randomization procedure provides confidence that any differences in responses across versions of the survey are attributable to the changes in conditions described in the survey and not to other factors.

Characteristic	Average among those responding to version:					Joint Test
	1	2	3	4	5	P-Value
Female	.600	.589	.545	.595	.633	.271
Hispanic	.216	.212	.175	.161	.184	.341
Black	.125	.123	.089	.133	.111	.431
Age (years)	48.9	49.3	49.7	49.9	50.4	.778
Married	.603	.656	.624	.528	.584	.020
U.S. citizen	.984	.967	.977	.978	.988	.447
College degree	.387	.427	.399	.370	.404	.684

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52. We conducted this test by estimating a multinomial logistic model where the outcome was which of the five surveys was administered and the explanatory variables included age and age squared, number of household members, citizenship status, gender, and indicators for race/ethnicity (6 categories), family income (5 categories), educational attainment (5 categories), marital status (5 categories), and employment status (4 categories). We tested for the joint significance of all the coefficients in the model.



<b>Household size</b>	2.29	2.19	2.14	2.23	2.15	.742
<b>Currently working</b>	.656	.669	.677	.646	.645	.892
<b>Annual family income &gt;\$50K</b>	.364	.414	.459	.399	.452	.096
<b>N</b>	<b>305</b>	<b>302</b>	<b>303</b>	<b>316</b>	<b>332</b>	

Table 2: Summary Statistics by Survey Version

**Note:** The final column of the table reports a p-value from a joint test of differences in means across any of the versions of the survey.

### III. RESULTS

#### A. Quantitative Analysis of Responses

Table 3 presents our main results, demonstrating how responses to the question about whether to pursue a lawsuit differ across the various versions of the survey. Across all versions of the survey, a majority of respondents express a willingness to pursue a suit, with approximately 90% of respondents favoring a lawsuit in Version 2 (a \$55,000 loss with no fund), and 51% favoring a lawsuit in Version 3 (a \$5000 loss with a \$5000 payment from the victim fund). We can statistically reject the hypothesis that rates of pursuing a lawsuit are the same across any two of the three versions of the survey that feature a VCF.

<b>Version</b>	<b>Scenario</b>	<b>Fraction Who Would Recommend Lawsuit</b>	<b>95% Confidence Interval</b>
<b>1</b>	\$5K loss, no fund	85.2%	[81.3% , 89.2%]
<b>2</b>	\$55K loss, no fund	89.7%	[86.3% , 93.2%]
<b>3</b>	\$5K loss, VCF pays \$5K	51.5%	[45.8% , 57.1%]
<b>4</b>	\$55K loss, VCF pays \$5K	86.4%	[82.6% , 90.2%]
<b>5</b>	\$55K loss, VCF pays \$50K	62.7%	[57.4% , 67.9%]

Table 3: Willingness to Sue by Survey Condition

Several other patterns are notable in the data. First, in the versions of the survey where there is no VCF (Versions 1 and 2), most respondents would pursue a lawsuit, but there is a non-negligible minority of 10–15% who say they would not recommend a suit, even with no obvious source of

compensation for their losses. Below we further explore this reluctance to recommend a suit by certain individuals. Second, the fraction of individuals who would recommend a suit is roughly the same in the first two versions of the survey, despite the fact that the loss in the first version is less than one-tenth as large as the loss in the second version. This suggests that factors other than the amount of loss may drive decisions to file suit, or alternatively, that losses above some *de minimis* level are likely to trigger a lawsuit.

Are decisions to litigate driven primarily by uncompensated loss rather than total loss? Comparing Versions 2 and 4 of the survey, which have similar amounts of uncompensated loss (\$55,000 versus \$50,000), we see similar rates of litigation. However, only 63% of respondents to Version 5 of the survey—which featured \$5000 in uncompensated loss—pursued litigation, whereas the rate of litigation was 85% in Version 1 of the survey, which had the same amount of uncompensated loss. This pattern suggests that respondents use their total loss as a reference point in thinking about adequacy of compensation, and that it is the performance relative to this benchmark rather than their absolute uncompensated loss that influences decisions to litigate.

If decisions to litigate are made primarily with reference to reimbursement relative to baseline loss, we would expect a smaller fraction of respondents to pursue a suit in a variant with full compensation (a \$5000 loss and a \$5000 payment) than the variant with near full compensation (a \$55,000 and a \$50,000 payment), despite the fact that the latter group receives more in absolute dollars. The data reveal precisely such a pattern. Perhaps less expected is the fact that fully 51% of respondents would pursue litigation even when their medical and wage losses had been fully compensated. We explore below the reasons given for pursuing litigation in such a situation.

Table 4 reports coefficients from a linear probability regression<sup>53</sup> where the outcome is whether an individual indicated that he or she would recommend a lawsuit, and the

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53. Using non-linear alternatives, such as probit or logit, yields very similar results.

explanatory variables are the survey version and a set of demographic characteristics. The coefficients in this regression measure the expected change in the likelihood of advocating a suit associated with a particular characteristic, holding constant the other characteristics in the model. Consonant with the results in Table 3, Table 4 demonstrates large and statistically significant differences in willingness to pursue a suit across survey versions, with those being compensated for a higher fraction of their economic losses demonstrating less willingness to sue.

Table 4 also reveals intriguing patterns across demographic groups in willingness to sue. Age, income, education, employment status, and family structure are not strong predictors of willingness to sue. However, women are about six percentage points less likely to recommend a suit than men. Relative to non-Hispanic Caucasians, African-Americans are ten percentage points more likely to recommend a suit, Asians are sixteen percentage points more likely, and Hispanics are eight percentage points more likely. These differences cannot be explained by income, since this is also controlled in the model, and persist when we also control for state of residence. The precise explanation for these differences by gender and race/ethnicity remain unclear; such patterns merit further examination in future research.

<b>Explanatory Variable</b>	<b>Coefficient</b>
<b>Survey version (reference: \$5000 loss, no VCF)</b>	
\$55,000 loss, no VCF	.049* (.028)
\$5000 loss, \$5000 VCF payment	-.327*** (.035)
\$55,000 loss, \$5000 VCF payment	.014 (.028)
\$55,000 loss, \$50,000 VCF payment	-.218*** (.033)
<b>Female</b>	-.062*** (.022)
<b>U.S. citizen</b>	.024 (.079)
<b>Hispanic</b>	.078** (.030)
<b>Age (years)</b>	.005 (.004)
<b>Age<sup>2</sup></b>	.000 (.000)
<b># in household</b>	.001 (.008)
<b>Employment status (reference: not working)</b>	
Employee	-.010 (.027)
Self-employed	.001 (.049)
Other	-.054 (.090)
<b>Education (reference: Less than HS)</b>	
High School only	-.013 (.041)
Some college, no bachelor's	-.004 (.042)
Bachelor's degree	-.053 (.046)
Advanced degree	-.049 (.051)

<b>Race (reference: White)</b>	
African-American	.104*** (.032)
Native-American	.024 (.085)
Asian-American	.161** (.073)
Other	.046 (.041)
<b>Marital status (reference: married or living with a partner)</b>	
Separated	-.007 (.071)
Divorced	.001 (.033)
Widowed	.031 (.052)
Never married	.029 (.030)
<b>Family income (reference: &lt;\$20K)</b>	
\$20K–\$40K	-.013 (.031)
\$40K–\$75K	.011 (.033)
\$75–\$100K	-.023 (.040)
>\$100K	-.052 (.043)
<b>Constant</b>	.747*** (.140)
<b>N</b>	1553
<b>R<sup>2</sup></b>	.150

**Table 4: Regression Estimates Relating Demographics to Willingness to Sue**

**Note:** The table reports coefficients from a linear probability regression model where the outcome is an 0/1 indicator for whether a particular survey respondent would sue. The explanatory variables include demographic characteristics of the respondents. The coefficients measure the difference in the expected probability of suing for someone with a particular characteristic relative to the reference group, or, for a continuous explanatory variable such as age, the difference in the expected probability of suit associated with a unit change in the explanatory variable. Heteroskedasticity robust standard errors are reported in parentheses. \*, \*\*, and \*\*\* denote estimates that are statistically significantly different from zero at the 10%, 5%, and 1% confidence levels, respectively.

Whom would respondents recommend suing? Table 5 demonstrates that nearly four out of five respondents who would pursue a suit would target the gunman, and three out of five would target the security company. About half of respondents would sue the stadium owner. A smaller but non-negligible fraction of respondents would sue gun manufacturers or sellers. The fact that such a large fraction of respondents would pursue lawsuits against parties other than the gunman is perhaps surprising, and suggests that the general public might have fairly broad notions of responsibility in incidents such as this one. Interestingly, although the willingness to sue at all was affected by the presence of a fund and the amount of compensation provided, the choice of whom to sue was not at all affected by those variables. This pattern suggests that receiving compensation from a victim fund may not change recipients' perceptions regarding culpability, even if it does alter their willingness to pursue formal legal action. Below we draw from the qualitative responses to provide further insight into decisions regarding whom to sue.

Lawsuit Target	% Suing Across All Versions	% Suing Among Those Responding to Version:					Joint Test
		1	2	3	4	5	P-value
Gunman	79.1%	77.3%	78.2%	80.1%	81.7%	78.4%	.741
Stadium owner	49.7%	52.7%	51.7%	48.1%	47.3%	47.6%	.640
Concert promoter/performers	24.8%	25.0%	21.8%	28.8%	28.6%	20.7%	.153
Gun seller/manufacturer	18.2%	16.2%	19.6%	17.9%	21.2%	15.4%	.425
Security company	63.3%	63.5%	64.2%	59.0%	64.5%	63.5%	.833
Other	3.5%	4.2%	3.0%	5.1%	3.7%	1.9%	.423

**Table 5: Target of Lawsuit by Survey Version**

**Note:** Percentages are conditional on indicating a willingness to sue, and more than one target can be selected. The final column of the table reports a p-value from a joint test of differences in means across any of the versions of the survey.

Appendix Table A1 reports regression coefficients from a model where we explain the total number of parties targeted as a function of demographic characteristics, limiting the analysis to those who would recommend a suit. Consistent with the findings in Table 4, which showed that after

controlling for other characteristics, women are less willing to sue and African-Americans are more willing to sue; in this specification we see that women would target fewer parties, and African-Americans would target more. There is also suggestive evidence that the number of parties targeted increases with education.

Our experimental survey results provide a number of insights into how VCFs shape attitudes towards litigation. Our results support Feinberg's argument that VCFs reduce willingness to litigate, even when receipt of VCF funds does not require a waiver of the right to sue.<sup>54</sup> Additionally, the data clearly indicates that the amount of compensation provided by the VCF matters, with evidence suggesting that victims measure adequacy of compensation in comparison to the amount of loss.

### B. *Qualitative Analysis of Responses*

We next draw from the free-form text respondents used to explain their answers to gain additional insights regarding attitudes towards litigation following a shooting. Ninety-four percent of respondents provided an explanation for their answers, a proportion that did not vary systematically by survey version. Most offered a sentence or two of explanation, with an occasional longer, more detailed response. Additionally, since many respondents offered similar explanations for the choices regarding whether to sue, we categorized and coded the free-form responses as an additional means of exploring respondents' attitudes.

Why do some respondents choose to not recommend a suit, even when there is no VCF present and there are substantial losses? Throughout all versions of the survey, respondents who advocated not suing provided four common explanations. First, some respondents indicated that attacks such as the one outlined in the scenario were akin to random accidents that are a feature of everyday life, and therefore felt that no one could be really held responsible through

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54. KENNETH R. FEINBERG, WHO GETS WHAT 81 (2012) (arguing that the Hokie Spirit Memorial Fund, which did not require a lawsuit waiver, reduced victims' willingness to pursue litigation).

litigation. Figure 1 categorizes and depicts these types of responses as “risks of life,” and shows that between roughly 5% and 18% of respondents who would not sue cited this as a reason, depending on the version of the survey. Illustrative responses in this vein include:

This is a random act. To me it is like a crazy freak accident. How can you sue a crazy person[?]

Who are the responsible parties? When you freely attend an event where many people are present, it is impossible to be guaranteed complete safety.

Any time you go somewhere there is always a possibility of something happening. I would imagine the people putting on the event would have checked people entering. We can't file lawsuits for everything.

Second, Figure 1 reports a smaller number of respondents as being “opposed to lawsuits.” Across all versions of the survey, 11% of respondents cited this as a reason not to sue. In this category, respondents generally cited adverse social consequences of lawsuits as a reason not to sue, for example:

America, the land of the free and frivolous law suits. I'm not sure that we can do much more at our public venues to prevent/protect against the sick minded killers in society. Unfortunately in the shadow of tragedies like this scenario, folks attempt to use the 'system' to get rich. I am not trying to sound unsympathetic, but someone is going to fund these payouts. It all comes back to the consumer eventually.

[I]n a situation like that, it becomes a circus, where ambulance chasing lawyers are pushing clients to file, then to settle, so that the lawyers can get paid. [I]t prolongs the grief as the lawyers and media rush to exploit the victims, and does nothing to really help the victims.

A third common explanation was that respondents recognized the shooter as likely being judgment proof. Depending on the survey version, Figure 1 reports that anywhere between 4% to 13% of respondents cited this as an explanation for not wanting to pursue litigation. Typical responses that fell in this category of explanations include:

I believe that there is no chance that anyone would be able to collect from the gunman. The gunman probably has issues that would



prevent them from having money, so suing them would be pointless . . . .

I believe the only responsible party is the shooter him/herself, and I doubt that all of the victims, even if they should file a lawsuit, would be able to collect any money from the shooter. Thus, I think that the cost of filing a lawsuit for my 'friend' would be a waste, as there would be nothing to collect.

The fourth reason cited for not suing was a concern over litigation costs. In the scenarios where the uncompensated loss was \$5000 (Versions 1 and 5), many voiced concern about whether lawyers' fees or other litigation costs would be more than the actual amount of recovery. In particular, Figure 1 shows a large majority of respondents in Version 1 cited "litigation costs" as a reason not to sue and that over 40% in Version 5 of the survey concurred. Responses concerning litigation costs include:

It would cost much more than \$5000 to try to get the money from the responsible parties. It would not be worth the trouble.

I would not recommend to pursue a lawsuit of [\$]5000 because the attorney fees would probably be more than what you would walk away with.

Others who cited litigation costs as a reason for not suing focused on the emotional and psychic costs of litigation:

It's so much more hassle, time, money and energy to pursue a lawsuit. Yes[,] in the end, you might get more money, but at what cost emotionally[?]

To go through a law[suit] would take an additional toll on a person. It is time to heal and not dwell on the past.

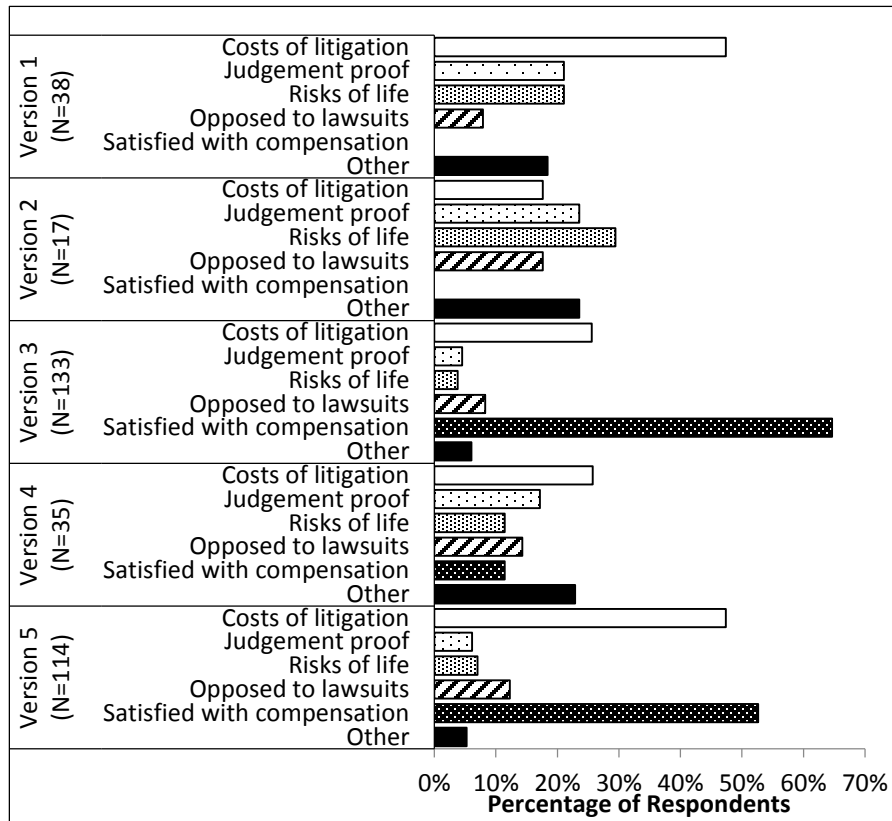


Figure 1: Explanations Provided by Respondents Who Would Not Pursue Litigation

Note: This figure reports the authors’ tabulations of the free-form responses explaining why victims choose not to pursue litigation. The tabulations are limited to those with usable responses, and the response categories are not mutually exclusive.

This reasoning regarding costs was much less apparent among those responding to the version of the survey with a \$55,000 or \$50,000 loss (Versions 2 and 4), and may help to explain why the VCF can provide a means of reducing litigation. Figure 1 shows that when compared to respondents who incurred \$5000 in losses (survey Versions 1 and 5), respondents who incurred \$50,000 to \$55,000 in losses (Versions 2 and 4) were significantly less likely to cite litigation costs as a reason not to sue. These patterns suggest that some respondents view pursuing litigation as involving fairly high fixed costs that were only worth sustaining if there was the possibility of a commensurate payoff. Even if a VCF does not provide full compensation, to the extent that it

narrows the gap between loss and compensation to a level closer to what is perceived as representing the fixed cost of litigation, it may deter lawsuits.

As suggested by the quantitative results, the free-form responses indicated that the amount of compensation provided by the fund is important. As two respondents to Version 4 of the survey who supported filing suit stated succinctly:

Receiving \$5000 is not much compared to losing \$55,000.

The \$5000 compensated from the victims' fund is way too little.

Moreover, only four of forty-four respondents to Version 4 of the survey who chose not to sue and explained their answer indicated that the payment from the VCF influenced their decision to forego a lawsuit. Overall, the pattern of explanations offered in Version 4 of the survey were largely similar to those for Version 2, again suggesting that an overly small VCF payment exerts little effect on judgments regarding whether to pursue litigation and whom to target.

In contrast, Figure 1 shows that many respondents who received full or almost full compensation for their economic loss (Versions 3 and 5) and were unwilling to recommend a suit, found compensation to be sufficient. In particular, some respondents felt that it would be unfair and selfish to sue. For example:

You already got what was compensated to you, why would you want to be greedy and pursue for more. Being greedy will not lead to nothing good.

The purpose of a civil lawsuit is to recover actual damages that the litigant has sustained. A lawsuit should not be a source of money beyond what is necessary to restore a person to health or go back to work.

These responses are consistent with prior scholarship emphasizing the compensation function of the tort system.<sup>55</sup> In short, VCFs that can provide full or nearly full

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55. See Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 Geo. L.J. 585, 629-30 (2003); Priest, *supra* note 35, at 5.

compensation can reduce the likelihood that victims will feel a need to resort to litigation.

On the opposite end of the spectrum from those who would not pursue a suit, even following a substantial loss and no compensation, are those who indicate they would sue even when fully compensated for economic loss. One of the more striking patterns in the survey is the fact that more than half of respondents in Versions 3 and 5 of the survey—where compensation for economic loss was at or near 100%—expressed a willingness to pursue a lawsuit. The high rate of lawsuits suggests that compensation is only one reason among many that citizens may wish to access the tort system.

Respondents who would pursue a lawsuit cited two predominant reasons for their behavior. The first was a desire to assign responsibility to those parties viewed as being at fault, and in some cases to pursue retribution against such parties. Figure 2 categorizes these responses as “accountability/retribution,” and reports that in all versions of the survey, this category accounted for at least 60% of all explanations provided by respondents who were willing to sue. For these respondents, litigation was less about receiving money than ensuring accountability and inflicting punishment. Representative responses along these lines include:

The injuries that people sustained are life-changing and disrupt their overall wellbeing especially their sense of peace and safety. For this reason, the people responsible should be held accountable by filing a lawsuit.

A civil suit against the gunman would punish the gunman by depleting him/her of any assets that otherwise would not be affected by a criminal conviction.

Automatic payment does not punish the shooter. Hitting the pocket book does.

These responses are consistent with findings in the literature more broadly, namely, that plaintiffs’ objectives in litigation

can be driven by the desire for accountability<sup>56</sup> or to inflict punishment on a wrongdoer.<sup>57</sup>

It remains unclear whether such attitudes would persist in a real-life scenario in which there was more information and publicity surrounding the criminal prosecution of the gunman. For example, in a situation more akin to the Boston Marathon bombing, where one of the alleged perpetrators was seriously injured during a police pursuit and now faces the death penalty if convicted, victims might view the criminal justice system as providing adequate retribution without the need to impose additional penalties through the civil justice system. On the other hand, several respondents cited a need to hold other parties responsible who likely would not fall under the purview of the criminal justice system. For example, one respondent noted:

Corporations that sell guns should be responsible for the negative actions that come from their products.

It is possible that such a concern could only be addressed through a civil suit.

Beyond assigning responsibility and inflicting punishment, the other main reason cited for pursuing litigation was a desire for compensation. We categorized responses desiring some kind of payment as “[i]nadequately compensated” under Figure 2, which also shows that across all survey versions, at least 25% of respondents who pursue a suit did so to obtain additional compensation. Interestingly, Figure 2 reveals relatively little variation across survey

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56. See Hadfield, *supra* note 17, at 661; Tyler, *supra* note 39, at 202-03.

57. See Relis, *supra* note 36, at 363 fig.4. Take for example a respondent in Hadfield’s study who had opted for litigation rather than a payment from the September 11th Victim Compensation Fund. The litigant indicated that pursuing a tort claim was

one way of saying no, it wasn’t just the terrorists. There was a lot of ordinary negligence that led to people’s deaths . . . . It’s not just about the facts; there is a need to bring those facts to accountability . . . .

. . . .

What I’m looking for is justice—someone held accountable for the murder. There are people who did not do their job. No one has been fired, demoted.

Hadfield, *supra* note 17, at 662 (first alteration in original).

versions in the proportion of respondents who cite inadequate compensation; it is not the case that respondents who received more from the VCF who would have ultimately chosen to sue were appreciably less concerned about adequacy of compensation. However, it is worth noting that because these responses are conditional on being willing to pursue a suit in the first place, all these data indicate is that among those who would sue, their reasons for doing so seem roughly comparable across survey conditions.

Many responses related to inadequate compensation focused on insuring against potential future unforeseen costs, particularly when VCF compensation was at or near economic loss (Versions 3 and 5). For example, one respondent succinctly stated:

I feel compensation is justified for future unfor[e]seen complications.

Others replied in a similar vein:

A lawsuit should be pursued because of the probability of medical and/or mental issues that have yet to surface.

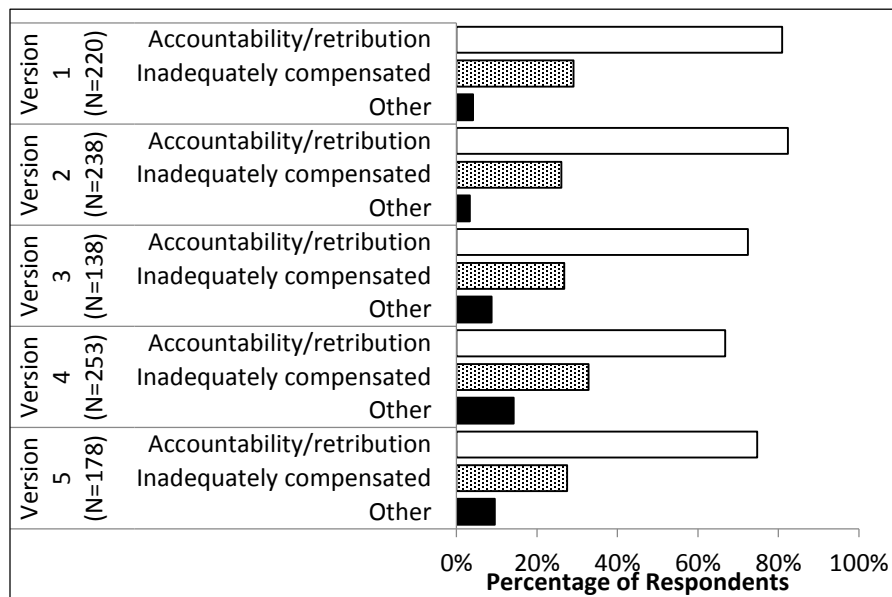


Figure 2: Explanations Provided By Respondents Who Would Pursue Litigation

**Note:** This figure reports the authors' tabulations of the free-form responses explaining why victims choose to pursue litigation. The tabulations are limited to those with usable responses, and the response categories are not mutually exclusive.

I would imagine that there would be trauma and treatment necessary (including psychological) beyond the immediate wage loss and first year of medical treatment.

These specific responses point to a possible dilemma facing those who design victim funds. Architects of such funds, most notably Ken Feinberg, have argued that providing prompt payment should be a major objective of the funds in order to reduce uncertainty and allow victims to move on as quickly as possible.<sup>58</sup> However, payments made before the full extent of injuries is realized may leave victims in the position of wishing to pursue litigation later to recover future unforeseen losses.

The qualitative responses also provide insights into the choice of whom to sue. Many respondents viewed the stadium owner and security company as sharing culpability with the gunman, because they could have prevented the incident if they had screened attendees better or taken more active security precautions. For example,

The owner of the stadium and security guards had a responsibility to the attendees to provide a safe environment—they did not. They could be held accountable for the safety of their patrons. And the gunman could obviously be sued because he broke the law and injured people.

Similarly, another respondent noted:

I would advise my friend to sue them because security and the owner of the stadium were not properly protecting the public from guns. This could have be[en] prevented, yet people were injured due to inefficient security and the stadium owners.

The responses that focus on the possibility of using the tort system to prompt behavioral change echo work by Gillian

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58. See FEINBERG, *supra* note 54, at 79-81, 159-64; see also Mark Arsenault & Todd Wallack, *One Fund Payments will Include Those Treated as Outpatients*, BOS. GLOBE (May 15, 2013), <http://www.bostonglobe.com/2013/05/15/one-fund-payments-will-include-those-treated-hospital-outpatients/y0rsHCwTEgx5sJZJLARwiI/story.html>.

Hadfield, whose study featured respondents who thought that litigation (as opposed to the alternative—the 9/11 Victim Compensation Fund) might give them the opportunity to enable “responsive policy change—making sure that lessons were learned and heeded in the future.”<sup>59</sup>

Whether similar attitudes would arise in other shootings or mass-casualty events may depend in part on the type of facility where an event occurred. The Aurora, Newtown, Ft. Hood, and Navy Yard shootings seem similar to the survey scenario in that these events occurred in a facility with controlled access, which likely provides bystanders with a greater expectation regarding security. Virginia Tech provides a sort of intermediate case where the shootings occurred on private property but in a facility where public access is not restricted; shopping malls, restaurants, and other retail spaces offer other examples. The Boston bombing occurred in a location that was completely open to the public. It is unclear whether views regarding the culpability of the property owner or security providers would persist in scenarios occurring in more public spaces.

Perhaps somewhat contrary to intuition, among those who would pursue a suit, nearly one in five would not target the gunman. The qualitative responses reveal a perhaps surprising degree of understanding regarding the fact that the gunman is likely judgment-proof, meaning that actually receiving compensation would necessitate including other parties in the lawsuit. Two illustrative comments on this score were:

It depends on my friend[']s situation. If he or she was so desperate for money, like about to lose their home I'd say yes pursue a lawsuit. But the person to blame is the shooter and most likely they wouldn't have the money to pay in a law suit;" and "[t]he gunman is the one responsible for his actions, regardless if he is likely to have less money than the other options.

Although not a widespread view, as for the first respondent above, some expressed willingness to sue parties they did not necessarily view as culpable in order to ensure that compensation was sufficient. For example, one

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59. Hadfield, *supra* note 17, at 648.



respondent who chose to sue all of the listed parties in the survey explained the response as follows:

It would be necessary to sue all parties involved[,] . . . the injured should be compensated for their injuries [and] suing each of them increases chan[c]es of getting compensation.

Another respondent who indicated willingness to sue the security company stated:

I would want to be compensated for my injuries, [a]lthough you can't really blame anyone for someone else[']s actions.

To summarize, our qualitative analysis reveals a number of factors that affect the expected amount of litigation in the wake of a mass shooting. Some fraction of the population profess unwillingness to sue despite incurring uncompensated losses, primarily due to either a belief that random injuries are an unavoidable feature of life, and therefore not deserving of special compensation, or a view that lawsuits generate undesirable social consequences. Respondents also pointed to high-perceived financial and emotional costs of litigation relative to expected returns and a likelihood that the gunman was judgment-proof as barriers to pursuing recovery in the courts.

Among those who would pursue a lawsuit, the most commonly cited reason for doing so was to ensure that culpability was properly assigned to responsible parties and/or that these parties were appropriately penalized. These latter findings reinforce results from the existing work, where plaintiffs “stress[ ] that they sued not for money, but rather for principles,”<sup>60</sup> including the principles of accountability, punishment, and acknowledgement of harm.<sup>61</sup> Additionally, a non-negligible proportion of those who would pursue litigation were motivated by a desire to ensure that their losses are fully compensated. Many respondents were sensitive to the possibility that payments made shortly after a loss might not be sufficient to cover unforeseen future complications, and advocated litigation as a hedge against potential future costs, even if compensation was already

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60. Relis, *supra* note 36, at 383.

61. *Id.* at 363 fig.4.

generous. The availability of comparatively “deep pockets” also appeared to promote litigation among a subset of respondents.

These responses broadly suggest conditions that may affect the ability of VCFs to achieve one oft-cited policy goal of reducing post-event litigation. Given that many cited accountability and retribution as primary reasons for pursuing litigation, litigation may be less likely in situations where the perpetrator is killed or the criminal justice system is viewed as providing sufficient retribution against wrongdoers. Many respondents who expressed a willingness to sue due to inadequate compensation cited the potential for future complications as an important factor, suggesting that VCFs may perform differently depending on whether injuries are well-defined at the time of payment and the likelihood of future complications is low. Even if VCFs lack the resources to fully compensate individuals for injuries, partial compensation may in some cases reduce litigation because many individuals view participation in the court system as carrying appreciable fixed monetary and emotional costs, and are therefore willing to forego litigation even when there is some uncompensated loss. However, if VCF payments are too small relative to loss, they may leave litigation rates largely unchanged. Finally, the substantial number of respondents who would pursue a lawsuit even when fully compensated for economic loss suggests there may be limits to the extent to which VCFs on their own can foreclose litigation.

### C. *How Do Survey Responses Compare to Real-World Behavior?*

The surveys provide interesting insights regarding how VCFs could affect attitudes towards litigation, but the usefulness of these data for policy purposes depend in part on how well the findings from surveys such as ours generalize to real-world behavior. In this Section, we review seven recent VCFs that have arisen in the wake of mass injury events that bear some similarity to the scenario presented in our survey, and qualitatively examine what is known about litigation following those events. Consonant with the findings of our survey, the experience with recent VCFs suggest that

monetary compensation is an important factor shaping attitudes towards litigation, but it is not necessarily the only determinant of whether victims choose to sue. Victims who do sue cite many of the same reasons for pursuing legal action as were cited in our survey, including a desire for accountability and concerns over future injury, while those who do not sue often cite the financial and emotional costs of tort litigation. Moreover, we see some suggestive evidence that litigation is more likely following events where VCF compensation is limited or non-existent. In short, recent historical experience appears to corroborate a number of the empirical findings from our survey.

#### 1. Oklahoma City Community Foundation Disaster Relief Fund

Following the Oklahoma City bombing at the Alfred P. Murrah federal building, the Oklahoma City Community Foundation Disaster Relief Fund (DRF) was established to collect donations and distribute relief.<sup>62</sup> To this day, the fund is still in existence.<sup>63</sup> Because donor intent varied, the DRF is actually comprised of several sub-funds, each serving a different purpose for victims.<sup>64</sup> As a whole, the fund generally pays for unmet medical expenses, funeral expenses, utilities, car payments, mortgages, rent, etc.<sup>65</sup> Additionally, a large portion of the funds are earmarked to assist children of the deceased with educational expenses for undergraduate and vocational schooling.<sup>66</sup> In total, the fund has received \$14,688,611<sup>67</sup> and has doled out \$7,295,071 directly to 1033 victims.<sup>68</sup> Eighteen years after the bombing, the fund still had

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62. BKD LLP, OKLAHOMA CITY DISASTER RELIEF FUND, INC.: FORENSIC INVESTIGATION REPORT 8-10 (2013), <http://www.occf.org/documents/OklahomaCityDisasterReliefFdreportissued3-20-13.pdf>.

63. *Oklahoma City Disaster Relief Fund*, OKLA. CITY COMMUNITY FOUND., <http://www.occf.org/drf> (last visited Sept. 18, 2015).

64. BKD LLP, *supra* note 62, at 18.

65. *Id.* at 21.

66. *Id.* at 23.

67. *Id.* at 20.

68. *Id.* at 26.

a \$10,000,000 account balance from investment income and earmarked donations.<sup>69</sup>

The DRF differs from more recent funds in several respects. The DRF does not make direct lump sum payments, rather, the fund assesses victims' needs and then compensates after other funding sources have been exhausted.<sup>70</sup> For example, the DRF will pay for unmet medical expenses related to the bombing when insurance does not cover costs.<sup>71</sup> Other funds discussed below, however, give victims a one time payment based solely on their injuries, which can be spent for any purpose. DRF funds have also been used to provide outputs such as scholarships that are not directly tied to economic loss from the event itself.<sup>72</sup>

Victims groups have expressed dismay at the fund's large remaining balance, and, by implication, the fact that the fund has paid out less in compensation than it could have.<sup>73</sup> Indeed, frustrated victims sued the Oklahoma Governor and Oklahoma City Mayor over the administration and distribution of funds donated after the bombing. While there have only been a handful of lawsuits related to the bombing,<sup>74</sup>

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69. *Id.* at 20.

70. *Id.* at 16-17, 23.

71. *Id.* at 22-23.

72. *Id.* at 23-25.

73. Randy Ellis, *Oklahoma City Bombing Fund Officials Say Criticism Unjust*, NEWSOK (Nov. 12, 2012), <http://newsok.com/oklahoma-city-bombing-fund-official-s-say-criticism-unjust/article/3727548/?page=1>; OKLAHOMAN EDITORIAL BD., *Audit Should End Talk of Oklahoma City Bombing Fund Being Mismanaged*, NEWSOK (Mar. 24, 2013), <http://newsok.com/audit-should-end-talk-of-oklahoma-city-bombing-fund-being-mismanaged/article/3769340/?page=1>; see also BKD LLP, *supra* note 62, at 20-23 (describing the substantial remaining balance of the relief fund).

74. *Gaines-Tabb v. ICI Explosives*, 160 F.3d 613, 613-18 (10th Cir. 1998); *Gaines-Tabb v. Mid-Kansas Coop. Ass'n*, 980 F. Supp. 1424, 1426 (D. Kan. 1997); Ed Godfrey, *Day-Care Center, ATF, Chemical Firm Sued*, NEWSOK (Apr. 19, 1997), <http://newsok.com/day-care-center-atf-chemical-firm-sued/article/2576476>; Ed Godfrey, *Lawsuit Seeks Accounting for Disaster Donations*, NEWSOK (June 28, 1995), <http://newsok.com/lawsuit-seeks-accounting-for-disaster-donations/article/2506849>; Ellie Sutter, *Last Rescued Victim Files \$4 Million Suit*, NEWSOK (May 12, 1995), <http://newsok.com/last-rescued-victim-files-4-million-suit/article/2502246>.

at least two were class actions involving over three-hundred plaintiffs.<sup>75</sup>

Some Oklahoma bombing victims also pursued lawsuits as a means of achieving accountability for the attacks. While prosecutors convicted and sentenced three perpetrators for the bombing, some victims were not satisfied by the answers provided from the criminal trials.<sup>76</sup> Consequently, several victims sued the country of Iraq in 2002, alleging Ramzi Yousef, a convicted terrorist, was an Iraqi government agent who recruited the Oklahoma City bombing perpetrators to conduct terrorist attacks in the United States.<sup>77</sup> In short, the U.S. government's investigation and criminal trials may not have provided enough accountability in the eyes of some victims.

## 2. Mile High United Way Healing Fund

The Mile High United Way created the Healing Fund the day of the Columbine High School shooting.<sup>78</sup> The fund raised about \$4,600,000 for the victims.<sup>79</sup> Unlike the DRF, this fund distributed several lump sum payments to the victims to be spent as they chose.<sup>80</sup> Initial payments included \$50,000 each for the thirteen families of the deceased, \$150,000 each to four victims who suffered brain and spinal injuries, and \$10,000 each to twenty-one other physically injured victims.<sup>81</sup> The fund reportedly distributed an additional \$1,115,000 to

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75. See *Gaines-Tabb v. ICI Explosives*, 160 F.3d at 613; *Gaines-Tabb v. Mid-Kansas Coop. Ass'n*, 980 F. Supp. at 1426.

76. See Jennifer L. Brown, *Oklahoma Victims Sue Iraq*, FAYETTEVILLE OBSERVER, Mar. 21, 2002, at 11A, <http://news.google.com/newspapers?nid=1559&dat=20020321&id=Rm05AAAAIIBAJ&sjid=eykMAAAAIBAJ&pg=1347,18268871>.

77. *Lawton v. Republic of Iraq*, 581 F. Supp. 2d 43, 44 (D.D.C. 2008).

78. WILLIAM H. ERICKSON, THE REPORT OF GOVERNOR BILL OWENS' COLUMBINE REVIEW COMMISSION 133 (2001), [http://trac.state.co.us/Documents/Reports%20and%20Publications/Columbine\\_2001\\_Governor\\_Review\\_Commission.pdf](http://trac.state.co.us/Documents/Reports%20and%20Publications/Columbine_2001_Governor_Review_Commission.pdf).

79. *Id.* at 133 n.270.

80. See *id.* at 133 n.271.

81. *Id.*

twelve of the most seriously injured victims.<sup>82</sup> In total, about \$2,575,000 went to victims and their families in the form of lump sum payments. The remaining funds, amounting to millions of dollars, went to nonprofits administering outreach programs, victim services, and other community programs.<sup>83</sup>

Soon after the Healing Fund began collecting a significant amount of donations, victims expressed varied opinions over how they felt the funds should be distributed.<sup>84</sup> Some believed the money should be divided equally, while others felt the money should be distributed based on the victims' actual needs.<sup>85</sup> Tensions reached the point where representatives of the victims met with fund administrators to address the conflicting concerns.<sup>86</sup> Ultimately, fund administrators and victims reached a compromise because a little over half of the funds were directed to victims and the rest to service providers and community programs.<sup>87</sup>

Seventeen lawsuits ultimately followed the Columbine shooting,<sup>88</sup> and both the need for compensation and desire to assign blame to responsible parties appear to have factored into victims' calculations regarding whether to sue. While some victims did accept settlements from the defendants,<sup>89</sup>

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82. *Id.*

83. *See id.*; *see also* Dana Liebelson, *CHARTS: Where Did the Money Donated to Columbine, Aurora, and Virginia Tech Mass-Shooting Victims Go?*, MOTHER JONES (Apr. 8, 2013, 6:00 AM), <http://www.motherjones.com/politics/2013/04/where-does-money-donated-victims-mass-shootings-go> (noting that the Healing Fund took in roughly \$4.5 million from charitable donations following the Columbine shooting).

84. Kieran Nicholson & Jim Kirksey, *Feelings Healed Over Healing Fund*, DENVER POST (May 27, 1999), <http://extras.denverpost.com/news/shot0527a.htm>.

85. *Id.*

86. *Id.*

87. ERICKSON, *supra* note 78, at 133 n.271.

88. Chelsea Kelly, *Mass Shooting Lawsuits Can Serve Purpose*, HARTFORD COURANT (Feb. 4, 2014), [http://articles.courant.com/2014-02-04/news/hc-op-fresh-talk-kelly-mass-shooting-lawsuits-usef-20140204\\_1\\_columbine-lawsuits-erin-peterson-julia-pryde](http://articles.courant.com/2014-02-04/news/hc-op-fresh-talk-kelly-mass-shooting-lawsuits-usef-20140204_1_columbine-lawsuits-erin-peterson-julia-pryde).

89. Michael Janofsky, *\$2.53 Million Deal Ends Some Columbine Lawsuits*, N.Y. TIMES (Apr. 20, 2001), <http://www.nytimes.com/2001/04/20/us/2.53-million-deal-ends-some-columbine-lawsuits.html>.

others pushed forward, seeking accountability.<sup>90</sup> For instance, some victims refused to accept settlements from the parents of the two gunmen, insisting that they wanted answers for their behavior.<sup>91</sup> One family in particular, who sued the parents of the gunmen for \$250 million, indicated that their suit was not about money but was instead focused on assigning blame for the parents' negligent behavior and preventing similar future tragedies.<sup>92</sup> Others sued the principal and several teachers of Columbine High School, stating these officials knew of the gunmen's violent tendencies and should have taken action.<sup>93</sup> Ultimately, these victims never obtained accountability, as their suit was dismissed based upon a judgment that the school officials were protected by government immunity.<sup>94</sup>

### 3. Hokie Spirit Memorial Fund

Established after a student killed thirty-two people at Virginia Polytechnic Institute (Virginia Tech), the Hokie Spirit Memorial Fund collected and distributed over \$7 million in donations to victims.<sup>95</sup> Unlike the funds discussed above, nearly all proceeds went directly to the victims in the form of lump sum payments. Families of the thirty-two deceased received \$208,000 and forty-eight victims who were physically injured or present at the scene of the shooting received an average payment of \$35,668.75.<sup>96</sup> Upon receipt of

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90. *See id.*

91. *See id.*

92. *Columbine Lawsuits May Go Beyond Shooters' Parents*, CNN (May 27, 1999, 7:02 PM), <http://www.cnn.com/US/9905/27/columbine.lawsuit.04>; *\$250 Million Columbine Lawsuit Filed*, CNN (May 27, 1999, 1:23 PM), <http://www.cnn.com/US/9905/27/columbine.lawsuit.02>.

93. Julia Campbell, *Principal and School Officials Named in Columbine Suit*, ABC NEWS (July 20, 2006), <http://abcnews.go.com/US/story?id=96453&page=1>.

94. *Most Columbine Lawsuits Dismissed*, CBS (Apr. 29, 2009, 2:25 PM), [http://www.cbsnews.com/2100-201\\_162-319250.html](http://www.cbsnews.com/2100-201_162-319250.html).

95. FEINBERG, *supra* note 54, at 202.

96. *Id.*

payment, victims did not waive their right to litigation.<sup>97</sup> Thus, victims could take the money and sue for even more.

Only two victims of the approximately two hundred potential claimants sued the university in connection with the shooting.<sup>98</sup> One explanation for the paucity of suits may be that victims found compensation from the Fund to be adequate; some commentators, including the Fund's administrator, Ken Feinberg, have argued that the Fund made a significant impact.<sup>99</sup> An alternative explanation is that the stringent nature of Virginia's tort law, which caps damages against the state at \$100,000, was the primary determining factor rather than the Fund.<sup>100</sup> However, the two explanations are not fully exclusive—if victims utilized a cost-benefit analysis in deciding whether to sue, and weighed potential recovery in a suit against unmet needs for compensation and the costs of litigation, the presence of the fund may have tipped the scale against litigation, particularly given the limited availability of damages.<sup>101</sup>

Both plaintiffs were successful at the trial court level.<sup>102</sup> In the initial judgment, the jury found the State was negligent and awarded the plaintiffs \$4 million, which was subsequently reduced to \$100,000 by the trial court and eventually overturned by the Virginia Supreme Court.<sup>103</sup> Nevertheless, victims felt some vindication from the jury's verdict. One parent of a slain Virginia Tech student stated that the lawsuit was about accountability, not money, and “still t[ook] a good measure of satisfaction that the jury listened to all of the evidence and decided as it did. We don't

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97. *Id.* at 81.

98. *Id.*

99. *Id.*

100. VA. CODE ANN. § 8.01-195.3 (2007); *see also* FEINBERG, *supra* note 54, at 81.

101. *See* FEINBERG, *supra* note 54, at 81.

102. J. Freedom du Lac, *Va. Supreme Court Overturns Verdict in Wrongful Death Suit Against Virginia Tech*, WASH. POST (Oct. 31, 2013), [http://www.washingtonpost.com/local/va-supreme-court-overturns-verdict-in-wrongful-death-suit-against-virginia-tech/2013/10/31/047864ac-423c-11e3-a751-f032898f2dbc\\_story\\_1.html](http://www.washingtonpost.com/local/va-supreme-court-overturns-verdict-in-wrongful-death-suit-against-virginia-tech/2013/10/31/047864ac-423c-11e3-a751-f032898f2dbc_story_1.html).

103. *Id.* The Court reasoned that the State did not have a duty to warn Virginia Tech students of the potential for violent acts by the shooter. *Id.*



feel at all that the Supreme Court can take that away from us.”<sup>104</sup>

Another measure of accountability may have come from the U.S. Department of Education, which found in 2012—after payments from the VCF had been made but before the two lawsuits over the tragedy had been resolved—that Virginia Tech violated the Clery Act and fined the university.<sup>105</sup> The Clery Act requires universities to issue timely warnings of threats to students, and the Department of Education found Virginia Tech failed to properly warn students after the gunman committed his first attack on the campus that day.<sup>106</sup> Like the jury verdict finding Virginia Tech negligent, this administrative finding may have provided the accountability and satisfaction some victims desired. Administrative processes such as this could provide a means of accountability without incurring the costs of litigation.

#### 4. Association of the United States Army Fort Hood Shooting Fund

On November 5, 2009, Major Nidal Hasan, a U.S. Army officer, shot and killed thirteen soldiers and civilians and wounded more than thirty-two others at Fort Hood, Texas.<sup>107</sup> Immediately after the shooting, the Fort Hood chapter of the Association of the United States Army (AUSA), a non-profit group, established a modest VCF for the victims.<sup>108</sup> The AUSA collected \$1 million, but as of November 2013, had not

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104. *Id.*

105. *Id.*

106. Va. Polytechnic Inst. & State Univ., U.S. Dep’t of Educ., No. 11-30-SF, at 3-4 (Aug. 30, 2012).

107. Moni Basu, *As Hasan Trial Starts, Fort Hood Victims Feel Betrayed*, CNN (Aug. 11, 2013, 12:28 PM), <http://www.cnn.com/2013/08/10/us/fort-hood-victims/index.html>.

108. *Fort Hood Tragedy: How You Can Help Right Now*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), [http://www.huffingtonpost.com/2009/11/05/help-fort-hood-victims-do\\_n\\_347821.html](http://www.huffingtonpost.com/2009/11/05/help-fort-hood-victims-do_n_347821.html).

yet distributed funds to the victims.<sup>109</sup> Thus, the Fort Hood shooting provides an example of an event with qualitative similarities to other mass injury events examined here, but that involved no real VCF compensation in the first three years post-event.

Our survey responses suggest that lawsuits are more likely in an environment in which no VCF money is available, and the Fort Hood experience thus far seems to support that conclusion. Motivated in part by concern about the level of compensation being provided by the federal government for their injuries, a number of survivors filed a civil suit which named the U.S. Army, the Federal Bureau of Investigation (FBI), the Department of Defense, Nidal Hasan, and Anwar al-Awlaki's estate as defendants.<sup>110</sup> Many Americans saw the shooting as a terrorist attack because Hasan's motivation for the shooting was to defend the Taliban<sup>111</sup> and because he consulted frequently with Anwar al-Awlaki, a radical cleric affiliated with Al Qaeda.<sup>112</sup> Nevertheless, the Army initially designated the shooting as workplace violence.<sup>113</sup> This classification denied survivors access to additional benefits provided to soldiers and civilians wounded in a theater of combat.<sup>114</sup> Hence, the survivors sued to have the incident

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109. *Fort Hood Charity Tight-Lipped About \$1M Collected*, CBS DFW (Nov. 3, 2013, 8:42 PM), <http://dfw.cbslocal.com/2013/11/03/fort-hood-charity-tight-lipped-about-1m-collected>.

110. Charley Keyes, *Victims of Fort Hood Shooting Sue the Army for \$750 Million*, CNN (Nov. 11, 2011), <http://www.cnn.com/2011/11/11/us/texas-fort-hood-lawsuit>; Matt Pearce, *Fort Hood Shooting Victims Accuse U.S. of Neglect, Betrayal*, L.A. TIMES (Feb. 13, 2013), <http://articles.latimes.com/2013/feb/13/nation/la-na-nn-fort-hood-victims-forgotten-20130213>; *Fort Hood Shooting Victims Sue Government*, CBS (Nov. 5, 2012, 9:28 PM), <http://www.cbsnews.com/news/fort-hood-shooting-victims-sue-government>.

111. Basu, *supra* note 107.

112. Larry Shaughnessy, *Hasan's Email Exchange with al-Awlaki; Islam, Money and Matchmaking*, CNN (July 20, 2012, 12:32 AM), <http://security.blogs.cnn.com/2012/07/20/hasans-e-mail-exchange-with-al-awlaki-islam-money-and-matchmaking>.

113. Basu, *supra* note 107.

114. *Id.*

re-designated as an enemy attack<sup>115</sup> and in February 2015, the Army relented and announced that it would award the Purple Heart and its civilian equivalent, the Defense of Freedom Medal, to shooting victims.<sup>116</sup>

The civil complaint in the Fort Hood case also suggests that some litigants are motivated by a desire to establish clearer accountability for the event. Prior to the shooting, Hasan consulted by email with Anwar al-Awlaki about the religious justifications for killing unarmed people.<sup>117</sup> Accordingly, survivors, in their lawsuit against Awlaki's estate, allege that he was responsible for the shooting because he inspired Hasan to carry out the attack.<sup>118</sup> Additionally, because the FBI was monitoring the email communication between the two,<sup>119</sup> the survivors argue that the Bureau shares some responsibility for not preventing the attack.<sup>120</sup> Furthermore, the survivors' complaint alleges Army officials disregarded troubling signs of Hasan's radicalism by ignoring disturbing reports by his peers.<sup>121</sup> In short, a court judgment establishing fault on behalf of the defendants, or a settlement where the defendants admit fault, could provide the justice and accountability survivors seek in addition to compensation.

### 5. Tucson Together Fund

The Tucson Together Fund was an amalgamation of three charitable relief funds established after the January 8, 2011 shooting by Jared Loughner in Tucson, Arizona.<sup>122</sup> The

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115. See Complaint at ¶¶ 307-23, Manning v. McHugh, No. 1:12-CV-01802 (D.D.C. Nov. 5, 2012), 2012 WL 5384166 [hereinafter Manning Compl.].

116. Laura Koran & Jamie Crawford, *Fort Hood Victims to be Awarded Purple Hearts*, CNN (Feb. 6, 2015), <http://www.cnn.com/2015/02/06/politics/fort-hood-purple-hearts>.

117. See Shaughnessy, *supra* note 112.

118. See Manning Compl., *supra* note 115, at ¶¶ 203-08.

119. See *id.* at ¶¶ 18, 258.

120. See *id.* at ¶ 269.

121. See *id.* at ¶ 24.

122. See KENT BURBANK, PIMA CTY. ATTORNEY'S OFFICE, A TRAINING OUTLINE: TUCSON'S EXPERIENCE IN MANAGING MULTIPLE VICTIM FUNDS 1-2 (2011), <https://>

attack left six dead and thirteen wounded.<sup>123</sup> Among the victims was the Chief Judge of the U.S. District Court for Arizona, John Roll, who was killed, and U.S. Representative Gabrielle Giffords, who was severely wounded.<sup>124</sup> The fund received over \$500,000<sup>125</sup> and worked in conjunction with two other compensation sources: Arizona's Victim Compensation Program and a federal Anti-Terrorism Relief Grant.<sup>126</sup> The fund compensated victims for expenses not covered by these two other sources, such as lost wages, funeral expenses, and travel expenses.<sup>127</sup> To provide quick relief, the fund distributed several small lump sum payments "intended for personal incidental expenses not covered by a government program or fund."<sup>128</sup> In all, the fund distributed \$454,500 in lump sum payments, \$31,142 for lost wages, \$15,970 for victim travel expenses, \$6943 for funeral expenses, and \$4512 for additional counseling expenses.<sup>129</sup>

Surprisingly, there has been little controversy involving the Fund, nor to our knowledge have there been lawsuits regarding liability for the shooting. We posit several possible explanations for this behavior that are consistent with our survey findings. First, victims may have felt that compensation, or at least the process of receiving compensation, was fair. Because there were relatively few victims compared to other VCFs, and the fund set procedures to protect the victims' identities, fund administrators

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[www.ncjtc.org/CONF/Ovccconf/AttMat/Understanding%20Victim%20Compensation\\_Burbank\\_Handout.pdf](http://www.ncjtc.org/CONF/Ovccconf/AttMat/Understanding%20Victim%20Compensation_Burbank_Handout.pdf).

123. *Id.* at 1.

124. *Arizona Congresswoman Giffords Shot; Doctors 'Optimistic' About Recovery Chances*, ARIZ. REPUBLIC (Jan. 8, 2011, 7:45 PM), <http://www.azcentral.com/news/articles/2011/01/08/20110108arizona-giffords-brk.html>.

125. BURBANK, *supra* note 122, at 3.

126. *See id.*

127. *See* Nicole Brophy, *Spring Training Game to Benefit Victims of Tucson Tragedy*, ARIZ. FOOTHILLS MAG., <http://www.arizonafoothillsmagazine.com/tucson/tucson-travel-and-leisure/1916-spring-training-game-to-benefit-victims-of-tucson-tragedy.html> (last visited Aug. 25, 2015).

128. *See* BURBANK, *supra* note 122, at 7.

129. E-mail from Kent Burbank, Dir. of Victim Servs., Pima Cty. Attorney's Office, to authors (Dec. 20, 2013) (on file with authors).

developed trust among the victims, enabling them to distribute relief quickly.<sup>130</sup> Additionally, all proceeds of the fund went directly to the victims and not non-profits, a move aimed at avoiding controversies experienced by prior VCFs.<sup>131</sup> Moreover, while the fund itself may not have provided as much dollar compensation for each victim as other funds, administrators designed the fund to maximize compensation by working alongside Arizona's Victim Compensation Program and an Anti-Terrorism Relief Grant.<sup>132</sup> Thus, in the presence of three compensation sources, victims had a greater chance of having their losses fully compensated. Altogether, the fund administrator felt the fund compensated nearly all of the victims' financial losses.<sup>133</sup>

Our survey responses revealed that many citizens understand that lawsuits may not be worthwhile in the absence of "deep pockets" who possess the financial wherewithal to provide compensation, and the Loughner case may provide an example where victims recognized that the likelihood of receiving compensation was slim. The most attractive target for a negligence suit would be Pima Community College, where Loughner was a student, because the college was well aware of his disturbing behavior prior to the shooting.<sup>134</sup> However, the college took corrective measures by reporting the killer's behavior to the police on several occasions and suspending him until he sought mental health treatment.<sup>135</sup> In theory, the college could have gone further by seeking court ordered mental health treatment, which would

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130. Telephone Interview with Kent Burbank, Dir. of Victim Servs., Pima Cty. Attorney's Office (Sept. 23, 2013).

131. *Id.*

132. *Id.*

133. *Id.*

134. See *Pima Community College Was On Alert About Jared Loughner One Week Before Giffords Shooting*, HUFFINGTON POST (Feb. 16, 2011, 12:00 AM), [http://www.huffingtonpost.com/2011/02/15/pima-community-college-jared-loughner\\_n\\_823838.html](http://www.huffingtonpost.com/2011/02/15/pima-community-college-jared-loughner_n_823838.html).

135. See Jacques Billeaud & Terry Tang, *Jared Loughner at Pima Community College: Emails Document Unstable Personality*, HUFFINGTON POST (May 20, 2011, 7:42 AM), [http://www.huffingtonpost.com/2011/05/20/jared-loughner-at-pima-co\\_n\\_864548.html](http://www.huffingtonpost.com/2011/05/20/jared-loughner-at-pima-co_n_864548.html).

have made it illegal for Loughner to possess firearms,<sup>136</sup> but a successful negligence suit under Arizona law on that basis would likely require a finding that the college owed a duty to the shooting victims to seek court-ordered medical treatment for Loughner.<sup>137</sup> Courts may be reluctant to make such a ruling because this could pressure colleges into actions that might potentially violate students' rights.<sup>138</sup>

Another factor that may have acted to limit litigation in the Tucson case was the perceived legitimacy of the criminal justice process. Criminal prosecution proceeded relatively quickly, as Loughner pled guilty and was sentenced to life in prison within two years of the shooting.<sup>139</sup> Overall, victims appeared to be satisfied with the outcome,<sup>140</sup> as the court sentenced him according to the shared intent of most victims to avoid the death sentence.<sup>141</sup> Some victims were able to use

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136. Larry Abramson, *The Tucson Shootings and Mental Health Procedures*, NPR (Jan. 11, 2011, 3:00 PM), <http://www.npr.org/2011/01/11/132840720/Alleged-Shooters-Mental-Health-And-College-Career>.

137. Under Arizona negligence law, a finding of a duty to protect from third persons is a difficult threshold to meet. See DOUGLAS A. BLAZE & JEFFERSON L. LANKFORD, *THE LAW OF NEGLIGENCE IN ARIZONA* § 2.05 (3d ed. 2003).

138. Pima Community College was concerned about violating Loughner's rights when considering taking further actions. Robert Anglen & Dennis Wagner, *College Unsure How to Handle Loughner's Behavior, Emails Show*, ARIZ. REPUBLIC (May 20, 2011, 12:00 AM), <http://www.azcentral.com/news/articles/2011/05/19/20110519loughner-emails-pima-community-college-brk19-ON.html>.

139. The shooting occurred on January 8, 2011. Loughner was sentenced on November 8, 2012. See James Ball, *Jared Lee Loughner Sentenced to Life in Prison*, WASH. POST (Nov. 8, 2012), [http://www.washingtonpost.com/world/national-security/gabrielle-giffords-confronts-shooter-jared-lee-loughner-in-court/2012/11/08/09968fe2-29c7-11e2-b4e0-346287b7e56c\\_story.html](http://www.washingtonpost.com/world/national-security/gabrielle-giffords-confronts-shooter-jared-lee-loughner-in-court/2012/11/08/09968fe2-29c7-11e2-b4e0-346287b7e56c_story.html).

140. Hipolito Corella, *Tucson Shooting Victims Face Loughner Before He Gets Lifetime in Prison*, ARIZONA DAILY STAR (Nov. 8, 2012, 10:01 AM), [http://azstar.net.com/news/local/crime/tucson-shooting-victims-face-loughner-before-he-gets-lifetime-in/article\\_e234dff4-29c5-11e2-8c1d-0019bb2963f4.html](http://azstar.net.com/news/local/crime/tucson-shooting-victims-face-loughner-before-he-gets-lifetime-in/article_e234dff4-29c5-11e2-8c1d-0019bb2963f4.html); Michel Marizco, *Tucson Shooting Victims Satisfied with Loughner Plea Deal*, FRONTERAS (Aug. 7, 2012), <http://www.fronterasdesk.org/content/tucson-shooting-victims-satisfied-loughner-plea-deal>; *Tucson Gunman Faces Victims, Including Gabby Giffords, Before Receiving Life Sentence*, FOX NEWS (Nov. 8, 2012), <http://www.foxnews.com/us/2012/11/08/tucson-gunman-faces-victims-including-gabby-giffords-during-sentencing>.

141. *Giffords Husband to Loughner: 'Gabby and I Are Done Thinking About You.'* OZARKSFIRST (Nov. 8, 2012), <http://www.ozarksfirst.com/news/giffords->

his sentencing hearing as a means to move forward as well. For instance, a victim addressing Loughner stated, “You pointed a weapon and shot me three times. . . . And now I walked out of this courtroom and into the rest of my life and I won’t think of you again.”<sup>142</sup> Others were simply satisfied he was in a place where he could no longer cause harm to society.<sup>143</sup> In sum, the effective prosecution and punishment of the shooter in the Tucson case may have limited victims’ need to seek retribution through the tort system.

## 6. Aurora Victim Relief Fund

The State of Colorado and the Community First Foundation established the Aurora Victim Relief Fund in response to the July 20, 2012, mass shooting at a movie theater in Aurora, Colorado, that left twelve dead and an additional fifty-eight injured.<sup>144</sup> The fund received over \$5 million in donations, which were distributed via lump sum payments.<sup>145</sup> The fund’s compensation plan provided families of the twelve deceased and five victims suffering from permanent brain damage or paralysis with \$220,000 each, six victims who were hospitalized for more than twenty days with \$160,000 each, thirteen victims who were hospitalized from one to seven days with \$35,000 each, and two victims who were hospitalized from eight to nineteen days with \$91,680 each.<sup>146</sup> All victims were eligible for free counseling,

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husband-to-loughner-gabby-and-i-are-done-thinking-about-you; see Corella, *supra* note 140.

142. *Jared Loughner Faces Tucson Rampage Victims*, CBS (Nov. 8, 2012, 2:09 PM), [http://www.cbsnews.com/8301-201\\_162-57546836/jared-loughner-faces-tucson-rampage-victims](http://www.cbsnews.com/8301-201_162-57546836/jared-loughner-faces-tucson-rampage-victims).

143. See Corella, *supra* note 140.

144. See Ben Brumfield, *Payments from Aurora Victim Relief Fund Finalized*, CNN (Nov. 18, 2012, 5:58 PM), <http://www.cnn.com/2012/11/17/us/colorado-aurora-compensation/index.html>. See generally *Officials Release Complete List of Injured Victims in Aurora Massacre*, FOX NEWS (Jan. 10, 2013), <http://www.foxnews.com/us/2013/01/10/officials-release-complete-list-injured-victims-in-aurora-massacre>.

145. Brumfield, *supra* note 144.

146. *Id.*

and victims did not have to waive their right to sue in order to access VCF funds.<sup>147</sup>

While victims ultimately received larger payments on average from the Aurora Fund than for several other VCFs, concerns over adequacy of compensation still appeared to be a major factor driving post-event litigation. Initially, the fund planned to disburse its resources to local non-profits who would then provide services to the victims, similar to the Columbine Healing Fund.<sup>148</sup> This outraged victims, who went public with their disapproval.<sup>149</sup> Consequently, the fund reevaluated its disbursement plan and decided to make lump sum payments directly to victims.<sup>150</sup> Nonetheless, by the time the fund announced a new and final payment plan, victims had already filed several lawsuits against the movie theater,<sup>151</sup> possibly out of concern about the original fund disbursement plan. In total, at least twenty-two lawsuits were filed in connection with the shooting.<sup>152</sup>

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147. *Id.*; *Ken Feinberg Announces Payment Plan for Aurora Theater Shooting Victims*, DENVER POST (Oct. 15, 2012, 9:43 AM), [http://www.denverpost.com/breakingnews/ci\\_21776275/ken-feinberg-announces-payment-plan-aurora-theater-shooting](http://www.denverpost.com/breakingnews/ci_21776275/ken-feinberg-announces-payment-plan-aurora-theater-shooting).

148. CITY OF AURORA, 7/20 RECOVERY ADVISORY COMMITTEE CHRONOLOGY 1 (2012), <https://www.auroragov.org/cs/groups/public/documents/document/012318.pdf>.

149. Oren Dorrell & Gary Strauss, *Aurora Shooting Victims' Families Upset Over Relief Fund*, USA TODAY (Aug. 28, 2012, 4:11 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-08-28/aurora-victim-families-speak/57377450/1>; *Families of Aurora Shooting Victims Angry About Relief Fund*, NBC NEWS (Aug. 28, 2012), <http://www.nbcnews.com/video/nightly-news/48818346#48818346>.

150. *See* Brumfield, *supra* note 144.

151. The following lawsuits were filed between July 27, 2012, when the initial fund disbursement plan was announced, and October 15, 2012, when the new and final payment plan was announced: *See* Complaint at ¶¶ 1-3, *Jackson v. Cinemark, USA*, No. 1:12-CV-02704 (D. Colo. Oct. 11, 2012); Complaint at ¶¶ 1-3, *Medek v. Century Theaters*, No. 1:12-CV-02705 (D. Colo. Oct. 11, 2012); Complaint, *Rosborough v. Cinemark, USA*, No. 1:12-CV-02687 (D. Colo. Oct. 10, 2012); Complaint at ¶¶ 1-2, *Nowlan v. Cinemark, USA*, No. 1:12-CV-02517 (D. Colo. Sept. 21, 2012); Complaint at ¶¶ 1-2, *Traynom v. Cinemark, USA*, No. 1:12-CV-02514 (D. Colo. Sept. 21, 2012).

152. *See* *Axelrod v. Cinemark Holdings, Inc.*, No. 12-cv-02514-RBJ-MEH (D. Colo. Aug. 15, 2014) (order denying summary judgment) (denying Cinemark's



## 7. Sandy Hook Community Foundation Fund

Following the Sandy Hook Elementary School shooting on December 14, 2012, United Way of Western Connecticut, and Newtown Savings Bank created what was to become the Sandy Hook School Support Fund.<sup>153</sup> The fund received \$11,400,000 in donations and distributed it according to a 70-30 plan, where victims received 70% of the donations and the remaining 30% went to the community.<sup>154</sup> Of the 70% distributed to victims, families of the twenty-six deceased received \$281,000, families of twelve children who witnessed the massacre received \$20,000, and two injured staff members received \$75,000.<sup>155</sup> Where the remaining 30% is to be allocated depends on the long-term needs of the community.<sup>156</sup>

Controversy has swirled around the 70-30 plan. Victims vented frustration over the plan at town hall meetings, demanding more transparency and more input into the fund's administration.<sup>157</sup> Some questioned why 30% of the Fund's proceeds were reserved for the community.<sup>158</sup> With all

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motion for summary judgment against collective plaintiffs in twenty consolidated cases); *see also* Amended Complaint at ¶ 1, *Phillips v. Lucky Gunner*, No. 2014CV031946 (D. Colo. Sept. 16, 2014); Complaint at ¶¶ 7-13, *Blunk v. Fenton*, No. 13-cv-00080 (D. Colo. Jan. 14, 2013).

153. *See Newton-Sandy Hook Community Foundation, Inc. to Oversee Sandy Hook School Support Fund*, UNITED WAY W. CONN., <http://www.uwwesternct.org/sandyhook> (last visited Dec. 19, 2013).

154. *Id.*; *see also* Tracy Connor & Tracy Jarrett, *Newtown Residents Vent Frustration at Meeting on Sandy Hook Fund Distribution*, NBC NEWS (July 11, 2013, 11:08 PM), [www.nbcnews.com/news/other/newtown-residents-vent-frustration-meeting-sandy-hook-fund-distribution-F6C10604182](http://www.nbcnews.com/news/other/newtown-residents-vent-frustration-meeting-sandy-hook-fund-distribution-F6C10604182).

155. *Plan Endorsed for Sandy Hook Community Foundation Distributions*, NEWTOWN BEE (July 17, 2013), <http://www.newtownbee.com/news/2013/07/17/plan-endorsed-sandy-hook-community-foundation-dist/150154>.

156. *See* UNITED WAY W. CONN., *supra* note 153.

157. Connor & Jarrett, *supra* note 154.

158. Dave Altimari, *Some Sandy Hook Victims' Families Still Angry Over Fund*, HARTFORD COURANT (July 6, 2013), [http://articles.courant.com/2013-07-06/news/hc-sandyhook-families-unitedway-20130705\\_1\\_sandy-hook-victims-foundation-shooting-spree](http://articles.courant.com/2013-07-06/news/hc-sandyhook-families-unitedway-20130705_1_sandy-hook-victims-foundation-shooting-spree).

of the controversy, however, litigation following the shooting has been limited.

Roughly two years elapsed from the date of the shooting before the first lawsuits. On December 15, 2014, victims decided to sue the manufacturer and sellers of the gun used in the shooting, a somewhat surprising strategy because federal law makes it very difficult to sue gun manufactures for their weapons used in illegal shootings.<sup>159</sup> On December 14, 2014, victims also sued Newtown and its Board of Education.<sup>160</sup>

There are a several potential explanations for the lawsuits. First, compensation may be a factor given that victims were not pleased with the Fund's 70-30 distribution. Second, victims may also desire to hold parties accountable whom they feel are culpable, but who fall outside of the scope of the criminal justice system. Because the shooter killed himself and his mother—who was his caretaker and the source of the weapon used—there has been no legal accountability for those most directly involved in the tragedy.

## 8. One Fund Boston

In the wake of the bombing attack on the Boston Marathon in 2013, various donors created the One Fund at the behest of the city's mayor and Massachusetts governor.<sup>161</sup> In all, the One Fund collected an unprecedented \$80 million in donations.<sup>162</sup> Almost all of the fund went directly to the victims as lump sum payments.<sup>163</sup> Like prior funds distributing payments, the One Fund used a formula based

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159. Pat Eaton-Robb & Dave Collins, *Families of Newtown Victims Sue Rifle Manufacturer*, YAHOO NEWS (Dec. 15, 2014, 2:42 PM), <http://news.yahoo.com/families-newtown-victims-sue-gunmaker-seller-141435892.html>.

160. Michele Richinick, *Families Sue Newtown School Board, Town for Children's Deaths*, MSNBC (Jan. 13, 2015, 1:11 PM), <http://www.msnbc.com/msnbc/families-sue-newtown-school-board-town-childrens-deaths>.

161. *About the One Fund*, ONE FUND, <https://secure.onefundboston.org/pages/about> (last visited Dec. 19, 2013).

162. *Id.*

163. James Oliphant, *How Much is a Life Worth?*, NAT'L J. (Aug. 1, 2013), <http://www.nationaljournal.com/s/74873/how-much-is-life-worth?mref=scroll>.

on the extent of the injuries to determine payments. Families of the four deceased and two double amputees received \$2,195,000 each.<sup>164</sup> Fourteen victims who had one limb amputated received \$1,195,000 each.<sup>165</sup> Depending on the length of their stay in a hospital, 212 victims received anywhere from \$8000 to \$948,000.<sup>166</sup> Both in absolute terms and relative to the number of victims, the One Fund represents the largest and most generous private VCF that has arisen following a mass attack to date.

Thus far, there has been little to no litigation surrounding the Boston attack. Costs seem prohibitive, as there appear to be no suitable targets for a lawsuit—the suspect is likely judgment-proof and the Boston Athletic Association, which manages the marathon, has its liability capped.<sup>167</sup> Government agencies, municipalities, and police departments are likely immune as well.<sup>168</sup> The fact that one of the alleged perpetrators of the attack was killed, while the other was seriously injured in the ensuing manhunt<sup>169</sup> and faces the death penalty,<sup>170</sup> may diminish victims' inclination to turn to the tort system for accountability and retribution.

One issue cited in our survey that has begun to surface among Boston victims is concern about whether the One Fund compensation adequately covers future unforeseen losses associated with the event. For example, some victims

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164. *Id.*

165. *Id.*

166. *Id.*

167. Martha Bebinger, *No Clear Targets for Civil Suits in Marathon Bombings*, WBUR (May 10, 2013), <http://www.wbur.org/2013/05/10/marathon-victims-law-suits>; see also MASS. GEN. LAWS ANN. ch. 231, § 85K (West 2015) (capping liability of charitable organizations at \$20,000 where a tort is “committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation”).

168. Bebinger, *supra* note 167.

169. *Was Tamerlan Tsarnaev Schizophrenic? Boston Bomber Told Friends and Family He ‘Had Two People Living in His Head’ Was the Victim of Mind Control*, DAILYMAIL (Dec. 16, 2013, 4:36 PM), <http://www.dailymail.co.uk/news/article-2524891/Was-Boston-bomber-Tamerlan-Tsarnaev-schizophrenic.html>.

170. Tara McKelvey, *Boston in Shock Over Tsarnaev Death Penalty*, BBC (May 16, 2015), <http://www.bbc.com/news/world-us-canada-32762999>.

who experienced symptoms of traumatic brain injury and post-traumatic stress disorder several months after the event have expressed concern that the One Fund calculations, which were based upon the initial injury assessment, may leave them undercompensated.<sup>171</sup> Other amputees, who received over a million dollars each from the fund, questioned the adequacy of even that sum for their lifetime needs given the cost of prosthetics, which can be quite expensive.<sup>172</sup> Moreover, their employment prospects have diminished significantly.<sup>173</sup> As of this writing, the statute of limitations on tort suits has not yet expired,<sup>174</sup> so some victims might still seek recovery.

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171. Lenny Bernstein, *Brain-Injured Woman and Others Seek More Money From Fund for Boston Marathon Victims*, WASH. POST (Oct. 2, 2013), [http://www.washingtonpost.com/national/health-science/brain-injured-woman-and-others-seek-more-money-from-fund-for-boston-marathon-victims/2013/10/02/84ebaa22-2531-11e3-b75d-5b7f66349852\\_story\\_1.html](http://www.washingtonpost.com/national/health-science/brain-injured-woman-and-others-seek-more-money-from-fund-for-boston-marathon-victims/2013/10/02/84ebaa22-2531-11e3-b75d-5b7f66349852_story_1.html).

172. Lenny Bernstein, *For Some Boston Marathon Bombing Victims, Charity Checks Bring Frustration*, WASH. POST (Sept. 15, 2013), [http://www.washingtonpost.com/national/health-science/for-some-boston-marathon-bombing-victims-charity-checks-bring-frustration/2013/09/15/759bd786-1983-11e3-82ef-a059e54c49d0\\_story.html](http://www.washingtonpost.com/national/health-science/for-some-boston-marathon-bombing-victims-charity-checks-bring-frustration/2013/09/15/759bd786-1983-11e3-82ef-a059e54c49d0_story.html).

173. *Id.*

174. *See* MASS. GEN. LAWS ANN. ch. 260, § 2A (West 2000).

Fund	Approximate # of victims	# of recipients	Total funds collected	Average payment	% of fund paid directly to victims	# of lawsuits
Oklahoma City Community Foundation Disaster Relief Fund	850	1033	\$14,688,611	N/A1	50%	62
Mile High United Way Healing Fund	40	38	\$4,600,000	\$67,763.15	55%	17
Hokie Spirit Memorial Fund	50	79	\$8,500,000	\$108,000	100%	2
AUSA Fort Hood Fund	50	?	~\$1,000,000	?	?	13
Tucson Together Fund	20	19	\$522,264	NA4	100%	0
Aurora Victims' Relief Fund	80	33	\$5,338,360	\$161,768.48	100%	22
Sandy Hook Community Foundation Fund	30	40	\$11,600,000	\$192,400	70%	25
One Fund Boston	270	232	\$70,500,000	\$262,724.14	86%	0

**Table 6: Summary of Recent VCFs Established Following Mass Injury Events**

**Notes:**

1. Fund disbursement was not direct lump sum payments. Instead, funds reimbursed victims for their losses and supplemented other sources of support.
2. At least two of the lawsuits were class actions involving approximately 300 plaintiffs.
3. The sole lawsuit includes roughly 150 plaintiffs.
4. Some compensation was provided as a lump sum payment directly to victims. Most compensation received, however, reimbursed expenses.
5. Nine families were represented in one lawsuit against manufacturers, and two in a lawsuit against the school board.

Table 6 summarizes the funds reviewed above. As a whole, the pattern of victim behavior observed following real-world events is in many ways consistent with the findings from our survey. The Fort Hood event, which has engendered no fund payouts thus far, and which has involved a lengthy and controversial criminal justice process, might seem particularly likely to foster follow-on litigation based on our survey responses indicating that compensation and

accountability are primary drivers of the decision to sue. There have indeed been substantial amounts of litigation since this event. Similarly, for both the Oklahoma City Fund and the Mile High Fund, available funds were much lower on a per-victim basis than for many of the later funds, and ultimately there was an appreciable amount of post-event litigation. For the Hokie Spirit Fund, the Sandy Hook Fund, and One Fund, in contrast, there was more money available on a per-victim basis and it was paid out quickly. Despite the fact that victims did not need to waive their right to sue to take money from these funds, post-event litigation has been scant.

Perhaps the two funds that stand out as anomalies with respect to the compensation/litigation pattern are the Tucson fund—which had limited resources for compensation yet saw no litigation—and the Aurora fund, which provided fairly generous compensation on a per-person basis but still saw a fair bit of litigation. However, in these cases other factors cited in our survey seem to have been important moderators of victim behavior. In the Tucson case, the perpetrator was likely judgment-proof, which our survey suggests is a factor citizens recognize and take into account when formulating their decision to pursue a suit. The Tucson case also involved a very high-profile victim, which may have altered behavior. For Aurora, there was considerable initial uncertainty regarding how the VCF would be administered; many of the lawsuits there may have reflected victims' efforts to manage the uncertain possibility that they might receive no compensation unless they filed a suit. Such uncertainty was also consistently noted in our survey as a reason for pursuing litigation.

Real-world victims also cited some purposes for litigation that were not directly addressed by the survey. Families of a number of victims in Oklahoma City and Columbine expressed a desire to obtain answers about who precisely was accountable, a motivation similar to that expressed by some 9/11 victims<sup>175</sup> and some medical malpractice plaintiffs.<sup>176</sup> Such motivations may have emerged in the survey had the

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175. Hadfield, *supra* note 17, at 661-62.

176. Relis, *supra* note 36, at 365.

vignette included more ambiguity about the circumstances surrounding the injury.

#### CONCLUSION

Our analysis represents one of the first efforts to empirically demonstrate how VCFs affect victims' willingness to pursue litigation. What implications do our results carry for policymakers, legal professionals, and the public?

First, the tort system offers victims more than simply compensation, and because of this, it is probably unrealistic to expect VCFs to completely foreclose post-event litigation. The experimental survey results suggested that roughly half of adults would pursue litigation even when fully compensated for economic loss. It seems reasonable to expect that the actual number of suits among victims in a similar a real-life situation could be lower—and our analysis of real-world funds suggests that this was indeed the case in some previous tragedies—because potential claims would be processed through the filter of the plaintiff's bar. Nevertheless, there appears to be considerable appetite for litigation among even those who receive appreciable amounts of compensation.

Our qualitative data explain this pattern by confirming findings in previous studies that potential plaintiffs consider the tort system to be a vehicle through which one can pursue multiple objectives, including compensation, vindication, policy change, retribution, access to information, acknowledgement of harms, accountability, and insurance against unforeseen future loss. While the insurance function might in theory be incorporated into a VCF, it seems unlikely that a VCF could ever serve many of these other functions of tort. Moreover, our research comports with previous findings that potential plaintiffs' willingness to pursue or forego litigation can be heavily influenced not only by compensation, but also by these non-monetary litigation aims.

Second, the data nonetheless clearly suggest that VCFs affect attitudes towards litigation, and that funds can reduce victims' inclination to use the tort system. If policymakers' objective following a mass disaster is to allow those who are injured to recover quickly without the need to resort to

potentially lengthy, costly, and uncertain litigation, then VCFs can provide an important tool to further that end.

Third, if there is a fund, decisions about how to structure or administer it can influence future litigation. The survey and real-world data suggest that one of the most important fund characteristics, but which is typically outside of policymakers' control, is the total amount of compensation available. However, for a given amount of resources, the data do suggest particular approaches that may have greater effects on tort litigation. Making small token payments to a large number of people—which is normal in more conventional consumer class actions—may not be an effective strategy; our experimental survey data revealed that litigation rates among those who received small payments relative to their loss were similar to those who received no payments at all. At the same time, VCFs do not necessarily need to fully compensate individuals for economic or other losses to affect litigation—victims are in many cases conscious of the substantial emotional and in some cases financial costs of pursuing litigation, and may be deterred when fund payments close the gap between their loss and net potential gains from litigation.

Both the survey and the real-world examples further suggest that choices regarding the timing of the payments can affect willingness to sue. Delaying payments too long, which arguably occurred with the Oklahoma City Fund, the Fort Hood Fund, and the Aurora Fund, can encourage litigation. However, if payments are made too quickly, before the full extent of event-related injuries manifest, our survey responses indicate that some victims may resort to litigation to address concerns about potential unforeseen future harms. Taken together, the data suggest that funds may be most successful at supplanting litigation in situations where there are substantial amounts of money available in the fund, the extent of injuries for victims is clear, responsibility for the event is apparent, and the criminal justice process has high legitimacy.

In instances of mass violence, VCFs often arise from spontaneous feelings of sympathy and generosity among the general public which leads them to make donations to assist victims. In these situations, the establishment of a VCF is



not necessarily the result of a specific policy decision. Our results thus do not directly address situations such as 9/11 or the Deepwater Horizon spill, where VCFs have been used as a way to discourage lawsuits against one or more deep-pocketed defendants for whom legal liability for a particular set of harms was not fully certain. However, at the risk of over-generalizing, one might also wish to consider whether our results can provide any insights for potential defendants who might be considering operating funds in such circumstances.

First, there appear to be some important differences across segments of the population in willingness to pursue litigation following an injury. Although the precise reasons for these differences remain obscure, this finding suggests a VCF's effects on litigation may, in part, depend on the target population for the fund. Second, in our scenario, VCF compensation reduced willingness to pursue litigation even though VCF payments did not require a waiver of the right to sue. This pattern suggests that VCFs may benefit potential defendants even if payments are made without a waiver, because some who are able to sue may decide not to do so once they receive some amount of compensation.

Third, there appears to be a small segment of the population who would not pursue a suit even without compensation. If this pattern extends to the situation where a corporate defendant establishes a VCF, then some of the deterrent benefits of setting up a fund would be offset because defendants would end up paying compensation to some victims who would not have been compensated through traditional tort mechanisms. Fourth, our data suggest that where multiple potential tortfeasors are involved, the presence or absence of a fund may not greatly impact victims' allocation of blame across the different parties.

Although this analysis provides an important first step in understanding how VCFs affect victim behavior, many questions remain. One fruitful area for future study would be to more carefully consider the breadth of situations across which VCFs might provide an alternative to litigation. For example, the Gulf Coast Claims Facility was established in part based upon the belief that providing rapid compensation to those affected by the Deepwater Horizon spill could

eliminate future litigation and associated costs while still providing injured parties a satisfactory resolution. It is unclear at present whether a VCF can provide a viable alternative to tort in such a situation. More generally, it seems possible that VCFs could reduce litigation in more traditional mass injury scenarios where corporations are defendants, causality is more difficult to establish, and the number of potential claimants is large. However, how much a fund could impact behavior in such a situation—and whether it could pass a cost-benefit test from the perspective of a defendant—remains an open question. A related question concerns whether the source of the money for a fund matters—in the scenario we presented, the VCF was funded through charitable donations, but in some cases, such as the 9/11 Fund and the Tucson Together Fund, VCF funds came from governmental sources. It seems reasonable to imagine that whether fund monies come from taxpayer dollars might affect victim behavior, but at this point it is unclear whether and how such effects operate.

Our analysis also does not address many important procedural justice aspects of VCFs. For example, there are many aspects of fund design, including how quickly payments are made, what injury documentation is required, whether hearings or other proceedings are held to allow victims to express feelings regarding the fund, and whether there is an appeals process, all of which likely affect whether victims believe they are treated fairly by a fund, and thus seem likely to ultimately affect their feelings about pursuing litigation. Additional research seeking to better understand the procedural justice aspects of VCFs is warranted.

Although there remains much to learn about what VCFs can and cannot accomplish, what is apparent is that VCFs are likely to remain an important component of the public response to events of mass violence or injury. Policymakers and legal scholars need to incorporate such programs and their effects into how they think about compensation and remedies following such tragedies.

## APPENDIX

A. *Text of Survey*

Imagine the following: During a large concert in a stadium, a gunman in attendance opens fire on the crowd, wounding and killing several dozen people before being captured.

(Versions 3, 4, and, 5): After the shooting, a variety of charitable organizations, individual donors, and entertainment companies contribute money to a victims' fund. The fund makes automatic payments to shooting victims and their families based upon the severity of their injuries.

Those harmed by the attack and their families could file a lawsuit with the help of an attorney and seek injury compensation. Suppose you were advising a loved one or friend who had a total of \$5,000 {\$55,000} in wage and medical losses from injuries in the shooting, (Versions 3, 4, and 5): and who had received a \$5,000 {\$50,000} payment from the victims' fund.

Would you recommend they pursue a lawsuit?

Yes  No

(If Yes) Who would you recommend they sue for their injuries (check all that apply):

- |   |   |
|---|---|
| <input type="checkbox"/> Gunman                         | <input type="checkbox"/> Gun seller or manufacturer |
| <input type="checkbox"/> Owner of the stadium           | <input type="checkbox"/> Security Company           |
| <input type="checkbox"/> Concert promoter or performers | <input type="checkbox"/> Other                      |

Please explain your answer regarding pursuing a lawsuit:

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<b>Explanatory Variable</b>	<b>Coefficient</b>
<b>Survey Version</b> (reference: \$5000 loss, no VCF)	
\$55,000 loss, no VCF	-.014 (.110)
\$5000 loss, \$5000 VCF payment	.012 (.129)
\$55,000 loss, \$5000 VCF payment	.075 (.112)
\$55,000 loss, \$50,000 VCF payment	-.115 (.115)
<b>Female</b>	-.230*** (.080)
<b>U.S. citizen</b>	-.108 (.257)
<b>Hispanic</b>	.128 (.116)
<b>Age (Years)</b>	.031** (.015)
<b>Age<sup>2</sup></b>	.000 (.000)
<b># in Household</b>	-.022 (.027)
<b>Employment Status</b> (reference: not working)	
Employee	-.097 (.099)
Self-Employed	-.202 (.163)
Other	-.139 (.255)
<b>Education</b> (reference: Less than HS)	
High School Only	.302* (.156)
Some College, No Bachelor's	.395** (.161)
Bachelor's Degree	.424** (.175)
Advanced Degree	.616*** (.193)

<b>Race (reference: White)</b>	
African-American	.460*** (.124)
Native-American	-.207 (.255)
Asian-American	.124 (.242)
Other	.220 (.152)
<b>Marital Status (reference: married or living with a partner)</b>	
Separated	-.270 (.195)
Divorced	.120 (.120)
Widowed	.163 (.182)
Never Married	-.002 (.109)
<b>Family Income (reference: &lt;\$20K)</b>	
\$20K–\$40K	.012 (.113)
\$40K–\$75K	.092 (.124)
\$75–\$100K	-.043 (.149)
>\$100K	.179 (.159)
<b>Constant</b>	1.34*** (.495)
<b>N</b>	1165
<b>R<sup>2</sup></b>	.056

**Table A1: Regression Estimates Relating Demographics to  
Number of Parties Sued**

**Note:** The table reports coefficients from a linear regression model where the outcome is the number of parties sued (1–6) and the explanatory variables include demographic characteristics of the respondents. The sample is limited to those who indicate that they would sue. Robust standard errors are reported in parentheses. \*, \*\*, and \*\*\* denote estimates that are statistically significantly different from zero at the 10%, 5%, and 1% confidence levels respectively.