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Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks

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I. INTRODUCTION

Aid to terrorism victims has, until recently, been a secondary aspect of American laws dealing with acts of terrorism. The earliest American laws dealing with terrorism, passed in response to terrorism directed at American facilities abroad, focused primarily on preventing such acts from happening again. Victims of early attacks received little or no aid targeted to them as victims of terrorism. As terrorist attacks have increased, lawmakers have incorporated more generous and more diverse kinds of aid for victims or their survivors. In fact, helping victims and their families in the aftermath of a terrorist event has been one of the goals of recent terrorism legislation. Recent federal laws recognize that survivors and their families are likely to need various levels of medical care, psychological counseling, and financial assistance.

While the trend in our terrorism response laws is to recognize that victims of terrorism need special assistance, victims who suffer similar harms may still be treated differently under our laws. This different treatment of victims springs from two causes. First, Congress passes terrorism legislation in response to individual episodes of terrorism. Lawmakers working to pass legislation in the emotional aftermath of a terrorist event are not necessarily concerned with how, or even whether, these laws coordinate with other similar laws. Second, while laws providing aid to victims may appear to be similar, two quite different rationales underlie our terrorist response laws. These two different rationales for providing aid lead to differences in the kind of aid that is available and who is eligible for it. As terrorism becomes more prevalent...
against American targets both outside and within the United States, we must be aware that the laws we pass to help victims may actually treat similarly situated victims in unfairly disparate ways. We should strive to make our laws providing aid to terrorism victims congruent to ensure that the goal of helping victims is fairly met.

Part II of this Article discusses why it is appropriate to provide aid to victims of terrorism. Part III discusses the rationales that underlie federal laws intended to aid terrorism victims. Part IV gives a brief overview of terrorism legislation and classifies the major federal laws under the two rationales explained in Part III. Part V presents an argument that we can best fulfill our responsibility to those who are hurt as a result of a terrorist attack against American targets by adopting a definition of victim that is broader than the traditional definition based on citizenship. Adopting a broad definition of victim ensures that similarly harmed victims receive similar aid. Defining victims broadly recognizes the trend away from focusing on a narrow group of victims in a narrow set of circumstances and toward aiding a wider group of people in broader circumstances. Broadly defining victims creates more flexibility and more consistency in our terrorism response laws, so that these laws can help the greatest number of injured victims. Part VI presents a proposed definition of victim for incorporation into existing and new legislation.

II. PROVIDING FEDERAL AID TO VICTIMS OF TERRORISM

Terrorism, both at home and abroad, has become a fact of modern life. The appellate court in the case of Pan Am Flight 103, which was blown up over Lockerbie, Scotland in 1988, took judicial notice of the rise in international terrorism. The court detailed specific attempts to sabotage air flights occurring in 1983, 1985, 1986 and 1988. While many terrorist acts are a "threat from outside," others represent a "threat from within." Terrorist acts within the United States vary from assaults on individuals to the bombing of massive

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1 See proposed definition infra at Part VI. I argue that victims must be defined more broadly than "citizen" and even more broadly than "resident" to encompass all who owe loyalty to the United States or for whom the United States has responsibility.


4 Id. at 56. Kushner discusses various antigovernment extremists, some of whom belong to organized groups and some of whom are freelancers. See id. at 56-85.
targets such as the World Trade Center in New York City in 1993. Official concern about terrorism is clear. In 1997, Congress approved a domestic preparedness plan to train local emergency service agencies to deal with potential terrorist attacks using weapons of mass destruction. In 1999, the National League of Cities published a guidebook for local officials to use in planning for and responding to terrorist attacks. Whenever an act of terrorism involves Americans, the President and Congress react with proclamations, directives, and legislation. The legislation passed in response to terrorist events also includes aid for victims.

Including aid for victims is entirely proper. Terrorists generally espouse "some ideological, religious, or political cause," so terrorist acts are generally targeted toward specific groups, which may be ethnic, religious, or national. Although individuals are injured and killed, their individuality is incidental to their membership in the target group. Terrorist acts are generally designed "to compel governments into making concessions." Paradoxically, as the government tries to prevent terrorism by hardening targets such as airports and embassies, terrorism is deflected to softer targets. "Rather than give up entirely, terrorist groups simply move to a target that is easier. For terrorist groups, the range of acceptable targets is determined by ideology, but the choice of a specific target within that range is a matter of convenience or opportunity." Thus, one result of combating terrorism may well be to create even more victims. Since it is government that is the ultimate target, it is appropriate for government to provide aid for the victims. Early legislation that provided compensation to hostages and their families was based on the "principle that the government as a reasonable and compassionate employer had a responsibility to . . . hostages to provide . . . some material relief to partially offset the duress suffered by them and their families."

5 See John K. Wiley, Training Focuses on Domestic Terrorism: Police, Firefighters and Paramedics in Spokane Learn How to Deal with Various Weapons, PORTLAND OREGONIAN, May 9, 2000, at D02.
6 See NLC Book Gives Practical Advice for Dealing with Terrorism, 23 NATION'S CITIES WKLY., May 15, 2000, at 13 (reviewing DOMESTIC TERRORISM: RESOURCES FOR LOCAL GOVERNMENT (pub. #3545)).
9 Id. at 158.
10 Kimberly A. Trotter, Note, Compensating Victims of Terrorism, 22 TEXAS INT'L L.J.
Further, as Congress struggles to find ways to prevent terrorist attacks, reduce their force, and help in recovery efforts afterwards, it is appropriate to help individual victims as well as the devastated community. Because massive attacks such as the World Trade Center bombing\(^{11}\) or the Oklahoma Federal Building bombing\(^{12}\) exact huge economic and psychological tolls on the community and on the nation, the federal government provides billions of dollars in aid at the community and state level.\(^{13}\) The economic and psychological toll is equally devastating to individual victims, and it is equally necessary to provide aid at this level. In establishing a memorial to be built in Oklahoma City, Congress found that the “losses and struggles” of the survivors were not only personal; “since they resulted from so public an attack, they are also shared with a community, a Nation, and the world.”\(^{14}\) Similarly, aid to victims not only helps particular victims get back on their feet; it reassures all who belong to the community that they will not be abandoned should they themselves become victims.

III. RATIONALES UNDERLYING FEDERAL LAWS INTENDED TO AID VICTIMS OF TERRORISM

The major provisions in current federal law that respond to the needs of terrorist victims fall into two categories: compensation and restitution. Aid to

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\(^{11}\) The World Trade Center in New York City was bombed in February, 1993. The truck bomb explosion killed six people and injured at least a thousand others. The economic damage was estimated to be over $510 million. See Daniel Wise, Lawyers Pack World Trade Center Hearing, N.Y.L.J., May 9, 1994, at 1.


terrorism victims is an extension of aid that has been given to victims of other crimes. Aid for traditional crime victims is not new.\textsuperscript{15} At the state level, California codified a right to restitution for crime victims in 1965.\textsuperscript{16} At the federal level, Congress codified such a right in the early 1980s.\textsuperscript{17} By 1992, all the states had passed laws to aid victims of crime.\textsuperscript{18} While these statutes that provide aid for crime victims seem to be interchangeably characterized as victim restitution or victim compensation laws, restitution- and compensation-type statutes provide aid in different ways. Generally, compensation-type statutes give financial or other aid to victims or their survivors. Restitution-type statutes enable victims or their survivors to seek restitution directly from the perpetrator. American federal law to aid victims of terrorism follows these two patterns.

\textit{A. Compensation Statutes—Protecting Victims}

Under compensation-type laws, the government collects fines from various categories of criminal wrongdoers and then uses money from the fines to provide aid to victims. Victims' compensation statutes were first passed in New Zealand and Great Britain, influenced by penal reformer Margaret Fry in the late 1950s.\textsuperscript{19} American states followed suit, and by 1992, all the states had passed laws to aid victims of crime.\textsuperscript{20} These laws grew out of a "humanitarian and 'liberal'"\textsuperscript{21} rights theory positing that a state that fails "to protect its citizens from crime is obligated to provide compensation to those who become victims."\textsuperscript{22} The rights theory can be based on tort or contract.


\textsuperscript{20} See Greer, \textit{supra} note 18, at 334.

\textsuperscript{21} Henderson, \textit{supra} note 19, at 944.

\textsuperscript{22} Charlene L. Smith, \textit{Victim Compensation: Hard Questions and Suggested Remedies}, 17
In the tort scenario, if the State breaches its duty to protect citizens, the injured citizens would have actions against the State for damages in tort. Under the contract theory, citizens have actions for breach of contract if society fails to protect them because they have given up the individual right to exact retribution from a wrongdoer in return for society's protection.

B. Restitution Statutes—Empowering Victims

In schemes that include state compensation of victims, the goals of criminal punishment are deterrence and rehabilitation. However, as support for liberal approaches to crime control declined during the '70s and '80s, deterrence and rehabilitation became less important as goals of punishment. Conservatives argued that "retribution and incapacitation [were] the only tenable justifications for punishment of criminals.

The emphasis on retribution leads to a second type of victim-centered law, laws that provide restitution. Under restitution statutes, the wrongdoer makes restitution by directly paying the victim for the harm he has suffered. As part of the debate surrounding passage of the Victim and Witness Protection Act in 1982, the Committee on the Judiciary pointed out that

[the principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.

Restitution schemes rest generally on this tort principle that the wrongdoer should "restore" the victim to his or her status quo ante. Critics of crime victims' restitution statutes point out that grafting the tort


23 See id.
24 See id. at 63.
25 See Henderson, supra note 19, at 945.
26 See id.
27 Id. at 947.
28 See Smith, supra note 22, at 57.
31 See Henderson, supra note 19, at 1007.
concept of making the victim whole onto the criminal law results in a hybrid that elevates the victim’s individual concerns above society’s concerns. This elevation of the victim’s concerns occurs more with restitution statutes than with compensation statutes. That is because compensation statutes are premised on the government’s duty to protect the citizen. When that duty is breached under compensation statutes, the government reimburses the victim, while the criminal remains subject to all the sanctions of the criminal law. With restitution statutes, however, the premise is that the government is not liable for the breach. Only the criminal is liable, and it is the criminal’s duty to make the victim whole. Thus, sentencing under a restitution statute may focus on requiring the criminal to pay a fine, without regard for the other purposes of sentencing. Critics argue that a society protects its right to exist by imposing criminal sanctions in response to crime, rather than allowing private settlements between victim and wrongdoer. Ordering restitution for victims requires that criminal sentencing focus on enabling the victim to obtain compensation from the criminal. Thus, the victim’s right to recover becomes the primary goal, to the exclusion of other sentencing goals such as punishment, retribution, or incapacitation.

Advocates of restitution point out that giving primacy to the victim’s right to recover helps victims even if their financial recovery from the perpetrator is slight. These advocates stress another rationale for restitution, the concept that victims recover more readily from the trauma of the event if they have some say in how the aftermath is handled. Some victims in a restitution system ask for no more than to confront the perpetrator and force him or her to view the result of the criminal event. Advocates of restitution argue that crime victims who must wait until criminal sentencing occurs and then sue in tort and in civil court never have this opportunity to confront their attackers and to bring the episode to closure. Forcing a crime victim to pursue a civil remedy after undergoing the ordeal of a criminal trial is “unnecessarily burdensome and duplicative.” Adding insult to injury, these victims are very often unable to recover financial damages anyway, when the perpetrators are indigent or otherwise judgment-proof.

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32 For example, restitution has been used as a condition of probation. See Alan T. Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 UCLA L. REV. 52, 65 (1982).
33 See Henderson, supra note 19, at 1009.
34 See id. at 1007-08.
35 Id. at 1007 n.312.
36 See id. at 942 n.25.
IV. OVERVIEW OF FEDERAL TERRORISM LEGISLATION

A. Compensation-Type Statutes

Terrorism legislation in the United States initially developed in response to acts of terrorism against Americans and American facilities abroad. One goal of these laws was to provide financial compensation to victims or their survivors. Victims under these early statutes were generally assumed to be United States citizens working directly for the United States government.

1. Hostage Relief Act of 1980

As part of the treaty under which the hostages taken captive in Iran were released, the United States agreed that the hostages would not sue Iran. Congress enacted the Hostage Relief Act of 1980 as an alternate means of aid to the captives. The Hostage Relief Act restricted victims to those working for the American government at the time of their captivity. It recognized that family members are compensable victims. It did not recognize as a compensable victim the only hostage who was not working for the American government at the time of the hostage taking. Congress made "a clear distinction between the private American hostage and public official hostages ... by providing only ... tax relief benefits ... to the private citizen while making the government employees eligible for the other benefits ...."

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42 Trotter, supra note 10, at 388 n.33 (quoting President's Commission on Hostage
other benefits included: an interest-bearing salary savings fund;\textsuperscript{43} reimbursement for the hostages and their families for medical expenses attributable to the hostage experience;\textsuperscript{44} extension of the Soldiers and Sailors Relief Act to hostages;\textsuperscript{45} exemption from gross income of compensation paid while a hostage;\textsuperscript{46} exclusion of compensation from income tax if the employee died as a result of hostile action;\textsuperscript{47} deferral of taxes and penalties;\textsuperscript{48} authorization of spouse to file joint return;\textsuperscript{49} and reimbursement of post-secondary educational or retraining expenses.\textsuperscript{50}

The Act did not provide monetary compensation directly to the victims or their families. On the same day that President Jimmy Carter signed the treaty providing for the release of the hostages,\textsuperscript{51} he signed an executive order creating the President's Commission on Hostage Compensation.\textsuperscript{52} The purpose of the Commission was to recommend "whether the United States should provide financial compensation to the United States nationals held hostage in Iran ...."\textsuperscript{53} The Commission recommended not to pay tort-type compensation to the hostages. Instead, the Commission considered that monetary damages such as those paid to prisoners of war would be more appropriate.\textsuperscript{54} The amount ultimately recommended as per diem compensation for 444 days in captivity was $12.50.\textsuperscript{55}

\begin{footnotes}
\item[44] See id. § 5569(c).
\item[45] See id. § 5569(e)(1).
\item[46] See Hostage Relief Act § 201.
\item[47] See id. § 202.
\item[49] See Hostage Relief Act § 203.
\item[52] See Exec. Order No. 12,285, 3 C.F.R. 117-18 (1982); see also Trotter, supra note 10, at 389 n.38.
\item[53] Trotter, supra note 10, at 389 n.39.
\item[54] See id. at 390.
\item[55] See infra notes 68-74 and accompanying text. The amount now authorized is "not less than one-half of the amount of the average per diem rate . . . in effect for each day" that the captive was held. 5 U.S.C. § 5569(d)(1) (1994 & Supp. V 1999).
\end{footnotes}
Congress did not implement the Commission’s recommendations. Instead, Congress passed new legislation building on the Hostage Relief Act.


The Committee on Foreign Affairs became more and more concerned that the security of American facilities abroad was “increasingly threatened by more sophisticated terrorist entities.” In 1984, Congress established a Staff Task Force on International Terrorism and Diplomatic Security in response to this increase in threats at United States embassies and consulates. By 1986, violence against American installations and personnel had escalated to the point that House Speaker Thomas “Tip” O’Neill, Jr. called for all committees working on terrorism issues to work together to develop an omnibus bill. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (“Omnibus Act”) grew out of these efforts. As part of the Omnibus Act, Congress passed the Victims of Terrorism Compensation Act.

3. Victims of Terrorism Compensation Act

The Victims of Terrorism Compensation Act, a part of the Omnibus Act, grew directly out of several hostage situations in which consular officials were killed, as well as out of the Iran hostage situation, in which fifty-two hostages were held captive for 444 days. The Victims of Terrorism Compensation Act builds on the earlier Hostage Relief Act but differs from it in significant ways. In terms of similarities, it focuses on the plight of victims of terrorist attacks, specifically victims held captive. The attacks are presumed to occur against American facilities abroad. The view that terrorist attacks were an

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58 See id.
international, not a domestic, problem, is clear from President Ronald Reagan's signing statement, in which he said the Act made "yet another step forward in our bipartisan effort to eradicate international terrorism."66 This law signals the beginning of a broader realization that terrorism was becoming ubiquitous enough that it was now necessary to plan to take care of victims as well as to prevent attacks on the buildings where they work. President Reagan was "particularly pleased" to support the victims of terrorism assistance program, which "for the first time will provide for the care and welfare of the victims of terrorism and their families."67

Like the Hostage Relief Act, the Victims of Terrorism Compensation Act provides benefits to civil servants or citizens, nationals, or resident aliens of the United States who are rendering personal service to the United States and who are taken captive as a result of their relationship with the United States government.68 Also like the Hostage Relief Act, families of captives receive compensation in cases of disability or death.69 Benefits include a cash payment for each day in captivity,70 special savings accounts,71 medical and health care made necessary by the captivity,72 relief provisions of the Soldiers and Sailors Relief Act,73 and educational benefits.74

A significant difference between the Victims of Terrorism Compensation Act and the Hostage Relief Act is that the former allows cash payments to be paid directly to the victims for every day of their captivity. Only non-monetary compensation was available under the earlier Hostage Relief Act. The House Report's analysis of the cash payment section of the bill reveals a new national recognition that victims must be compensated not only on their own behalf, but on the nation's. According to the report,

In determining a level of cash compensation for civilian captives, the committee attempted to weigh the issues presented in the debate over the rate of compensation for the Iran hostages. At the time that the President's Commission on Hostage Compensation presented its findings, many felt that

69 See id. § 5570.
70 See id. § 5569(d)(1).
71 See id. § 5569(b)(1).
72 See id. § 5569(c).
73 See id. § 5569(d)(6)(e)(1).
74 See id. § 5569(d)(6)(f)(1)(A).
the Commission’s recommendation that the hostages receive $12.50 per day for every day in captivity vastly underestimated both the captivity itself and the sympathy of the American people for the captives’ plight.\(^75\)

Under the new law, the cash payment was set at $50 per day for each day of captivity between November 4, 1979 and January 21, 1981. Then the base cash payment was to be not less than half of the amount of the world-wide average per diem rate in effect for each day the captive is held.\(^76\)

Another significant difference between the Victims of Terrorism Compensation Act and the older Hostage Relief Act is that the latter was created to respond to a specific act of hostage taking. The newer law recognizes that such events are not unique; looking beyond a specific triggering event, it covers hostages taken in any terrorist event after the Iranian hostage taking.

4. Policy Statements in Response to the Pan Am Flight 103 Bombing

In 1990, four years after passage of the Victims of Terrorism Compensation Act, Congress passed new legislation to aid victims hurt or killed in international terrorist incidents directed at American targets.\(^77\) This time the terrorist target was not an embassy or consulate, but an American jetliner bringing people home for the holidays. And for the first time, the relief measure aided ordinary citizens, not just government workers. After Pan Am flight 103 exploded over Lockerbie, Scotland in December 1988, victims’ families criticized the United States’ lack of preparation to deal with such a tragedy.\(^78\) Congress moved quickly to add a series of policy statements to Title 22, which deals with foreign relations, intending to guide the State Department in responding to aviation disasters or terrorist attacks.\(^79\) These

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1. To directly and promptly notify the families of American victims of aviation
policy statements are titled loosely "United States Response to Terrorism Affecting Americans Abroad." The congressional findings underlying passage of these policy statements stressed that the safety and security of passengers

2. To provide a State Department liaison for the family of each citizen involved in an aviation disaster. See id. § 5504(a).

3. To provide supplemental disaster training to consular officers. See id. § 5505(a). In implementing supplemental disaster training, the Secretary of State is directed to consult with death and bereavement specialists in planning how to deal with aviation disasters and terrorist attacks. See id. § 5505(b)(1). The Secretary of State should also consider "providing specialized training to create a team of disaster specialists to deploy immediately in a crisis," id. § 5505(b)(2)(A), and "securing outside experts to be brought in during the initial phases to assist consular personnel." Id. § 5505(b)(2)(B).

4. To dispatch at least one senior State Department official to the site of a disaster. See id. § 5506(a). To create an ombudsman to help families who travel to the site of a disaster. See id. § 5506(c). To deploy a crisis team to the site. See id. § 5506(d).

5. To provide liaise with foreign governments to arrange to bring home remains and personal effects. See id. § 5507.

6. To assess the Department of State response to the Flight 103 disaster as a guideline for future Department of State responses to similar disasters. See id. § 5508(a)–(b).

7. To create guidelines for appropriate ceremonies to show respect and support for families of United States citizens killed through acts of terrorism abroad. See id. § 5509.

8. To ask the President to consider recommending legislation to provide monetary and tax relief as compensation to United States citizens who are victims of terrorism. See id. § 5510(a).


10. To establish antiterrorism measures that include: guidelines to help international aviation travelers from unwittingly assisting in terrorist activities, negotiating with other nations to establish such guidelines, notifying the public of available rewards for information on international terrorist-related activities. See id. § 5512(a)–(c) (1994 & Supp. V 1999).

11. To propose the establishment of a comprehensive aviation security program. See id. § 5513.
on United States air carriers should receive the highest priority, that aviation security systems in place at the time were inadequate to do that, and that the United States, alone and with other nations, should immediately take steps to improve international safety. The policy statements include sending disaster specialists and crisis teams to the site, providing an ombudsman to help bereaved families who travel to the area, liaising with foreign governments to arrange to bring home bodies and personal effects, and creating guidelines for appropriate ceremonies. The attention to victims' and families' needs is a new step in terrorist legislation for victims who are not employees of the government.

5. Antiterrorism and Effective Death Penalty Act

The policy statements mentioned above were drafted in response to an act of terrorism occurring abroad. Although Congress had been considering several crime bills that contained provisions dealing with terrorism, the bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995, killing 168 people, was the catalyst for legislation responding to terrorism at home. After the bombing, these bills were modified specifically to respond to that event. The new laws are found in the Antiterrorism and Effective Death Penalty Act ("Antiterrorism Act"). Those portions dealing with victims are codified in Title 42, Public Health and Welfare, and are intended to coordinate with the earlier Omnibus Act. Passage of these new laws shows Congress' recognition that terrorism occurs within the United States. Supplemental grants to state crime victim compensation programs are the mechanism for providing aid to victims of terrorism; thus, for the first time, victims are defined based on their residence in a particular state rather than on their status as American citizens.

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84 See id. § 10603b(b) (Supp. V 1999).
85 See id. § 10603b(a)–(b).
a. Crime Victims Fund Modifications

One of the new laws in the Antiterrorism Act was a modification to the Crime Victims Fund to allow reserve funds to be set aside to make supplemental grants to help provide assistance to victims of the Murrah Federal Building bombing, to enable victims to participate in trial proceedings arising from the bombing, and for other related expenses.86

b. Justice for Victims of Terrorism Act

Another section of the Antiterrorism Act was an amendment to be cited as the Justice for Victims of Terrorism Act of 1996.87 The Justice for Victims of Terrorism Act creates two categories of victims: (1) victims of terrorism outside the United States,88 and (2) victims of terrorism within the United States.89

With regard to an act of terrorism occurring outside the United States,

The Director may make supplemental grants . . . to States to provide compensation and assistance to residents of such States who, while outside of the territorial boundaries of the United States, are victims of a terrorist act and are not persons eligible for compensation under title VIII of the Omnibus Diplomatic Security and Antiterrorism Act of 1986.90

Thus, this provision is meant to supplement the Omnibus Act.

With regard to acts of terrorism occurring within the United States, § 10603b(b), titled "Victims of Terrorism within the United States," provides that,

the Director may make supplemental grants as provided in section 10603(d)(4)(B) of this title to States for eligible crime victim compensation and assistance programs to provide emergency relief, including crisis response efforts, assistance, training, and technical assistance, for the benefit of

87 See id. § 10603b (Supp. V 1999).
88 See id. § 10603b(a).
89 See id. § 10603b(b).
90 Id. § 10603b(a).
victims of terrorist acts or mass violence occurring within the United States and may provide funding to United States Attorney’s Offices for use in coordination with State victim compensation and assistance efforts in providing emergency relief.91

Thus, this amendment also addresses an important loophole in the Omnibus Act, the lack of immediate crisis response. Crisis response was an area for which the Flight 103 survivors castigated the United States government. That criticism was not lost on Congress. After the bombing of the Murrah Federal Building in Oklahoma City, Congress recognized a need for similar responses within the United States. The supplemental grants from this fund to eligible programs are earmarked to provide emergency relief, including, among other things, crisis response efforts.92 One of the specific provisions was for “crisis response efforts, assistance, training, and technical assistance, for the benefit of victims . . . .”93 The tragedies in Lockerbie and Oklahoma City triggered passage of laws providing for immediate crisis response efforts.

In conclusion, under these compensation laws, victims receive aid from the State. From a torts perspective, the State fulfills its obligation to care for its members by making them whole when they are injured. From a contracts perspective, the State helps citizens regain the status quo when a terrorist event breaches the societal contract of a safe environment. The aid in the earlier laws went only to United States citizens. The aid in later laws responding to acts of terrorism within the United States is not restricted only to citizens.

B. Restitution-Type Statutes

Congress has codified a restitution approach for terrorist victims in laws that enable victims or survivors to bring suit themselves.

1. Federal Courts Administration Act

Congress enabled victims to sue directly by creating the Federal Courts Administrative Act of 1992,94 an addition to the Omnibus Act. While terrorism

91 \textit{Id.} § 10603b(b).
92 \textit{See id.}
93 \textit{Id.}
is generally discussed as a criminal activity in this Title, the Federal Courts Administration Act of 1992 created "a civil cause of action in Federal court for victims of terrorism" that makes it possible for injured citizens or their families to sue terrorists directly in United States federal courts. The statute assumes that the terrorist act occurs abroad. The statute applies to "any national of the United States." The statute enables victims or their survivors to sue perpetrators directly by creating a cause of action and a jurisdiction that victims lacked before. According to the Senate report, this provision was designed to "allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed."

The civil remedy section provides that:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

"International terrorism" is defined to mean activities that

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

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95 Id. § 2333 (1994).
96 Id. "[T]he term 'National of the United States' has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act." Id. § 2331(2). See infra notes 126 & 175 and their accompanying text.
(iii) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.99

By defining as crimes violent extraterritorial acts that would be crimes if they were committed in the United States, Congress has made it possible for federal courts to reach acts that previously escaped the net of United States jurisdiction.100

2. Exceptions to the Foreign Sovereign Immunities Act

Congress not only enabled victims to sue perpetrators directly. Victims can now sue foreign governments that sponsor terrorism. This new right comes from a 1996 exception to the Foreign Sovereign Immunities Act of 1976.101 A foreign state is generally immune from suit by other states.102 However, growing anger in Congress at federal courts' refusal to find jurisdiction in cases such as Pan Am 103 led to passage, as part of the Antiterrorism Act, of an exception to this jurisdictional immunity.104 The 1996 terrorism exception is:

99 Id. § 2331(1)(A)-(C).
100 The principle seems to be that of universal jurisdiction, which allows "a state to prescribe its laws over a class of criminal offenses recognized as being of 'universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended." Brandon S. Chabner, The Omnibus Diplomatic Security And Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas, 37 UCLA L. REV. 985, 998 (1990) (quoting Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 TEX. L. REV. 785, 788 (1988)). See also Flatow v. The Islamic Republic of Iran, 999 F. Supp. 1, 15 n.7 (D.D.C. 1998) (suggesting three bases on which "extraterritorial application of the state sponsored terrorism exceptions is consistent with international law.").
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(7) ... in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency ...\textsuperscript{105}

This amendment to the Antiterrorism Act penetrates the shield of sovereign immunity behind which government sponsors of terrorism could hide. Once the shield of sovereign immunity is down, a second amendment, the Civil Liability for Acts of State-Sponsored Terrorism Act,\textsuperscript{106} enables victims to bring private lawsuits against the officials, employees, or agents of that state sponsor of terrorism.

In all of these laws, victims are defined as American nationals.\textsuperscript{107} Under these laws, injured victims or survivors now have a cause of action in federal court against individual foreign terrorists, against foreign governments that sponsor terrorism, and against employees or agents of those governments who themselves committed terrorist acts. Congress hoped that suits under these provisions would affect not only the specific individuals charged with acts of terrorism but also the states or entities that fund them. According to the Senate report accompanying the bill for the Federal Courts Administration Act, "[b]y its provisions for compensatory damages, treble [sic] damages, and the imposition of liability at any point along the causal chain of terrorism, it would

\textsuperscript{105} Id. \S 1605(a)(7).
\textsuperscript{106} See id. \S 1605 note (Civil Liability for Acts of State Sponsored Terrorism). This amendment provides:

an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [50 App. U.S.C. 2405(j)] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

interrupt, or at least imperil, the flow of money." President George H. Bush was "pleased that the bill explicitly authorizes an American national to file suit in the United States for the recovery of treble damages against the perpetrators of international terrorism. This will ensure that, if needed, a remedy will be available for Americans injured abroad by senseless acts of terrorism." These laws embody the restitution concept that victims should be able to seek redress from their attackers regardless of other aid the government may provide.

V. ARGUMENT FOR A BROADER DEFINITION OF VICTIM

Victims of terrorism are not always treated the same in the aftermath of a terrorist attack. A person injured in an airline bombing abroad will be treated differently than his neighbor injured in a car bombing in the United States. Initially, the only victims who received aid under a terrorism response statute were American citizens or resident aliens injured, captured, or killed while working for the American government overseas. As terrorism has become more widespread against American symbols overseas and at home, our laws responding to terrorism must recognize the need to provide aid to a larger category of victims. Relief provisions should help the injured, not create disparate treatment of victims. The goal of the aid sections of our terrorism legislation should be to treat similarly harmed victims similarly. To treat victims similarly, victims should be defined as broadly as possible.

109 Signing Statement by President George Bush Upon Signing S. 1569, supra note 106.
110 Psychological satisfaction flowing from the opportunity to have one's day in court might be a benefit of this restitution approach. But see Henderson, supra note 19, at 953-66 (discussing the impact of core crime on victims).
111 See 5 U.S.C. § 5569(a)(1)(B) (1994) (covering citizens, nationals, or resident aliens); see also discussion supra Part IV.A.1.
Each new terrorism law is designed to fit a particular circumstance. Thus, the statute's remedies may be specific to that episode. Hopefully, the later law fills gaps in earlier laws. For example, no provisions existed to help victims' families who traveled to Lockerbie, Scotland. Responding to that lack of aid, in later legislation, Congress included a policy providing a variety of aid onsite. Similarly, victims are generally defined on an ad hoc basis as Congress reacts with legislation in response to a terrorist act. The legislation reflects the event that precipitated it, so the definitions fit the event. But once the category has been created, it continues to exist in the statute. If it is too specific, it may exclude people who fall victim in a later terrorist event.

Terrorism response statutes employ a host of terms to describe those to whom the statutes are intended to apply. For example, our statutes apply variously to "citizens," "resident aliens," "nationals," "Americans," "American victims," "United States citizens," "injured citizens" or "any national of the United States." Historically, it may have made sense to limit aid to United States citizens when terrorism was something that occurred abroad, infrequently, and against such obvious symbols of American society as embassies and consulates. Today, however, the existence of multiple terms to identify who is eligible for relief under the various statutes could cause victims who suffer similar harms to be treated differently. Providing aid for a broader category of victims than "citizens" is a starting place; our society is composed of many who "owe[] . . . allegiance to the United States" and who deserve protection from the United States when they are the victims of attacks against the United States. Defining victims more broadly comports with the historical trend in the statutes to cover more situations and more victims. It sharpens a growing awareness of the need to respond with

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112 These laws are similar to "the government's security procedures . . . based upon terrorist threats, which makes them, by their very definition, reactive rather than proactive." McQuade, supra note 78, at 352 and accompanying text (paraphrasing comments of the assistant administrator of Aviation Standards for the Federal Aviation Administration, reported in Pan Am Flight 103: Hearings of the Narcotics, Terrorism and International Operations Subcommittee of the Senate Foreign Relations Committee, FED. NEWS SERV., Apr. 7, 1989).

113 See Chabner, supra note 99, at 1000 (pointing out that "the biggest obstacle to a universal prohibition of terrorism is the international community's inability to define the term adequately.") (citing Restatement (Third) of the Foreign Relations of the United States § 404 (comment a) (1987)). If there can be no universal agreement of what terrorism is, our lawmakers can hardly be expected to do more than try to keep up as new types of terrorist acts occur.

flexibility to treat victims with dignity and to assist and compensate them. It makes our statutes consonant with each other. Finally, it prevents unfair results.

A. Defining Victims Based on Residence Rather Than Citizenship Comports with the Historical Trend in the Statutes to Cover More Situations and to Aid More Victims.

The first terrorism laws to provide aid to victims were passed in response to terrorism directed at American targets abroad. These earlier laws define victims differently depending on where the terrorist event occurs. Victims injured abroad are eligible for different types and levels of aid than those harmed within the United States. Terrorist acts abroad targeted against Americans trigger definitions of victims that focus on citizenship. The Victims of Terrorism Compensation Act,115 part of the Omnibus Act,116 is narrowly designed to aid civil servants or citizens, nationals, or resident aliens of the United States who are rendering personal service to the United States and who are taken captive as a result of their relationship with the United States government.117 The law is compensatory in nature. Captives were to be compensated not only on their own behalf but on the nation's. Just as the terrorism was aimed at symbols of American society, the captives were compensated at least partly as symbols of the nation. Their symbolic status grew directly out of their employment with the United States government. While the statute allows compensation to "nationals" or "resident aliens," this category of victims is very narrow, limited only to those nationals or resident aliens who were rendering personal service to the United States.

The legislation passed in response to the Lockerbie bombing similarly provided aid only for those victims who were United States citizens. Again, the compensatory nature of the statute highlights the focus on aiding only United States citizens. This focus stems directly from Congress' perception at the time that terrorism was an international, not a national, problem. In response to the bombing of Pan Am Flight 103, Congress amended Title 22, "Foreign Relations and Intercourse," of the United States Code by adding a chapter entitled "United States Response to Terrorism Affecting Americans

116 See discussion supra Part IV.A.2.
Dealing with aviation security, this chapter provides policy statements and guidelines for the Department of State to follow in dealing with victims of international disasters, particularly aviation disasters. A pervasive concept in this foreign relations chapter is that of citizenship. In promulgating the policy statements, Congress found that "the United States Government has a special obligation to United States victims of acts of terrorism directed against this Nation and should provide prompt assistance to the families of such victims and assure that fair and prompt compensation is provided to such victims and their families."119 The term "United States victims" is not defined in the policy statements. However, the very first policy statement announces that "[i]t is the policy of the Department of State pursuant to section 2715 of this title to directly and promptly notify the families of victims of aviation disasters abroad concerning citizens of the United States directly affected by such a disaster, including timely written notice."120 This phrase or something similar appears nine more times in the twelve policy statements. Since the bombing of Pan Am Flight 103 was so blatantly targeted at an American airliner bringing American college students home for the holidays, it is understandable that the legislation passed in the aftermath of the event would focus on aiding American citizens.

However, as terrorism has come home, the trend is toward aiding a broader group of victims. Terrorist events that have occurred within the United States generally trigger restitution-type statutes in which the definition of "victim" is based on residence rather than on citizenship. Legislation passed after the Murrah Federal Building bombing in Oklahoma City did not focus on the citizenship of the victims. Legislation arising from the Murrah Federal Building bombing shows that Congress was concerned with aiding everyone hurt by this act of domestic terrorism rather than with making aid available only to citizens. The legislation's positioning in Title 42 of the Code, which deals with the public health and welfare, reflects the focus on aiding crime victims that characterizes this chapter.121 After the bombing, Congress amended the Victim Compensation and Assistance section of Title 42 to create the Justice

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119 Id. § 5501 note (Congressional Findings).
Desire to help the Oklahoma City victims prompted this law, but the law goes further than those specific victims. The Act’s purpose is to expand crime victims’ compensation programs to cover injuries suffered by terrorism victims. As with crime victim compensation programs generally, those who could be compensated under these amendments merely had to qualify for compensation under eligible state crime victim compensation programs. They did not need to demonstrate United States citizenship. Compensation in this statute stems from sustaining an injury on United States soil rather than from being a United States citizen. Providing aid to United States residents instead of limiting it to citizens is appropriate because it recognizes that those victimized may owe allegiance to this country even if they are not citizens.

Rather than considering the victims of the Murrah Federal Building bombing in Oklahoma City to be victims of crime, they are considered to be victims of terrorism. This is a new development in American law. Amendments to sections of Title 42 dealing with victim compensation and assistance are to be cited as the “Justice for Victims of Terrorism Act of 1996.” Originally § 10601 of the Justice for Victims of Terrorism Act, the Crime Victims Fund, was intended to subsidize state victim assistance programs. After the Murrah Federal Building was bombed, a new section was incorporated into § 10601, which provided:

The Director may set aside up to $500,000 of the reserve fund described in paragraph (4) to make supplemental grants to United States Attorneys Offices to provide necessary assistance to victims of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, to facilitate observation of and/or participation by such victims in trial proceedings arising therefrom, including, without limitation, provision of lodging and travel assistance, and to pay such other, related expenses determined to be necessary by the Director.
Section 10602 was also amended in response to the Murrah Federal Building attack. Originally, Section 10602, "Crime victim compensation," provided that the director of the Crime Victim Fund could make grants to eligible crime victim compensation programs. Eligible crime victim compensation programs were those operated by states and offering "compensation to victims and survivors of victims of criminal violence, including drunk driving and domestic violence." If a compensable crime occurred within the state, the program would have to compensate victims who were non-residents of the state using the same criteria that it would use to compensate victims who were residents of the state. The program would have to compensate victims of federal crimes that occurred within the state "on the same basis that such program provides compensation to victims of State crimes." The program would compensate residents of the state who were victims of crimes occurring outside the state if the crimes would have been compensable had they occurred within the state and if the places where the crimes occurred did not have eligible victim compensation programs.

The amendments to § 10602 reflect Congress’ interest in providing aid to terrorism victims. Subsection (b)(6) now compensates residents of the State who are victims of crimes occurring outside the State if—. . . (B) the places the crimes occurred in are outside of the United States (if the compensable crime is terrorism, as defined in section 2331 of title 18) or are States not having eligible crime victim compensation programs.

Originally, § 10602(d) defined "compensable crime" as "a crime the victims of which are eligible for compensation under the eligible crime victim compensation program, and includes driving while intoxicated and domestic violence."
violence.” The amendment reads:

(3) the term “compensable crime” means a crime the victims of which are eligible for compensation under the eligible crime victim compensation program, and includes crimes, whose victims suffer death or personal injury, that are described in section 247 of title 18, crimes involving terrorism, driving while intoxicated, and domestic violence.

Thus, under this law, to receive aid, one must be a victim of a compensable crime, and compensable crimes include terrorism.

The new amendment also includes a benefit to crime victims that did not exist under the original law. At § 10602(c), “[e]xclusion from income for purposes of means tests,” if a victim wants to apply for federal, state, or local government programs that use federal funds, provide medical, or other assistance, the victim may exclude from income the crime victim compensation that he received through crime victim compensation programs until “the total amount of assistance that the applicant receives from all such programs is sufficient to fully compensate the applicant for losses suffered as a result of the crime.” The purpose of this Section is to keep a victim from seeming to have an income level that would exclude him from consideration for assistance.

An important concept in the Justice for Victims of Terrorism Act is that of “resident” of a state. If a compensable crime occurs within a state, victims who are residents of the state and victims who are nonresidents of the state receive compensation awards based on the same criteria. Eligible programs provide compensation to residents of the state for crimes occurring outside the state if the crime would have been compensable in the state and it occurred outside of the United States if it was terrorism, or it occurred in states without compensation programs. “Resident” is not defined in the original Section or in the supplement. Use of the term “resident” rather than “citizen” suggests that the sweep of the statute is broad. Remarks of Senator

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137 Id. § 10602(c).
139 See id. § 10602(b)(6)(A).
140 See id. § 10602(b)(6)(B).
Patrick Leahy, who suggested the changes to § 112,\textsuperscript{142} indicate that “resident” should be interpreted broadly. Speaking specifically of the Oklahoma City bombing, he said,

[w]e can do more to see that victims of crime, including terrorism, are treated with dignity and assisted and compensated with government help . . . Section 112 of the substitute . . . includes a proposal I made to increase the availability of assistance to victims of terrorism and mass violence here at home . . . . [T]he substitute includes provisions to make funds available through supplemental grants to the States to assist and compensate our neighbors who are victims of terrorism and mass violence, which incidents might otherwise overwhelm the resources of a State’s crime victims compensation program or its victims assistance services.\textsuperscript{143}

He further said,

[it]he substitute (bill) will also fill a gap in our law for residents of the United States who are victims of terrorism and mass violence that occur outside the borders of the United States. Those who are not in the military, civil service or civilians in the service of the United States are not eligible for benefits in accordance with the Omnibus Diplomatic Security and Antiterrorism Act of 1986. One of the continuing tragedies of the downing of Pan Am flight 103 over Lockerbie, Scotland, is that the U.S. Government had no authority to provide assistance or compensation to the victims of that heinous crime. Likewise, the U.S. victims of the Achille Lauro incident could not be given aid. This was wrong and should be remedied.\textsuperscript{144}

In these remarks, “residents of the United States” and “U.S. victims” should be seen as synonyms and should be interpreted as applying to “residents” broadly rather than to “citizens” specifically. If “U.S. victims” were read to mean “U.S. citizens,” these remarks could suggest that victims of domestic acts of terrorism may receive compensation from the state in which the act occurred if they are residents of a state, but they cannot receive compensation for injuries sustained in terrorist acts abroad unless they are United States citizens. Interpreting “resident” as different from “citizen” dramatically changes the effect of the statute. Under this interpretation, the


\textsuperscript{143} Id. at 940 (emphasis added).

\textsuperscript{144} Id. at 941 (emphasis added).
statute would not effectuate its intended purpose, to offer compensation to a wider group of people.

This Section broadens protection for crime victims to include terrorist events. Throughout the Section, the victims whose rights are being expanded are described as "residents" of a state. Although the statute does not define "resident," in keeping with the historical trend of expanding protection to fit the greatest number of circumstances, it should be broadly interpreted to cover the greatest number of potential victims.

B. Broadly Interpreting "Victims" Under Our Terrorism Response Laws Addresses the Need to be Flexible in Our Approach to Aiding Victims.

In commenting on the Antiterrorism Act, Senator Leahy said,

[i]t is my hope that through this substitute [improvements to the Victims of Crime Act, Section 112] we will proceed to enact a series of improvements in our growing body of law recognizing the rights and needs of victims of crime. We can do more to see that victims of crime, including terrorism, are treated with dignity and assisted and compensated with government help.145

Leahy noted that Americans' "sense of security has been shaken by the bombing in Oklahoma City, the destruction at the World Trade Center in New York, and recent assaults upon the White House."146 He therefore proposed allowing "additional flexibility in targeting resources to victims of terrorism and mass violence and the trauma and devastation that they cause."147 Specific provisions such as "crisis response efforts, assistance, training, and technical assistance, for the benefit of victims"148 demonstrate a broad range of aid calling for a flexible approach. Under a flexible approach, status as limited as "citizens" should not determine who is eligible for aid.

146 Id.
147 Id.
148 Id.
C. A Broad Reading of "Victims" Helps Ensure Consistency in Our Terrorism Response Laws.

The earlier Omnibus Act applies primarily to those in service to the United States, and the policy statements adopted after Pan Am 103 only apply to American citizens. Reading the Justice for Victims of Terrorism Act to apply to the broadest category of victims promotes a flexible approach to aiding victims. Bringing coverage to a broader group of victims fits the growing trend in our terrorism response laws. Defining victims broadly under the Justice for Victims of Terrorism Act makes it consistent with other recent terrorism response laws, notably the Federal Courts Administration Act of 1992 and the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), both of which cover American nationals.

We should define victims broadly to ensure that those who qualify for federal benefits even if they are not citizens or nationals will be eligible for terrorism benefits should they become victims. In only the second case to apply the FSIA,149 the Flatow v. Islamic Republic of Iran court emphasized the need to create national standards in dealing with legal issues raised by terrorism.

The Supreme Court has recognized that the FSIA "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law" and that its application will "generally require interpretation of numerous points of federal law." . . . Subsequently, Congress created jurisdiction and federal causes of action for personal injury or death resulting from state-sponsored terrorism, including its own statute of limitations. These actions indicate Congressional intent that the federal courts create coherent national standards to support this initiative of national significance.150

For the creation of "coherent national standards" that will apply in all terrorism cases, the interpretation of "victim" should be broad.

The Justice for Victims of Terrorism Act and the other earlier federal laws passed in response to acts of terrorism were compensation-type statutes.

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149 See Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998). In 1995, twenty-year-old college student Alisa Flatow, spending a junior semester abroad in Israel, was killed when an Islamic Jihad suicide truck bomb blew up the bus she was riding in. Her father brought a wrongful death action against Iran under the Foreign Sovereign Immunities Act in the United States District Court for the District of Columbia.

150 Id. at 15 (emphasis added) (citation omitted).
More recent laws continue to be primarily compensatory but also include restitution provisions. Some opponents of restitution for crime victims believe that there is no rationale for treating crime victims as more "special"\(^\text{151}\) than victims of tortfeasors or governmental actors. However, regardless of how society regards crime victims, victims of terrorism should be seen as special since they are targeted not as individuals but as symbolic representatives of government.\(^\text{152}\) In the criminal law context, victims generally claim restitution from their attackers as part of the sentencing that follows a criminal trial.\(^\text{153}\) However, in many terrorism episodes, there will never be a criminal trial. Restitution statutes open a way for terrorism victims to seek redress directly, by suing the perpetrators\(^\text{154}\) or by suing the state that sponsored the perpetrators.\(^\text{155}\) The restitution remedy is separate from whatever measures the federal government may pursue.

The terrorism victim sets restitution in motion by filing a civil suit in federal district court.\(^\text{156}\) As part of the Omnibus Act, Congress created the Federal Courts Administration Act,\(^\text{157}\) which established the right to sue individual terrorists in civil court for terrorism injuries. Those allowed to sue are "nationals of the United States."\(^\text{158}\) "National" is defined in Title 8 as either a citizen or one who owes permanent allegiance to the United States.\(^\text{159}\) This definition of victim is rightly broader than the definitions in the Omnibus Act or the policy statements promulgated after the bombing of Pan Am Flight

\(^{151}\) Henderson, supra note 19, at 1017.

\(^{152}\) See Jennifer A. Rosenfeld, The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way, 15 SUFFOLK TRANSNAT'L L. REV. 726, 737 n.37 (1992) (paraphrasing statement of Senator Chuck Grassley as follows: "Those who were killed died because they were Americans and, thus, it is Americans who should be able to send a world-wide message that their legal system will not tolerate such acts of terrorism." The senator's remarks are found at Hearing on S. 2465 Before the Subcomm. of Courts and Administrative Practice, Senate Judiciary Comm., 101st Cong., 5-6 (1990)).


\(^{157}\) See id.

\(^{158}\) Id.

However, since individual perpetrators will rarely be identifiable, it may be a moot point that a broader category of victims is theoretically enabled to seek restitution. A more useful law for victims and their survivors is the 1996 restitution provision known as the terrorism exception to the Foreign Sovereign Immunities Act. The terrorism exception is a jurisdictional statute allowing terrorism victims to sue, in United States federal district court, foreign states that sponsor terrorism.

The victim of a terrorist attack traditionally had little or no such direct recourse. He could not sue the perpetrator for committing a crime because the State must bring suit against those who commit crimes. He generally could not sue for damages in a civil court because the jurisdiction of such courts was limited. He could not sue a government, assuming he could posit

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160 See supra argument Part IV.A.
162 Victims or their survivors are beginning to sue under this law. The first lawsuit against a foreign state sponsor of terrorism was an action brought by the families of the pilots known as Brothers to the Rescue, whose two unarmed civilian planes were shot down over the Straits of Florida by the Cuban Air Force on February 24, 1996. See Alejandre v. The Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997) [hereinafter “Alejandre I”]. Both the Cuban government and the Cuban Air Force were named as defendants. Although neither defendant entered an appearance, under 28 U.S.C. § 1608(e) (1994), which prohibits default judgments without satisfactory evidence, “the district court conducted a trial in order to determine whether the plaintiffs had satisfactory evidence to support their claims.” Alejandre v. Telefonica Larga Distancia De Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999) (vacating a judgment that the plaintiffs could collect a portion of their damages by garnishing certain companies’ debts to the Cuban government). The Alejandre I court found that “the defendants were not immune from the plaintiffs’ suits because the Cuban Air Force (as an agent of the terrorist-sponsoring Cuban Government) had committed an act of extrajudicial killing by shooting down the airplanes. See 28 U.S.C. § 1605(a)(7) (Supp. II 1996). Alejandre I, 996 F. Supp. at 1247-48.” Id. at 1279.


163 In Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984), affg per curiam, 517 F. Supp. 542 (D.D.C. 1981), where victims sought compensatory and punitive damages, the court dismissed for lack of subject-matter jurisdiction. On March 11, 1978, members of the Palestine Liberation Organization (“PLO”) seized a car, a taxi, and two buses, taking hostages and killing Israeli, Dutch, and American citizens. See id. at 776. The victims’ estates sued in United States federal court, asserting federal question jurisdiction under 28 U.S.C. § 1331, diversity jurisdiction under § 1332, and jurisdiction under the Foreign Sovereign Immunities Act. See id. at 775. One of the judges found a jurisdictional basis for the alien plaintiffs under the Alien Tort Statute but held that they were barred from bringing suit because they were injured by private citizens who were acting as terrorists. The other two members of
government negligence or even complicity, because governments were protected by sovereign immunity. In a few instances he may be able to sue a third party. In the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1989, victims' families sued Pan Am for negligence in not carrying out mandated security procedures that could have prevented the bomb from being loaded onto the plane. In general, however, without a specific congressional grant of authority, victims had no cause of action on which to sue for terrorism-related injuries and could play no direct role in their recovery from the terrorist event. Allowing a terrorist victim to sue is a break from traditional concepts of jurisdiction and immunity.

Allowing terrorism victims to sue in federal court through the terrorism exception to the Foreign Sovereign Immunities Act establishes jurisdiction in United States courts for acts of terrorism sponsored by foreign states. The provision does not spell out who may bring the law suit. The critical language is "money damages are sought . . . for personal injury or death . . . ." The exception does not limit the seeking of money damages to victims who are United States citizens. The provision should be read to apply to the broadest group of plaintiffs. This is because "[t]he state sponsored terrorism exception . . . provides an express jurisdictional nexus based upon the victim's United States nationality." This jurisdictional nexus is found in the second of the the panel found other reasons not to grant jurisdiction, including a floodgate argument that courts could be inundated by such suits.

In 1985, terrorists claiming PLO connections high-jacked the cruise ship Achille Lauro. Passenger Leon Klinghoffer was shot in his wheelchair as he sat on the ship's deck, then thrown into the sea. His daughters brought suit in federal court, under state law, maritime law, and the Death on the High Seas Act. See Klinghoffer v. PLO, 739 F. Supp. 854 (S.D.N.Y. 1990), vacated, 937 F.2d. 44 (2d Cir. 1991). The PLO moved to dismiss on the ground that it was immune from suit. The district court denied the motion, and the PLO appealed. See Klinghoffer v. PLO, 937 F.2d 44 (2d Cir. 1991). The Court of Appeals for the Second Circuit found that the PLO was not immune from suit because it was not a sovereign state, and only sovereign states were immune from suit under the version of the Foreign Sovereign Immunities Act then in force, 18 U.S.C. §§ 1602-1611 (1994 & Supp. V 1999). See id. at 46. Although the Klinghoffers could sue the PLO, difficult questions of process and long-arm jurisdiction remained for the district court to deal with on remand. The terrorism exception to the Foreign Sovereign Immunities Act, see discussion supra Part IV.B.2, eliminates these problems.

164 See supra note 167.
165 See In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 37 F.3d 804 (2d Cir. 1994).
167 Flatow, 999 F. Supp. at 22.
two exceptions to the terrorism exception. The first exception to the terrorism exception is that a foreign state cannot be sued for terrorism if it was not a state sponsor of terrorism at the time of the act or did not become one because of the act for which it is being sued. The second exception is that a foreign state cannot be sued for terrorism even if the foreign state is or was so designated, if—(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

In other words, either the plaintiff or the victim must be a “national of the United States.”

“National of the United States” is defined in the Immigration and Nationality Act as “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” Thus, the jurisdictional nexus required to recover under this provision is to owe allegiance to the United States.

States such as Iraq could argue that enlarging the definition to include permanent residents and others, such as refugees, would abrogate “the minimum contacts requirement of due process necessary for the assertion of personal jurisdiction.” In the narrower case of United States citizens, Iraq made this argument in *Daliberti v. Republic of Iraq*. In *Daliberti*, four United States citizens who were doing business in Kuwait were kidnapped or otherwise forced into Iraq, where they were imprisoned and tortured. They and their wives sued the government of Iraq under the Foreign Sovereign Immunities Act. Iraq moved to dismiss for lack of personal and subject matter jurisdiction. Iraq argued that the activities for which the victims sued Iraq occurred outside the United States, so Iraq had “no fair warning that a particular activity [would] subject [it] to the jurisdiction of a foreign state.”

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169 Id. § 1605(a)(7)(B)(i) & (ii).
172 See id. at 41.
173 See id. at 40.
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In rejecting this argument, the Daliberti court pointed out that Congress had explicitly considered the requirements of minimum jurisdictional contacts and adequate notice laid out in *International Shoe Co. v. Washington* when it created the Foreign Sovereign Immunities Act. The court explained that personal jurisdiction could be found if the claim was "one over which the district courts have original jurisdiction under [28 U.S.C.] section 1330(a), meaning a claim for which the foreign state is not entitled to immunity."  

The court pointed out that the provisions in the Foreign Sovereign Immunities Act detailing when a foreign state is not entitled to immunity all require some connection between the lawsuit and the United States. Thus, the immunity provisions "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." Further, the statute "satisfies the due process requirement of adequate notice by prescribing that proper service be made." The due process inquiry, according to the court, is twofold:

Have states that sponsor terrorism been given adequate warning that terrorist acts against United States citizens, no matter where they occur, may subject them to suit in a United States court? Have they been provided with that "degree of predictability ... that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit?"

The Daliberti court concluded that it was reasonable "that foreign states be held accountable in the courts of the United States for terrorist actions perpetrated against U.S. citizens anywhere." In support of this conclusion, the court quoted the conclusion from Flatow:

All states are on notice that state sponsorship of terrorism is condemned by

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175 See *Daliberti*, 97 F. Supp. 2d at 53.
176 *Id.*
177 See *id.* at 53.
178 *Id.*
180 *Daliberti*, 97 F. Supp. 2d at 53 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).
181 *Daliberti*, 97 F. Supp. 2d at 54.
the international community. United States policy towards state sponsors of terrorists, [sic] has been made abundantly clear since the 1979-1981 hostage crisis in Tehran and the ensuing suspension of diplomatic relations with and establishment of international boycotts against foreign state sponsors of terrorism. Foreign state sponsors of terrorism could not reasonably have expected that the United States would not respond to attacks on its citizens, and not undertake measures to prevent similar attacks in the future. In light of the mounting Congressional frustration at the inability of United States victims of foreign state abuses to obtain relief from any forum, it is manifest that Congress enacted 28 U.S.C. § 1605(a)(7) to ensure fair play and substantial justice for American victims of state sponsored terrorism.182

The Daliberti and Flatow courts concluded that "the state-sponsored terrorism exception 'provides an express jurisdictional nexus based upon the victim's United States nationality.'"183

Applying the due process analysis using the proposed broader definition of victim yields the same result. A person who demonstrates a legal connection to the United States (through being a permanent resident, a refugee, or a political asylum seeker) and who brings suit against a terrorist state for terrorism can demonstrate "some connection" between the lawsuit and the United States. Indeed, to interpret otherwise could result in depriving the victim of a forum if he has forsworn other allegiances and now owes allegiance to the United States.

It would defeat the growing legislative purpose to aid a larger group of victims, and it would make the statutes' coverage inconsistent, if we read the Justice for Victims of Terrorism Act as applying only to citizens while allowing all who owe allegiance to the United States to seek redress under the terrorism exception of the Foreign Sovereign Immunities Act.

Not only is it necessary to read "victim" broadly to ensure that our developing terrorism response laws are consistent with one another, "victim" must also be defined more broadly than "citizen" to be consistent with our treatment of aliens in other parts of the United States Code. Treatment of aliens is dealt with in Title VIII of the United States Code, Aliens and Nationality. Congress announced in § 1601, "Statements of national policy concerning welfare and immigration," that it is United States immigration policy

182 Id. (quoting Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23 (D.D.C. 1998)).
183 Daliberti, 97 F. Supp. 2d at 54 (quoting Flatow, 999 F. Supp. at 22).
that aliens be self-sufficient to the degree possible. However, qualified aliens are eligible for federal benefits. Qualified aliens are defined in § 1641, and include, among others, those "lawfully admitted for permanent residence," those "granted asylum," and refugees. Thus, limiting aid under terrorism response statutes to citizens or nationals would be too restrictive. Even adding permanent residents to the list of those eligible for aid in a terrorism event would leave out asylum seekers and refugees. In fact, even those people classified as not qualified aliens, and therefore not eligible for any federal aid, are still eligible for "[s]hort-term, non-cash, in-kind emergency disaster relief." Thus, to treat victims fairly while ensuring that each law in our developing system of terrorism response laws is consistent not only with the others but also with treatment mandated for non-citizens elsewhere in the United States Code, "victims" should be broadly defined.

D. Reading "Victim" Narrowly Could Lead to Grotesquely Unfair Situations.

Imagine two neighbors, a citizen and a permanent resident. Both are injured in a terrorist event in their state. As residents of their state, both receive compensation for their injuries, and both have the right to sue the perpetrators. Recovering, they travel to the same conference abroad, where they both again become victims of a terrorist attack. Narrowly interpreting "U.S. victims" as "U.S. citizens" would result in compensation for one neighbor but not for the other. Imagine a third neighbor, a refugee, who was also injured in the attack within the state. This neighbor received, at most, disaster relief. If he had made it to the international conference, he would again have received nothing. Consider the four members of Brothers to the

191 Non-qualified aliens, for example foreign tourists in the United States, can seek civil remedies against international terrorists through the Alien Tort Statute, 28 U.S.C. § 1350 (1994).
Rescue, flying in small planes over international waters and looking for rafters adrift on the sea between Cuba and Florida. The planes are shot down, the four are killed, and their survivors seek restitution. Three of the victims were United States citizens, and their families ultimately received a judgment of $187 million. One was a resident. His family received nothing.

VI. PROPOSED DEFINITION OF VICTIMS OF TERRORISM

This kind of inequitable aid for similar harms is not right and should not be inevitable. Statutes giving aid to victims of terrorist attacks should clarify in their definition sections that the intended recipients of the aid need not be United States citizens. It is proposed to create a new category entitled “United States victims,” comprising those who owe allegiance to the United States and of those to whom the United States owes protection. This proposed definition should be added to existing terrorist legislation and should be incorporated in new legislation.

PROPOSED DEFINITION: UNITED STATES VICTIMS OF TERRORISM

In the context of providing aid to persons injured or killed in terrorist attacks against the United States, whether the attack occurs at home or abroad, those persons eligible for aid shall be called United States victims. United States victims are people who owe allegiance to the United States, such as citizens, nationals, permanent residents and those lawfully admitted for permanent residence. United States victims are also people for whom the United States has responsibility, such as aliens granted asylum, refugees, and other aliens lawfully in the United States.

VII. CONCLUSION

Defining victims broadly effectuates the developing intent of our statutes to aid more terrorism victims rather than fewer. A broad definition of victim comports with the statutes’ underlying compensation and restitution rationales. In addition, broadening the definition of victims could serve as a deterrent to state sponsors of terrorism because a broader definition would increase the

number of claimants. The sense of security that Senator Leahy mentioned\textsuperscript{193} must extend to all who live here, not just to citizens. The flexibility in aiding victims that Senator Leahy desired can best be achieved by interpreting broadly. Drafters of new legislation must be aware of the trend toward being more rather than less inclusive in providing aid for victims. Drafters should define "victim" broadly to ensure that terrorism relief legislation actually helps the greatest number of victims. One way to do this is to incorporate the proposed definition of "United States Victims of Terrorism" into terrorism legislation. New terrorism laws may be based on the idea of compensating victims or on the concept of providing restitution to victims. They may address acts of terror perpetrated at home or abroad. Whatever the rationale for the aid or the locale of the act, our terrorism response laws should not exclude victims because they are not citizens. Our terrorism response laws should ask whether an injured victim owes allegiance to the United States or is one for whom the United States has responsibility. If so, the law should provide aid. Our laws to aid victims should not themselves create more hardship.

\textsuperscript{193} See supra note 149 and accompanying text.