

Social Insurance for the Socially Distant: Reforming the Countermeasures Injury Compensation Program

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The various COVID-19 vaccines have done immeasurable good for society. The vaccines have slowed the spread of the virus, reduced hospitalization rates, and prevented deaths. Of course, the vaccines are not perfect. Of the hundreds of millions of people who have been vaccinated, some, albeit relatively few, have suffered serious adverse side effects from vaccination. How these individuals are compensated has significant implications for the nation's vaccination efforts and public health.

Pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act), broad liability protections are afforded to manufacturers and administrators of COVID-19 vaccines. Thus, those that allege harm from vaccines cannot bring suit to recover damages for their injuries. At present, the Countermeasure Injury Compensation Program (CICP) is the exclusive mechanism by which individuals injured by COVID-19 vaccines can seek compensation. However, the CICP was not designed with COVID-19 in mind. The program is woefully deficient, particularly when compared to its sister federal vaccine injury program, the Vaccine Injury Compensation Program (VICP). Moreover, other social insurance programs employ successful design principles that are lacking in the CICP.

This Note argues that the CICP is best conceptualized as social insurance and draws from successful social insurance programs to suggest reforms to the CICP. Others have critiqued the CICP, compared it to the VICP, and proposed reforms. However, this Note is unique in developing its reform suggestions by viewing the CICP through the lens of social insurance. In doing so, this Note seeks to inform the current federal vaccine injury compensation reform discourse by extracting valuable design principles from social insurance programs.

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Introduction

The rapid development of COVID-19 vaccines and boosters in the midst of a global pandemic has been nothing short of a medical marvel. The vaccines created by Pfizer, Moderna, Johnson & Johnson, and other private corporations have slowed the spread of the coronavirus, reduced hospitalization rates, and prevented deaths.¹ At the time of this writing, over 220 million people—roughly 67% of the United States’ population—are fully vaccinated.²

While serious COVID-19 vaccine side effects are rare,³ vaccinating hundreds of millions of individuals naturally means that some will experience adverse effects. The question then becomes: What legal remedies are available to the individuals who experience these serious side effects or death? What compensation, if any, ought they receive? Who ought to foot

1. *Benefits of Getting a COVID-19 Vaccine*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html> [https://perma.cc/UQE7-CL2Y] (Aug. 17, 2022); *CDC COVID-19 Study Shows mRNA Vaccines Reduce Risk of Infection by 91 Percent for Fully Vaccinated People*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 7, 2021), <https://www.cdc.gov/media/releases/2021/p0607-mrna-reduce-risks.html> [https://perma.cc/Q6XJ-FT58].

2. *COVID Data Tracker Weekly Review*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 26, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> [https://perma.cc/9M5P-3M33].

3. *Benefits of Getting a COVID-19 Vaccine*, *supra* note 1.

the bill? The vaccine manufacturer? The federal government? Employers who mandate the vaccine?⁴

Typically, individuals harmed by products can bring product liability suits against manufacturers, distributors, and retailers.⁵ However, individuals who suffer injury or death as a result of COVID-19 vaccination cannot sue in state or federal court.⁶ The 2005 Public Readiness and Emergency Preparedness Act (PREP Act) precludes individuals from bringing suit for any claims involving administration or use of certain countermeasures—such as diagnostics, treatments, and vaccines—except in cases of willful misconduct.⁷ At the beginning of the pandemic, the Secretary of Health and Human Services (HHS) issued a declaration extending the PREP Act’s immunity protections to include COVID-19 countermeasures.⁸ Thus, during the pandemic, hundreds of millions of Americans have received vaccines created by private drug manufacturers that cannot be sued for any harm their products might cause. This shield is quite broad; courts have recognized that “the PREP Act is, at its core, an immunity statute”⁹ and that immunity is “sweeping.”¹⁰

There is strong historical and practical support for limiting litigation against vaccine manufacturers. The late 1970s and early 1980s saw a significant increase in the number of lawsuits filed against vaccine manufacturers.¹¹ The costs of defending against this wave of litigation forced many manufacturers out of the vaccine market, causing vaccine shortages

4. Three Alabama legislators seem to favor this suggestion. In September 2021, Alabama Representatives Tommy Hanes, Andrew Sorrell, and Arnold Mooney proposed a bill that would provide a private right of action against employers for injuries and death arising from an employer mandating that their employees receive the COVID-19 vaccine. H.B. 16, 2022 Leg., Reg. Sess. (Ala. 2022).

5. See *Products Liability*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/products_liability [<https://perma.cc/5NKJ-NETX>] (“Products liability refers to the liability of any or all parties along the chain of manufacture of any product for damage caused by that product.”).

6. See Public Readiness and Emergency Preparedness Act, Pub. L. No. 109-148, § 319F-3(a)–(b), 119 Stat. 2818, 2818–20 (2005) (codified as amended at 42 U.S.C. § 247d–6d) (declaring that “covered person[s],” including manufacturers and distributors, are immune from suit for claims relating to the administration or use of covered countermeasures for which the Secretary of Health and Human Services has issued a declaration).

7. *Id.* § 319F-3(d).

8. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198 (Mar. 17, 2020).

9. Dupervil v. All. Health Operations, LCC, 516 F. Supp. 3d 238, 251 (E.D.N.Y. 2021).

10. Parker v. St. Lawrence Cnty. Pub. Health Dep’t, 954 N.Y.S.2d 259, 262 (App. Div. 2012).

11. See Louis Di Mauro, *The DPT Vaccine Controversy: Medical and Legal Aspects*, 57 DEF. COUNS. J. 490, 490 (1990) (discussing the frequency of litigation over the DPT vaccine in the 1980s).

and increasing vaccine costs.¹² Allowing tort litigation to stymie vaccine development can be problematic in ordinary times but is particularly acute in the context of a pandemic. Indeed, in advocating for the PREP Act's broad immunity protections, one legislator asserted that "there is no business model that would have vaccine manufacturers take on the tremendous liability risks to produce such a vaccine. We must address this concern or we will have none. It's really that simple."¹³ The PREP Act's immunity protections were thought necessary to incentivize vaccine development in the midst of global health crises and advance our nation's public health policy.

These immunity protections do not leave harmed individuals without a remedy. Two distinct federal programs provide compensation to individuals who suffer injury or death as a result of vaccination: the Vaccine Injury Compensation Program (VICP) and the Countermeasures Injury Compensation Program (CICP). The older of the two programs, the VICP, covers vaccines that the Centers for Disease Control and Prevention (CDC) recommends for routine administration to children or pregnant women and that are subject to a federal excise tax.¹⁴ The CICP instead applies to "countermeasures covered by a PREP Act declaration of a public health emergency," such as the declarations issued for the 2009 H1N1 "swine flu," Ebola, and now COVID-19.¹⁵ Thus, individuals seeking compensation related to COVID-19 vaccine countermeasures must resort to the CICP.¹⁶

Unfortunately, the CICP was not designed with a public health threat at the scale and severity of COVID-19 in mind. While some experts may have understood that something like the COVID-19 outbreak was inevitable,¹⁷ many aspects of the COVID-19 pandemic have been surprising, even to scientists and public health experts.¹⁸ The scale of the crisis and the scope of

12. *See id.* ("DPT vaccine litigation losses forced many manufacturers out of the vaccine market, at one point causing a temporary shortage of the vaccine and forcing the price of the vaccine to increase dramatically.").

13. 151 CONG. REC. 30409 (2005) (statement of Rep. Nathan Deal).

14. *Covered Vaccines*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/vaccine-compensation/covered-vaccines/index.html> [<https://perma.cc/52Y3-JSUH>] (Aug. 2022).

15. KEVIN J. HICKEY, CONG. RSCH. SERV., LSB10443, *THE PREP ACT AND COVID-19, PART 1: STATUTORY AUTHORITY TO LIMIT LIABILITY FOR MEDICAL COUNTERMEASURES* 4 (2022).

16. *Id.* at 1.

17. *See The Kind of Outbreak Our Scientists Knew Would Happen*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Mar. 13, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/kind-outbreak-our-scientists-knew-would-happen> [<https://perma.cc/F3TC-DGC3>] (reporting that "[w]e didn't know which virus would emerge or where, but the fact that it happened is no surprise at all").

18. *See* Simon Romero, Manny Fernandez & Marc Santora, *'We May Be Surprised Again': An Unpredictable Pandemic Takes a Terrible Toll*, N.Y. TIMES, <https://www.nytimes.com/2020/09/20/us/coronavirus-us-update.html> [<https://perma.cc/32GS-A8HS>] (Sept. 24, 2020) (quoting Catherine Troisi, an infectious disease epidemiologist at The University of Texas Health Science Center at Houston, in reporting "[t]his virus has surprised us on many fronts, and we may be surprised again").

the COVID-19 vaccination program dwarf H1N1 and Ebola. For example, between April 12, 2009, and April 10, 2010, the CDC estimated that there were 12,469 deaths due to H1N1 in the United States.¹⁹ By contrast, to date, the CDC estimates that there have been over 1 million U.S. COVID-19 deaths.²⁰ The CDC's final estimates for H1N1 vaccination put total vaccination coverage for persons above six months old in the United States at 27% of the population.²¹ Roughly 67% of the U.S. population has been fully vaccinated for COVID-19.²² The difference is even starker for Ebola. Only four patients were ever diagnosed with Ebola in the United States,²³ and only specific Ebola responders, laboratory staff, and healthcare personnel were ever designated as eligible to receive the Ebola vaccine.²⁴

Our nation's public health now depends on our government's ability to foster public confidence not only in COVID-19 vaccines but also in the compensation programs available to individuals injured by the vaccines. Admittedly, it may seem unlikely that the United States' relatively low vaccination rate is due to deficiencies in our federal vaccine injury compensation programs. However, historical support exists for the notion that inadequate compensation programs can have a negative effect on vaccination efforts. The failures of the Bush Administration's smallpox vaccination program have been attributed to the perception that it "lacked an adequate compensation plan to protect individuals who might be injured by the vaccination."²⁵

The CICIP is broadly viewed as deficient. As a result, reform efforts are already under consideration.²⁶ Several senators propose to reform the CICIP

19. *2009 H1N1 Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/67YZ-KYUY>] (June 11, 2019).

20. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 25, 2022, 5:31 PM), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days [<https://perma.cc/5WRK-GSZ2>].

21. *Final Estimates for 2009–10 Seasonal Influenza and Influenza A (H1N1) 2009 Monovalent Vaccination Coverage – United States, August 2009 through May, 2010*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/fluview/coverage_0910estimates.htm [<https://perma.cc/86QB-2R58>] (May 13, 2011).

22. *See supra* note 2 and accompanying text.

23. *Ebola Report: Ebola by the Numbers*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/about/ebola/ebola-by-the-numbers.html> [<https://perma.cc/X2CA-WBED>] (Oct. 1, 2015).

24. *Ebola Vaccine: Information about ERVEBO®*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vhf/ebola/clinicians/vaccine/index.html> [<https://perma.cc/V8NT-KYT2>] (Mar. 8, 2022).

25. Peter H. Meyers, *Fixing the Flaws in the Federal Vaccine Injury Compensation Program*, 63 ADMIN. L. REV. 785, 827 (2011).

26. *See, e.g.*, Countermeasure Injury Compensation Fund Amendment Act, S. 3810, 117th Cong. (2022) (proposing amendments to the CICIP with respect to COVID-19 vaccines).

to make its process and compensation scheme more similar to the VICP.²⁷ But developing an effective federal vaccine injury compensation program—designed to address COVID-19 and future pandemic diseases of similar magnitude—will demand more than simply mirroring the VICP.

This Note argues that to respond to public health crises and foster public confidence, vaccine compensation programs need to be redesigned in the model of social insurance. This Note extracts design principles from other social insurance programs like Social Security, unemployment insurance, and the Radiation Exposure Compensation Program. Each of these programs provides models for a process that results in high satisfaction and public trust.

This Note proceeds in three parts. Part I provides background on the CICP and VICP and explains the deficiencies in the former. Part II explores the phenomenon and objectives of social insurance and establishes that vaccine injury compensation fits within this paradigm. Finally, Part III extracts design principles from social insurance programs and applies them to propose reforms to the CICP.

I. The CICP and VICP

This Part supplies necessary history and background on the CICP, including its purpose, structure, and key features. It then provides similar information on a related but distinct federal vaccine injury compensation program, the VICP. Finally, it contrasts the two federal vaccine injury compensation programs, explains and evaluates critiques of the CICP, and lays out the need to reform the CICP.

A. *The CICP*

In the wake of an avian influenza outbreak in the early 2000s, Congress passed the PREP Act, and President George W. Bush signed it into law.²⁸ The PREP Act has the purpose of encouraging the “expeditious development and deployment of medical countermeasures during a public health emergency.”²⁹ The PREP Act does this by immunizing covered entities from legal liability for losses relating to the manufacture, testing, development, distribution, administration, and use of covered medical countermeasures such as diagnostics, treatments, and vaccines.³⁰ This liability shield is

27. *Id.* § 2.

28. See Kenya S. Woodruff, *COVID-19 and PREP Act Immunity*, NAT’L L. REV. (Aug. 5, 2020), <https://www.natlawreview.com/article/covid-19-and-prep-act-immunity> [<https://perma.cc/SW6X-Q3K2>] (“The PREP Act was enacted by Congress and signed into law by George W. Bush in 2005 in the wake of an avian influenza outbreak.”).

29. HICKEY, *supra* note 15, at 1.

30. *Id.* at 1–2.

strikingly broad and is only lifted in cases of willful misconduct.³¹ Under the Act, the Secretary of HHS must issue a federal declaration to bring a public health threat under the ambit of the PREP Act.³² To date, the Secretary has issued declarations for threats from COVID-19, Ebola, swine flu, and more.³³

The PREP Act also created the CICIP to provide compensation to individuals “who die or suffer serious injuries directly caused by the administration of covered countermeasures.”³⁴ The program derives funding from emergency appropriations to the Covered Countermeasure Process Fund.³⁵ The CICIP is considered a “payer of last resort,” which means that it only covers expenses or provides benefits that other private and public programs do not.³⁶

The CICIP processes claims in a nonadversarial fashion.³⁷ Only one party—the individual requesting compensation—participates in the compensation claim process.³⁸ Moreover, after that individual submits a request for CICIP benefits, their participation is over.³⁹ HHS officials then conduct a nonpublic investigation and make decisions on compensation.⁴⁰ In the time between filing a request and receiving a determination on compensation, “[t]he CICIP will communicate with . . . [requesters] periodically to provide . . . [them] with updates on the status of . . . [their] case or to request needed information.”⁴¹ Requesters do not have the option to appeal determinations of their CICIP benefit eligibility to a court, as judicial review is explicitly precluded by statute.⁴²

31. Public Readiness and Emergency Preparedness Act, Pub. L. No. 109-148, § 319F-3(d), 119 Stat. 2818, 2824 (2005) (codified as amended at 42 U.S.C. § 247d-6d). However, even in cases of willful misconduct, the PREP Act still requires individuals to exhaust their options for compensation through the CICIP before they can sue in court. *Id.* § 319F-4(d).

32. *Id.* § 319F-3(b).

33. HICKEY, *supra* note 15, at 4.

34. *Id.* at 1.

35. KEVIN J. HICKEY & ERIN H. WARD, CONG. RSCH. SERV., LSB10584, COMPENSATION PROGRAMS FOR POTENTIAL COVID-19 VACCINE INJURIES 3 (2021).

36. *Countermeasures Injury Compensation Program*, HEALTH RES. & SERVS. ADMIN. (Dec. 2020), <https://www.hrsa.gov/sites/default/files/hrsa/cicp/cicpfactsheet.pdf> [<https://perma.cc/QG2X-YFPY>].

37. See Meyers, *supra* note 25, at 839 (discussing the CICIP and VICP and writing with respect to the VICP that “[a]ll of the compensation programs discussed in this Article, with the exception of the Vaccine Program, were based upon a nonadversarial, inquisitional model”).

38. See *id.* at 835 (“The legislation for this program clearly intended nonadversarial processing of claims for compensation, with HHS officials making decisions after conducting nonpublic investigations.”).

39. *Id.*

40. *Id.*

41. *Frequently Asked Questions*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/cicp/faq/requesters> [<https://perma.cc/G6WV-D5PK>] (Nov. 2020).

42. Meyers, *supra* note 25, at 835.

B. *The VICP*

In 1986, an increase in litigation related to vaccines for diphtheria, pertussis (whooping cough), and tetanus threatened to decrease United States vaccination rates, prompting Congress to pass the National Childhood Vaccine Injury Act (NCVIA).⁴³ Congress sought to encourage vaccination, provide vaccine manufacturers and healthcare providers with legal protection, and “create a safety net for those few who would be injured by the vaccinations so that compensation to injured petitioners would be provided ‘quickly, easily, and with certainty and generosity.’”⁴⁴ Under the NCVIA, individuals injured by most routinely administered vaccines must first seek compensation through the VICP before seeking other legal remedies against a vaccine manufacturer or any entities involved in administering the vaccine.⁴⁵

The VICP only provides compensation for injuries caused by “covered vaccine[s],” and the program’s funding comes from an excise tax of \$0.75 per dose on certain “taxable vaccines”; that tax goes into the federal Vaccine Injury Compensation Trust Fund.⁴⁶ For a vaccine to be covered, the CDC must recommend it for routine administration to children or pregnant women, and it must be subject to the \$0.75 excise tax.⁴⁷ The current list of covered vaccines includes hepatitis A, measles, polio, and tetanus among a dozen others.⁴⁸

The VICP is described as a “no-fault alternative to the traditional legal system for resolving vaccine injury petitions.”⁴⁹ Like an ordinary civil suit, VICP proceedings have adversarial parties.⁵⁰ A petitioner must bring a claim for compensation with accompanying medical documents in the U.S. Court

43. 132 Cong. Rec. 30,762 (1986) (statement of Rep. Biaggi) (supporting the NCVIA as a solution to the troublesome decision of “vaccine-producing pharmaceutical companies . . . to get out of the business rather than face potential high-dollar legal penalties for vaccine-related injuries or death”).

44. Meyers, *supra* note 25, at 794 (quoting H.R. REP. NO. 99-908, pt. 1, at 3 (1986)).

45. See 42 U.S.C. § 300aa-11(a)(2). The NCVIA states:

No person may bring a civil action for damages in an amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988 . . . unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death.

Id.

46. HICKEY & WARD, *supra* note 35, at 4, 8.

47. *Id.* at 7-8.

48. See *Covered Vaccines*, *supra* note 14 (providing a list of VICP-covered vaccines).

49. *National Vaccine Injury Compensation Program*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/vaccine-compensation/index.html> [<https://perma.cc/KYE9-YEGK>] (Aug. 2022).

50. See *id.* (noting that within the VICP “both parties can present evidence”) (emphasis added).

of Federal Claims.⁵¹ After a recommendation from medical staff at HHS, a special master is appointed by the U.S. Court of Federal Claims.⁵² The special master then reviews the petition, holds hearings, and determines if compensation is warranted.⁵³ The decision of the special master can be appealed by either party to the U.S. Court of Federal Claims, and that court's decision can then be appealed to the U.S. Court of Appeals for the Federal Circuit.⁵⁴ After exhausting the appeals process, a petitioner may accept the judgment, or reject it and file a tort claim in state or federal court.⁵⁵

The VICP has inquisitorial features as well as adversarial components.⁵⁶ The NCVIA requires that the VICP adhere to procedural rules that “provide for a less-adversarial, expeditious, and informal proceeding.”⁵⁷ Moreover, special masters in VICP proceedings are afforded greater control and responsibility in adjudicating claims for compensation than typical judges.⁵⁸ Most VICP proceedings result in settlements, and compensation, if approved, is provided by HHS.⁵⁹

C. Critique of the CICIP

The CICIP and VICP share the dual goals of protecting vaccine manufacturers from lawsuits and compensating individuals injured by vaccines.⁶⁰ But the two programs are distinct in five key ways. First, structural differences between the programs afford participants in the VICP more control and transparency from the process than participants under the CICIP. This is because the CICIP has a purely inquisitorial system, whereas the VICP has a mixed adversarial and inquisitorial system.⁶¹

51. *See id.* (“An individual files a petition with the U.S. Court of Federal Claims.”).

52. *See id.* (“The report is presented to a court-appointed special master . . .”).

53. *Id.*

54. *See HICKEY & WARD, supra* note 35, at 8 (“[T]he petitioner has 30 days to appeal a special master’s decision to the Claims Court for review. . . . Once the court issues its judgment . . . the petitioner has 60 days to appeal the judgment to the U.S. Court of Appeals for the Federal Circuit.”).

55. *See id.* (“[C]laimant may accept the judgment or reject it and file a tort claim.”).

56. *See Meyers, supra* note 25, at 805 (“The Vaccine Act created a partially inquisitorial and partially adversarial process for adjudicating vaccine injury claims.”).

57. 42 U.S.C. § 300aa–12(d)(2)(A).

58. *See Meyers, supra* note 25, at 806 (explaining that special masters “are given authority to participate actively in the cases and to structure the process for each case” and that “[t]hey are not expected to play the neutral umpire’s role as are judges in other sorts of civil litigation”).

59. *See Vaccine Injury Compensation Data*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/vaccine-compensation/data/index.html> [<https://perma.cc/C6CM-KMHW>] (Aug. 2022) (“Approximately 60% of all compensation awarded by the VICP comes as [a] result of a negotiated settlement between the parties . . .”); *National Vaccine Injury Compensation Program, supra* note 49 (“The Court orders the U.S. Department of Health and Human Services to award compensation.”).

60. *See supra* subparts I(A)–(B).

61. *See supra* notes 37 and 56 and accompanying text.

Second, compared to the VICP, the CICIP offers injured persons a short window to file for compensation. Individuals injured by a countermeasure have just one year *from administration* of that countermeasure to file for compensation from the CICIP, whereas individuals injured by a covered vaccine have three years *from their first symptom* to file a petition for compensation through the VICP.⁶² Because symptoms must manifest after administration of a vaccine, the VICP is more favorable for individuals seeking compensation—both in the program’s length of time to file and in the point at which the statute of limitations clock begins to tick.

Third, the CICIP has more stringent eligibility and causation requirements than the VICP. In order to demonstrate eligibility for recovery under the CICIP, an individual has two options. A requester may show that their injury meets the requirement of one of the CICIP’s Countermeasure Injury Tables, which list covered countermeasures, covered injuries, and the required time interval from receipt of a covered countermeasure to the first symptom or manifestation of injury.⁶³ Critically, however, this option is not available for individuals requesting CICIP benefits for COVID-19 countermeasure injuries as Countermeasure Injury Tables only exist for smallpox and pandemic influenza.⁶⁴ Thus, COVID-19 CICIP requesters are relegated to the CICIP’s alternative eligibility requirement. When a CICIP requester cannot use a Countermeasure Injury Table, they must show proof that their injury was the direct result of the administration or use of a covered countermeasure.⁶⁵ Moreover, that proof must be “based on ‘compelling, reliable, valid, medical and scientific evidence’ beyond mere temporal association.”⁶⁶

Similarly, in order to demonstrate eligibility for recovery under the VICP, a petitioner must be able to demonstrate that their illness, disability, injury, condition, or death meets the requirements of the VICP’s Vaccine Injury Table or that the vaccine otherwise caused their injury.⁶⁷ However, in proving that the covered vaccine caused the petitioner’s injury, the petitioner only needs to satisfy a preponderance of the evidence standard, and must use

62. HICKEY & WARD, *supra* note 35, at 7.

63. *See* Countermeasures Injury Compensation Program, 42 C.F.R. § 110.100 (2016) (providing the pandemic influenza countermeasures injury table).

64. *See* Countermeasures Injury Compensation Program (CICIP), HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/cicp> [<https://perma.cc/GZD5-R6XH>] (Nov. 2020) (showing tables only for smallpox and pandemic influenza in its “Countermeasures Injury Tables” section).

65. HICKEY & WARD, *supra* note 35, at 7.

66. *Id.* at 3.

67. *Vaccine Program Background*, U.S. CT. OF FED. CLAIMS OFF. OF SPECIAL MASTERS (2010), https://www.uscfc.uscourts.gov/sites/default/files/vaccine_files/vaccine.background.2010.pdf [<https://perma.cc/ZMJ9-4D38>].

expert witness testimony, medical records, or medical opinion to do so.⁶⁸ In meeting that standard, the petitioner must merely demonstrate that it is more likely than not that the covered vaccine caused their injury. The more onerous “compelling” causation standard of the CICIP stands in stark contrast to the “preponderance of the evidence” standard used in the VICP.

Fourth, the VICP permits a broader range of recoverable damages than the CICIP, including pain, suffering, and emotional distress damages.⁶⁹ Under the CICIP, a requester is only allowed to recover reasonable medical expenses, lost employment income, and death benefits.⁷⁰ Moreover, lost employment income benefits are limited to \$50,000 per year under the CICIP, but uncapped under the VICP.⁷¹ Additionally, unlike the CICIP, the VICP allows recovery of attorney’s fees associated with navigating the program’s compensation process.⁷²

Finally, the VICP includes a robust appeals process that permits petitioners to sue in federal court after going through the program.⁷³ If a requester is unsatisfied with their CICIP decision, they may ask for reconsideration of their CICIP decision to a qualified independent panel.⁷⁴ This request must be made in writing and mailed to the Health Resources and Services Administration Headquarters.⁷⁵ No further judicial or administrative review is available.⁷⁶

Despite a more streamlined inquisitorial structure, recovery rates under the CICIP are significantly lower than recovery rates under the VICP. According to a Congressional Research Service report, from 2010 to 2021, the CICIP received 491 requests unrelated to COVID-19.⁷⁷ Of those 491 claims, only 39 (8%) were determined to be eligible for compensation; of those 39, only 29 (6%) were paid out.⁷⁸ By contrast, since its inception in 1988, the VICP has received over 24,000 petitions (with 4,141 yet to be adjudicated), of which 8,353 (34%) were found to be eligible for

68. *See id.* (noting that in establishing “actual causation,” the standard of proof a petitioner must meet “is akin to traditional standards applied in tort litigation”).

69. *See* HICKEY & WARD, *supra* note 35, at 7 (listing available benefits under both programs).

70. *Id.*

71. *See id.* (noting a cap of “\$50,000/year for lost employment income” under the CICIP but no such limit for the VICP).

72. *See id.* (listing attorney’s fees as an available benefit under the VICP but unavailable under the CICIP).

73. *See id.* at 8 (outlining the appeals and judicial review processes of the VICP and CICIP).

74. *See id.* (same).

75. *Frequently Asked Questions*, *supra* note 41.

76. HICKEY & WARD, *supra* note 35, at 8.

77. *Id.* at 3.

78. *Id.*

compensation; all 8,353 claims were compensated.⁷⁹ The disparity between CICP requesters and VICP petitioners becomes even more drastic when the inquiry is focused on individuals requesting compensation for COVID-19 countermeasure-related injuries. As of October 1, 2022, the CICP has received 10,323 COVID-19 countermeasure claims—7,412 allege injuries or death from COVID-19 vaccines, and 2,911 allege injury or death from other COVID-19 countermeasures.⁸⁰ To date, not a single one of these claims has been fully compensated;⁸¹ forty-seven claims have been denied, and six have been determined eligible for compensation, some of which have been pending review of eligible expenses for months.⁸²

It is unclear what exactly to make of these numbers. It is possible that the VICP compensates too many individuals, or that the CICP simply needs more time to make decisions on requests for benefits. Of course, it is also conceivable that the CICP has been inundated with many false claims of injury or death. However, because some people—albeit relatively few—suffer serious adverse effects as a result of vaccination,⁸³ there are likely some legitimate claims of injury or death among the thousands filed with the CICP, none of which have been fully compensated.

Recently, the CICP has received significant criticism.⁸⁴ The program has been attacked from all angles, including for the types of compensation it affords, its one-year deadline to file, and most notably, its dismal compensation rates.⁸⁵ Some legal scholars have advanced arguments that the CICP should not exist and that all vaccine injury compensation should go

79. *See id.* at 4, 8 (noting “24,441 petitions as of 10/1/2021, of which 20,300 have been adjudicated, 11,947 were determined ineligible, and 8,353 compensated (41%)”).

80. *Countermeasures Injury Compensation Program (CICP) Data*, HEALTH RES. & SERVS. ADMIN. (Oct. 1, 2022), <https://www.hrsa.gov/cicp/cicp-data> [<https://perma.cc/J9RP-SE63>].

81. *Id.* (noting that “[a]s of October 1, 2022, the CICP has *partially* compensated *one* COVID-19 countermeasure claim”) (emphasis added).

82. *Id.* At least one eligible claim has been pending review for over a year. *Compare id.* (noting that six COVID-19 claims “have been determined eligible for compensation and are pending a review of eligible expenses” as of October 1, 2022), with *Countermeasures Injury Compensation Program (CICP) Data*, HEALTH RES. & SERVS. ADMIN. (Oct. 1, 2021), <https://web.archive.org/web/20211017044357/https://www.hrsa.gov/cicp/cicp-data> [<https://perma.cc/GVG7-KLRB>] (noting that “[o]ne COVID-19 claim has been determined eligible for compensation and is pending a review of eligible expenses” as of October 1, 2021).

83. *See supra* notes 1–3 and accompanying text.

84. Maryanne Demasi, *Covid-19: Is the US Compensation Scheme for Vaccine Injuries Fit for Purpose?*, *BMJ* (Apr. 19, 2022), <https://www.bmj.com/content/377/bmj.o919> [<https://perma.cc/FB3N-LQVQ>] (“Patients and lawyers say that America’s system for covid vaccine injury claims is costly, opaque, and yet to issue a single payout.”).

85. *See id.* (reporting criticism of the CICP as inferior to the VICP in terms of its payouts and the way claims are assessed).

through the VICP.⁸⁶ However, the VICP itself arguably does not do enough, and takes too long, to compensate injured individuals.⁸⁷ Vaccine injury compensation is an increasingly important and evolving area of the law, and it has become clear that the CICIP, as currently constructed, is woefully deficient. Moreover, though the CICIP was not built for COVID-19, it has received drastically more claims related to COVID-19 in the past two years than claims related to all other countermeasures in the program's twelve-year history combined.⁸⁸ In order to improve the program and better align its design with the objectives it should achieve, we must reevaluate and recontextualize the CICIP.

II. The CICIP as Social Insurance

Just as COVID-19 has necessitated innovation in our restaurants, educational institutions, and work environments, so too does it necessitate innovation in our federal vaccine injury compensation programs.⁸⁹ Conceptualizing the CICIP as social insurance permits us to look to other successful social insurance programs to assemble a set of design principles better able to address a twenty-first-century pandemic. This Part defines social insurance and provides three examples of successful social insurance programs. It then draws from these programs four critical objectives of social insurance. In doing so, it integrates federal vaccine injury compensation programs, specifically the CICIP, within the paradigm of social insurance such that these objectives are demonstrated to be applicable in this new context.

Social insurance is a term of art used to describe compulsory social programs administered by the government that function as a social safety net.⁹⁰ Aptly named, “social insurance may be considered to cover social risks.”⁹¹ Often social insurance programs are designed to ameliorate risks associated with the provision of education, health, income, nutrition, and

86. *Id.* (quoting Peter Meyers, an emeritus professor at George Washington University Law School, saying, “It’s a mess, in my opinion . . . I think the best thing that could happen is to transfer all the covid-19 cases out of the CICIP and put them in the vaccine court [VICP]”) (internal quotation marks omitted) (alteration in original).

87. *See* Meyers, *supra* note 25, at 805 (noting that problems with the VICP include “the short, inflexible three-year statute of limitations to file a claim in the program; the low \$250,000 award for death cases; the low \$250,000 cap on pain and suffering in injury cases; and the burden of proof imposed on petitioners in off-Table cases”).

88. *See supra* notes 78–80 and accompanying text.

89. *See, e.g., 17 Pandemic Innovations That Are Here to Stay*, POLITICO (Dec. 10, 2021, 4:30 AM), <https://www.politico.com/news/2021/12/10/17-ways-covid-hit-fast-forward-on-the-future-523845> [<https://perma.cc/357K-BMLQ>] (discussing changes driven by COVID-19 across various industries).

90. ROBERT I. MEHR & EMERSON CAMMACK, PRINCIPLES OF INSURANCE 434 (3d. ed. 1961).

91. *Id.*

shelter.⁹² However, the principal distinction between social insurance and private insurance or optional government insurance is that social insurance is inherently compulsory.⁹³

The United States has implemented social insurance programs in various forms. Social Security is the preeminent form of social insurance in America. Through this program the United States Social Security Administration provides benefits to retirees, disabled individuals, and survivors of deceased workers.⁹⁴ The program currently provides benefits to over 60 million Americans.⁹⁵ Unemployment insurance is another form of social insurance,⁹⁶ one that proved particularly important during the COVID-19 pandemic. Unemployment insurance is a joint program between states and the federal government that provides benefits to eligible workers who become unemployed through no fault of their own.⁹⁷ The Radiation Exposure Compensation Program (RECP) provides a unique example of social insurance. Through this program, the federal government provides compensation to ordinary civilians, government workers, and uranium miners unwittingly exposed to harmful radiation from the United States' Cold War nuclear testing.⁹⁸ Although these programs vary, these three successful social insurance programs share at least four critical objectives—namely, social solidarity, broad and predictable eligibility requirements, efficiency, and efficacy. The following subpart will examine these objectives and describe how the CICIP fits within the paradigm of social insurance.

A. *Social Solidarity*

Social solidarity is defined as “the cementing force that binds individuals based on normative obligations that facilitate collective action

92. MITCHELL BARNES, LAUREN BAUER, WENDY EDELBERG, SARA ESTEP, ROBERT GREENSTEIN & MORIAH MACKLIN, BROOKINGS, *THE SOCIAL INSURANCE SYSTEM IN THE U.S.: POLICIES TO PROTECT WORKERS AND FAMILIES 1* (2021), https://www.brookings.edu/wp-content/uploads/2021/06/Social-Insurance-FP_v4.5.pdf [<https://perma.cc/9Z7P-8CYE>].

93. See O.D. DICKERSON, *HEALTH INSURANCE* 414 (rev. ed. 1963) (“The compulsory nature of social insurance is what distinguishes it from private insurance.”).

94. *About Us*, SOC. SEC. ADMIN. <https://www.ssa.gov/agency/> [<https://perma.cc/J4GH-FXMD>].

95. See *id.* (“We pay benefits to about 64 million people including retirees, children, widows, and widowers.”).

96. See Grace Abbott, *The Social Security Act and Relief*, 4 U. CHI. L. REV. 45, 52 (1936) (referring to unemployment compensation as a “form of social insurance”).

97. See, e.g., Daniel N. Price, *Special Anniversary Feature: Unemployment Insurance, Then and Now, 1935–85*, SOC. SEC. BULLETIN, Oct. 1985, at 22, 24 (1985).

98. Jason C. Bougere, *The Radiation Compensation Program: A Doorway to the EEOICP*, U.S. DEP’T OF LAB. (Dec. 9, 2020), at 3–4, 6, https://www.dol.gov/sites/dolgov/files/OWCP/energy/regs/compliance/Outreach/Outreach_Presentation/doj_presentation120920.pdf [<https://perma.cc/ZQU8-XTQ2>].

and social order.”⁹⁹ This collective action is often instigated by large societal catastrophes. Moreover, collective efforts to remediate the effects of these catastrophes often result in the creation and modification of social insurance programs. For example, the Great Depression spurred passage of the Social Security Act of 1935.¹⁰⁰ With few narrow exceptions, Americans are required to contribute to Social Security such that benefits can be provided to groups particularly affected by economic downturn—retirees, disabled individuals, and survivors of deceased workers.¹⁰¹ Employers, employees, and self-employed people all pay into Social Security.¹⁰² We collectively bear the expense of providing this social insurance program as Social Security costs the United States roughly a trillion dollars each year¹⁰³—just under a quarter of the federal budget.¹⁰⁴

Like Social Security, unemployment insurance was also created in the wake of the Great Depression by the Social Security Act.¹⁰⁵ Unemployment insurance is funded through employer payroll taxes.¹⁰⁶ States provide most of the funding for the program, including the benefits distributed; the federal government only pays for the administrative costs.¹⁰⁷ Recently, unemployment insurance has become a particularly salient example of the way in which social solidarity impacts the design of the United States’ social insurance programs. At the beginning of the COVID-19 pandemic, the

99. Chinmayee Mishra & Navaneeta Rath, *Social Solidarity During a Pandemic: Through and Beyond Durkheimian Lens*, SOC. SCIS. & HUMANS. OPEN, Nov. 15, 2020, at 1, 1.

100. *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> [<https://perma.cc/275E-9YGX>].

101. See, e.g., Troy Segal, *Who Is Exempt from Paying into Social Security?*, INVESTOPEDIA (Oct. 14, 2021), <https://www.investopedia.com/ask/answers/020315/there-any-way-opt-out-paying-social-security.asp> [<https://perma.cc/V3V4-L4SM>] (discussing how “a small number of people” qualify for an exemption from Social Security taxes).

102. See *How Is Social Security Financed?*, SOC. SEC. ADMIN., <https://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm> [<https://perma.cc/ZF4M-9C7V>] (“Social Security is financed through a dedicated payroll tax. Employers and employees each pay 6.2 percent of wages up to the taxable maximum of \$147,000 (in 2022), while the self-employed pay 12.4 percent.”).

103. *Id.* (reporting that \$980.06 billion of total Old-Age and Survivors Insurance and Disability Insurance (OASDI) income came from payroll taxes, \$70.1 billion from interest earnings, and \$37.6 billion from revenue produced by taxation of OASDI benefits).

104. *Budget Basics: How Does Social Security Work?*, PETER G. PETERSON FOUND. (July 5, 2022), <https://www.pgpf.org/budget-basics/how-does-social-security-work> [<https://perma.cc/HS4M-2XDN>].

105. See Price, *supra* note 97, at 22 (discussing The Great Depression and then explaining that “[a]mid controversy about the best way to deal with poverty in old age and with unemployment, the Congress established the old-age and unemployment insurance programs. . . . [T]he unemployment insurance program was incorporated in the legislative package enacted as the Social Security Act of 1935”).

106. See *id.* at 23 (“A payroll tax on covered employers was established.”).

107. See *id.* at 24, 29 (explaining that federal “[g]rants are authorized to each State to administer the State unemployment insurance program,” but “the States have had primary or exclusive responsibility for most facets of unemployment insurance”).

nation's unemployment rate skyrocketed to 14.4%.¹⁰⁸ In response, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which created the Federal Pandemic Unemployment Compensation Program (FPUC).¹⁰⁹ FPUC benefits temporarily provided an additional \$600 per week to individuals across the country collecting unemployment benefits.¹¹⁰ The CARES Act also gave states the option to extend unemployment compensation to certain categories of workers who are ordinarily ineligible for unemployment benefits.¹¹¹ Unemployment insurance is typically managed at the state level; however, social solidarity, in the face of a large societal issue, had the capacity to drive nationwide design modifications to the program.

In the case of the RECP, the Cold War served as the instigating event.¹¹² From the mid-1940s to the early-1960s, the United States conducted “nearly 200 atmospheric nuclear weapons development tests.”¹¹³ This, and other nuclear weapons development efforts, unwittingly exposed thousands of ordinary civilians, government workers, and uranium miners to harmful radiation.¹¹⁴ As a result, many individuals filed class action lawsuits alleging exposure to hazardous radiation.¹¹⁵ In an effort to apologize and ameliorate the societal and individual harm caused by the radiation, Congress passed the

108. See, e.g., Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/> [<https://perma.cc/3J5E-AS7X>].

109. CARES Act, Pub. L. No. 116-136, 134 Stat. 281, 318 (2020) (codified as amended at 15 U.S.C. § 9001).

110. See *id.* (requiring that for “any week for which the individual is . . . otherwise entitled under the State law to receive regular compensation” that they receive “an additional amount of \$600”).

111. See *Unemployment Insurance Relief During COVID-19 Outbreak*, U.S. DEPT. OF LAB., <https://www.dol.gov/coronavirus/unemployment-insurance> [<https://perma.cc/9CRP-BQTB>] (noting that, for example, a “gig economy worker, such as a driver for a ride-sharing service, is eligible”).

112. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1037R, RADIATION EXPOSURE COMPENSATION ACT: PROGRAM STATUS I (2007) (discussing how “the United States conducted a series of aboveground atomic weapons tests as it built up its Cold War nuclear arsenal” and how “[t]o make partial restitution to these individuals, or their eligible surviving beneficiaries, for their hardships associated with the radiation exposure, the Radiation Exposure Compensation Act (RECA) was enacted on October 15, 1990”).

113. *Compensation Programs: Radiation Exposure Compensation Program*, DEPT. OF JUST., <https://www.justice.gov/civil/compensation-programs> [<https://perma.cc/KG85-MJ8S>] (Dec. 22, 2020).

114. See Bougere, *supra* note 98 (listing the categories of claimants eligible for compensation under RECA).

115. See *Compensation Programs: Radiation Exposure Compensation Program*, *supra* note 113 (“Following the tests’ cessation in 1962 many of these workers filed class action lawsuits alleging exposure to known radiation hazards.”).

Radiation Exposure Compensation Act (RECA) on October 5, 1990.¹¹⁶ The Act established the RECP, which is funded by congressional appropriations and was designed as an alternative to litigation.¹¹⁷ The RECP recognizes a normative obligation to compensate those injured by nuclear radiation and facilitates the fulfillment of that obligation through collective action in the form of federal legislation and congressional appropriations. In doing so, the RECP provides an excellent example of the way in which social solidarity influences the creation and design of social insurance programs.

The CICP is best conceptualized as instituting social solidarity with those injured by vaccination efforts. The CICP was created in the wake of an avian influenza outbreak in the early 2000s.¹¹⁸ The CICP has significant ramifications for social solidarity. It is a compensation program administered by the government that functions as a social safety net for individuals who suffer adverse reactions after administration of covered countermeasures. Moreover, these countermeasures are specifically designed to prevent and respond to public health emergencies such as pandemics, which are generally viewed as social risks.¹¹⁹ Additionally, resorting to and contributing to the CICP is compulsory, as individuals seeking compensation for covered countermeasures are required to go through the program, which is funded through congressional appropriation of revenue collected from federal taxes.¹²⁰ Further, the CICP recognizes a normative obligation to compensate those injured by vaccination efforts, and facilitates the fulfillment of that obligation through collective action in the form of the federal legislation that created the program and the congressional appropriations that fund it. Admittedly, the legislative efforts and congressional appropriations that comprise the attenuated collective action present in the CICP and RECP are distinct from the direct collective action of paying taxes to support Social Security and unemployment insurance. Nonetheless, each of these programs serves as a cementing force that binds the United States in its responses to societal catastrophes. Thus, the CICP directly implicates the social solidarity objectives that motivated the inception and design of the other long-standing social insurance programs.

116. See U.S. DEP'T. OF JUST., RADIATION EXPOSURE COMPENSATION ACT TRUST FUND: FY 2022 BUDGET & PERFORMANCE PLAN 1–2 (2021), <https://www.justice.gov/jmd/page/file/1398506/download> [<https://perma.cc/M6Q2-NDBZ>] (“The Radiation Exposure Compensation Act (“the Act” or “RECA”) offers an apology and monetary compensation to individuals who contracted certain cancers and other serious diseases as a result of their exposure to radiation . . .”).

117. See *id.* at 1, 4 (describing litigation considerations and funding history of RECA).

118. See *supra* note 28 and accompanying text.

119. See *supra* note 29 and accompanying text.

120. HICKEY, *supra* note 15, at 2–3, 8.

B. Broad and Predictable Eligibility Requirements

Because social insurance programs are so often established in response to urgent societal needs, they are designed with the primary goal of comprehensive compensation.¹²¹ Unnecessarily opaque eligibility requirements—particularly those with rigorous causation standards—are inapposite to that goal. Thus, well-designed social insurance programs intentionally utilize predictable, broad-based eligibility requirements to facilitate a more straightforward and inclusive compensation process.

Often, social insurance programs implement broad and predictable eligibility by taking a categorical approach. Take, for instance, the RECP. The RECP is paradigmatic of categorical eligibility requirements. The RECP compensates eligible claimants for certain covered illnesses.¹²² Three broad categories of claimants are eligible for compensation through the RECP: “Downwinders”—individuals who were physically present in specified covered areas downwind from the Nevada Test Site; “Onsite Participants”—individuals who participated in above-ground nuclear tests at certain sites; and “Uranium Workers”—individuals who worked in a covered uranium mine, mill, or ore transport operation.¹²³ Surviving spouses, children, parents, grandchildren, and grandparents are also eligible beneficiaries.¹²⁴ Claimants are not required to prove a causal connection between exposure to radiation and their subsequent illnesses to obtain compensation; instead they must only meet the statutory eligibility criteria.¹²⁵ Moreover, “[r]easonable doubt with respect to eligibility must be resolved in the claimant’s favor.”¹²⁶

Similarly, Social Security uses a categorical system to determine eligibility for benefits. The Social Security Administration’s website clearly articulates the eligibility requirements for various benefits. For instance, an individual’s eligibility for retirement benefits is generally determined by whether they have worked for at least ten years and are of retirement age.¹²⁷ Eligibility for unemployment insurance is more nuanced. Precise eligibility requirements for unemployment insurance vary from state to state; but generally to be eligible for the program, workers must have (1) become

121. See *supra* subpart II(A).

122. See *Radiation Exposure Compensation Act*, U.S. DEP’T. OF JUST., <https://www.justice.gov/civil/common/reca> [<https://perma.cc/NHX2-UNYW>] (Sept. 1, 2022) (“RECA establishes lump sum compensation awards for individuals who contracted specified diseases in three defined populations . . .”).

123. Bougere, *supra* note 98, at 4.

124. *Id.* at 10.

125. See *id.* at 3 (“Exposure to radiation is presumed if statutory eligibility criteria are met.”).

126. *Id.*

127. See SOC. SEC. ADMIN., RETIREMENT BENEFITS 1, 3 (2020), <https://www.ssa.gov/pubs/EN-05-10035.pdf> [<https://perma.cc/X58W-32XM>] (explaining that “[i]f you were born in 1929 or later, you need 40 credits (10 years of work)” and that “[y]ou can get Social Security retirement benefits as early as age 62”).

unemployed through no fault of their own, (2) worked for some specified period of time, (3) earned some minimum amount of wages, and (4) be actively seeking work each week they are collecting benefits.¹²⁸ The first requirement seemingly involves the sort of unpredictable, noncategorical analysis that this subpart designates as inapposite to social insurance programs' compensation objectives. However, during the pandemic, this requirement was broadened and made more predictable by the CARES Act, which added categorical carve-outs for individuals who "self-quarantine due to being immuno-compromised," "ha[d] Covid-19 symptoms," "[were] unable to do their job temporarily due to coronavirus-related medical complications," or "ha[d] a family care responsibility without access to an alternative."¹²⁹ Thus, just as COVID-19 strengthened unemployment insurance's accordance with principles of social solidarity, so too did it foster unemployment insurance's adoption of broader and more predictable eligibility requirements.

Like other social insurance programs, the CICIP has categorical eligibility requirements, but only for certain requesters. Under the CICIP, in order to demonstrate eligibility for recovery, an individual can show that their injury meets the requirement of one of the CICIP's Countermeasure Injury Tables.¹³⁰ However, this option is only available if such a table exists. Unfortunately, no table exists for COVID-19 countermeasure injuries.¹³¹ Instead, requesters must show proof that their injury was a direct result of the administration or use of a covered countermeasure.¹³² Moreover, that proof "must be based on compelling, reliable, valid, medical and scientific evidence."¹³³

This stringent, complex causation requirement strays away from the broad and predictable approach that is the hallmark of other social insurance schemes. It is unlikely that an average person would be able to gather evidence to meet a "compelling, reliable, valid, medical and scientific evidence" standard.¹³⁴ In the context of an unpredictable pandemic, the CICIP would benefit from broader and more predictable eligibility requirements. This can be accomplished by producing a COVID-19 Countermeasures

128. See *Unemployment Insurance*, BENEFITS.GOV, <https://www.benefits.gov/benefit/91> [<https://perma.cc/Z8X2-F5KW>] (listing general requirements for unemployment insurance eligibility).

129. Greg Iacurci, *Can I Get Unemployment Benefits After Quitting or Refusing a Job? Here's What to Know*, CNBC, <https://www.cnbc.com/2020/06/23/can-i-get-unemployment-after-quitting-or-refusing-my-job-heres-what-to-know.html> [<https://perma.cc/ZN75-4TYR>] (June 23, 2020, 9:15 AM).

130. HICKEY & WARD, *supra* note 35, at 7.

131. See *supra* note 64 and accompanying text.

132. See *supra* note 65 and accompanying text.

133. HICKEY & WARD, *supra* note 35, at 3.

134. *Id.*

Injury Table for categorical eligibility and adopting an alternative “preponderance of the evidence” standard as employed in the VICP.¹³⁵ Just as unemployment insurance broadened and simplified its eligibility requirements in light of COVID-19, so too should the CICIP in order to afford individuals navigating the program’s compensation process more certainty.¹³⁶ Thus, CICIP reform efforts should strongly consider making the CICIP’s eligibility requirements more broad and predictable to better conform with its sister social insurance programs.

C. *Efficiency*

Just as the VICP was designed to provide compensation “quickly, easily, and with certainty and generosity,”¹³⁷ so too were other social insurance programs. Social insurance programs commonly implement features designed to provide applicants with a frictionless experience in pursuing compensation. Take, for instance, Social Security. The application process can be completed relatively quickly online.¹³⁸ Receiving a decision on an application takes a relatively short time and can be as quick as a few weeks.¹³⁹ For instance, it typically takes about three to five months to receive a decision on a disability benefits application.¹⁴⁰ While the process for applying for unemployment insurance varies from state to state, it is often similarly efficient. In Texas, a worker must first file an initial claim, which can be completed online.¹⁴¹ Afterwards, a claim examiner at the Texas Workforce Commission makes an initial determination.¹⁴² If a worker is determined to be eligible for compensation, they can expect their first payment approximately four weeks after applying for benefits.¹⁴³

135. *See supra* note 68 and accompanying text.

136. *See supra* note 129 and accompanying text.

137. Meyers, *supra* note 25, at 794 (quoting H.R. REP. NO. 99-908, pt.1, at 3 (1986)).

138. *See* Jim Borland, *Retire Online with Social Security, Quickly and Easily*, SOC. SEC. ADMIN.: SOC. SEC. MATTERS, <https://blog.ssa.gov/retire-online-with-social-security-quickly-and-easily/> [<https://perma.cc/Y2Y8-YDH3>] (July 21, 2021) (“We have an online retirement application that you can complete in as little as 15 minutes and from the comfort of your home or office.”).

139. *See* John Csiszar, *Social Security Benefits: How Long Does It Take to Get Approved?*, GOBANKINGRATES (Mar. 28, 2022), <https://www.gobankingrates.com/retirement/social-security/social-security-benefits-how-long-it-takes-get-approved/> [<https://perma.cc/4T8X-N4BN>] (“[Y]ou can expect to wait approximately six weeks before you get your approval for benefits.”).

140. SOC. SEC. ADMIN., WHAT YOU SHOULD KNOW BEFORE YOU APPLY FOR SOCIAL SECURITY DISABILITY BENEFITS, <https://www.ssa.gov/disability/Documents/Factsheet-AD.pdf> [<https://perma.cc/E5VT-Z4CH>].

141. *Request Benefit Payments*, TEX. WORKFORCE COMM’N, <https://www.twc.texas.gov/jobseekers/request-benefit-payments> [<https://perma.cc/U3SP-YWHT>] (July 14, 2022).

142. *Unemployment Insurance Law: The Claim and Appeal Process*, TEX. WORKFORCE COMM’N, https://www.twc.texas.gov/news/eft/ui_law_the_claim_and_appeal_process.html#top [<https://perma.cc/6HAZ-UFUN>].

143. *Request Benefit Payments*, *supra* note 141.

Compared to Social Security and unemployment insurance, the process for obtaining compensation under the RECP is outdated and inapposite to efficiency goals. To file a RECA claim, a claimant must print a RECA claim form, complete it, and mail the form and any supporting documentation to RECP headquarters.¹⁴⁴ A decision on an application for RECA benefits must be made within twelve months of the receipt of a completed application.¹⁴⁵ If no decision is made within that time, “the application is automatically approved for benefits.”¹⁴⁶ In contrast, there is no required timeline for the CICP to issue a determination on eligibility for benefits.¹⁴⁷

Efficiency does not merely involve time. Our social insurance systems also afford applicants with assurance that the process of requesting compensation is being completed correctly and without waste. This may necessitate guidance from—and provisions for compensation of—attorneys. Whether providing attorney’s fees to assist in this process achieves efficiency objectives will depend on the nature of the program and what is expected of the benefits requester. For instance, the Social Security Administration has afforded Social Security applicants a “right to representation.”¹⁴⁸ Attorneys or other eligible representatives can help applicants apply for benefits and in return receive reasonable compensation from the Social Security Administration for their services.¹⁴⁹ By contrast, Texas’s unemployment benefits process is explicitly “structured so that you do not need an attorney.”¹⁵⁰ Indeed, individuals who choose to have an attorney or other individual represent them in the Texas unemployment benefits application process must do so at their own expense.¹⁵¹ RECA takes a compromise approach and cabins the amount that an attorney can obtain from a client for RECP representation. The RECA provision regarding attorney’s fees limits attorneys to receiving no more than 2% of a claimant’s benefit for the filing of an initial claim and no more than 10% of benefit for resubmission of a

144. See Bougere, *supra* note 98, at 11 (describing the process for filing a RECA claim).

145. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R43956, THE RADIATION EXPOSURE COMPENSATION ACT (RECA): COMPENSATION RELATED TO EXPOSURE TO RADIATION FROM ATOMIC WEAPONS TESTING AND URANIUM MINING 8 (2022).

146. *Id.*

147. See *Frequently Asked Questions*, *supra* note 41 (making no mention of a required timeline for the determination on eligibility for benefits).

148. See SOC. SEC. ADMIN., YOUR RIGHT TO REPRESENTATION (2022), <https://www.ssa.gov/pubs/EN-05-10075.pdf> [<https://perma.cc/SDT4-WFGW>] (describing the right to have a representative when doing business with Social Security).

149. See *id.* (“If an attorney or non-attorney whom we have found eligible for direct payment represents you, we withhold up to 25% of your past-due benefits to pay toward the fee. We pay all or part of the representative’s fee from this money and send you any money left over.”).

150. *Introduction to the Unemployment Benefits Appeal Process*, TEX. WORKFORCE COMM’N, <https://www.twc.texas.gov/jobseekers/introduction-unemployment-benefits-appeal-process#appeal> [<https://perma.cc/8Q74-UJVJ>] (July 14, 2022).

151. *Id.*

denied claim.¹⁵² Additionally, RECA permits attorneys to recover expenses associated with bringing the claim.¹⁵³ While these social insurance programs have different provisions regarding attorney's fees, each is thoughtfully designed with an understanding of the way that representation might be involved in the process. This, in turn, helps these programs achieve efficiency objectives.

The CICP, like all other social insurance programs, must take into account objectives of efficiency—including the time in which requesters can bring a claim for benefits, ease of filing, and proper guidance regarding attorney's fees. These considerations help define the program and contribute to the program's overall success.

D. *Efficacy*

Successful social insurance programs are, most importantly, designed with the intention that they will actually work. That is to say, they are designed with the hope that they will adequately compensate individuals.¹⁵⁴ Part of ensuring adequate compensation is ensuring that a social insurance program offers appropriate types of compensation. Sometimes it is appropriate to afford applicants differing types of compensation. For instance, there is a wide variety of Social Security benefits. These include survivor benefits, parent's benefits, retirement benefits, disability benefits, spouse's benefits, and more.¹⁵⁵ However, other times it is appropriate for a social insurance program to afford applicants the same type of benefits, such as in the case of unemployment insurance recipients who each receive lost employment income.¹⁵⁶ Regardless of whether applicants are entitled to uniform or different types of benefits, the benefits afforded should be appropriate to compensate applicants. Under the CICP, requesters may only

152. Bougere, *supra* note 98, at 12.

153. See *Hackwell v. United States*, 491 F.3d 1229, 1241 (10th Cir. 2007) (holding that Congress had an “unambiguous intent to exclude expenses from [RECA’s] attorney-fee limitation”).

154. Unfortunately, social insurance programs often fail to meet their objectives of adequately compensating individuals. Annie Nova, *Living Only on Social Security Can Be Difficult. There Are Many Resources That Can Help Struggling Seniors*, CNBC, <https://www.cnbc.com/2022/02/14/living-only-on-social-security-can-be-difficult-these-resources-can-help.html> [https://perma.cc/8S7W-WJ42] (Feb. 14, 2022, 2:34 PM) (describing how “[f]or many households, the benefit isn’t enough to cover their bills”).

155. *Explore the Benefits You May Be Due*, SOC. SEC. ADMIN., <https://www.ssa.gov/potentialentitlement/> [https://perma.cc/VCK5-W7QD].

156. See Chad Stone & William Chen, *Introduction to Unemployment Insurance*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/introduction-to-unemployment-insurance> [https://perma.cc/69RU-LZEZ] (July 30, 2014) (“The federal-state unemployment insurance system (UI) helps many people who have lost their jobs by temporarily replacing part of their wages while they look for work.”).

recover reasonable medical expenses, lost employment income, and death benefits.¹⁵⁷

Additionally, the precise amount of compensation that a social insurance program opts to afford its beneficiaries will often vary with the circumstances of the beneficiary, as it does in the case of Social Security and ordinary unemployment insurance.¹⁵⁸ However, social insurance programs may also opt to afford differing lump-sum amounts to particular categories of affected individuals. Take, for instance, the RECP. Compensation through the RECP is paid in a lump sum. Eligible claimants receive compensation based on their claimant category. Downwinders receive \$50,000, Onsite Participants receive \$75,000, and Uranium Workers receive \$100,000.¹⁵⁹ Additionally, under the CARES Act, FPUC benefits temporarily and uniformly provided a lump-sum additional \$600 per week to individuals across the country collecting unemployment insurance.¹⁶⁰ The CICIP was designed with the express goal of providing “uniform” and “adequate” compensation to eligible individuals.¹⁶¹ With regard to the former goal—but arguably in contravention of the latter—lost employment income benefits are limited to \$50,000 per year under the CICIP.¹⁶²

Another aspect of a program’s efficacy is how often it produces the right result. Systems—particularly legal systems—are designed with the knowledge that they may initially fail to reach the right result.¹⁶³ This is the purpose of appeals. Successful social insurance programs are designed with this same humility and often include robust appeals processes. For instance, Social Security applicants also have the benefit of a robust appeals process that includes reconsideration, a hearing, review by an appeals council, and federal court review.¹⁶⁴ Likewise, in Texas, an unemployment benefits determination can be appealed to the Appeal Tribunal, and subsequently, to the Texas Workforce Commission.¹⁶⁵ Once the Commission’s decision becomes final, the losing party can appeal that decision to a court.¹⁶⁶

157. HICKEY & WARD, *supra* note 35, at 3.

158. For a discussion of some circumstances covered by various social security programs, see *supra* note 155 and accompanying text.

159. Bougere, *supra* note 98, at 4.

160. 15 U.S.C. § 9023(b)(3)(A).

161. 42 U.S.C. § 247d–6e(a).

162. See *supra* note 71 and accompanying text.

163. See, e.g., *About the U.S. Courts of Appeals*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals> [<https://perma.cc/5UHU-8HWN>] (explaining that a losing party has the right to appeal on the grounds that there were procedural issues or an incorrect application of the law).

164. *Disability Benefits: Appeal a Decision*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/disability/appeal.html> [<https://perma.cc/6HCA-B3V3>].

165. *Unemployment Insurance Law: The Claim and Appeal Process*, *supra* note 142.

166. *Id.*

Additionally, RECA permits any claimant who has been denied compensation to file an appeal with the Department of Justice.¹⁶⁷ If dissatisfied with the result of that appeal, a claimant can seek judicial review in U.S. district court.¹⁶⁸ These appeals processes afford these social insurance programs additional efficacy. By contrast, the CICIP lacks a robust appeals process and merely includes a “one-step administrative reconsideration” of a benefits determination.¹⁶⁹

Prevention of fraud is a minor aspect of a social insurance program’s efficacy. In fact, an undue focus on fraud can result in a failed social insurance program. The RECP was not an immediate success. In the first few years following implementation, the program was “widely perceived as flawed by former miners, their families, and their advocates.”¹⁷⁰ In particular, “[t]he central criticism of 1990 RECA by former miners, their families, and advocates for the miners was that the law failed to compensate many deserving claims.”¹⁷¹ The program had “extremely stringent conditions for qualification for compensation” as it was seemingly designed to foil fraud.¹⁷² However,, RECA was amended in 2000 to account for some of these critiques and the RECP now enjoys more public support.¹⁷³ Unfortunately, some fraud in our systems, especially in times of economic instability and social crisis, is likely inevitable.¹⁷⁴ Fortunately, social insurance programs can successfully withstand this fraud in their overall pursuit of efficacious compensation of deserving individuals.¹⁷⁵

Finally, efficacious social insurance programs are often met with substantial public support and thus help further the social solidarity goals that motivated these programs’ creation. The Social Security program is far from perfect and has received criticism for its hefty price tag and uncertain

167. SZYMENDERA, *supra* note 145, at 9.

168. *Id.*

169. *Comparison of Countermeasures Injury Compensation Program (CICP) to the National Vaccine Injury Compensation Program (VICP)*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/cicp/cicp-vicp> [<https://perma.cc/95VP-JE3C>] (Apr. 2021) (“One step administrative reconsideration possible. No judicial appeal permitted.”).

170. Doug Brugge & Rob Goble, *The Radiation Exposure Compensation Act: What Is Fair?*, 13 NEW SOLUTIONS 385, 386 (2004).

171. *Id.* at 389.

172. *Id.*

173. *See id.* at 392, 394 (listing amendments successfully included in 2000 RECA that met many of the main demands of the miners and their advocates).

174. *See, e.g.*, Jordan McKee, *Fraud: An Inevitable Symptom of COVID-19*, FORBES (Apr. 10, 2020, 10:18 AM), <https://www.forbes.com/sites/jordanmckee/2020/04/10/fraud-an-inevitable-symptom-of-covid-19/?sh=64063dba7582> [<https://perma.cc/7MGR-CCL4>] (detailing the uptick in fraud since the advent of COVID-19).

175. *See Social Security: Fraud Prevention and Reporting*, SOC. SEC. ADMIN., <https://www.ssa.gov/fraud/> [<https://perma.cc/MKZ3-NXG9>] (“Despite the efforts of those who seek to abuse the integrity of our programs, we strive to provide a high level of service to the public.”).

future.¹⁷⁶ Nonetheless, the program enjoys widespread popularity and is generally regarded as the most successful anti-poverty program in our nation's history.¹⁷⁷ With regard to unemployment insurance and the CARES Act, FPUC benefits lapsed in the fall of 2020, and despite—or perhaps due to—some views that the benefits were disincentivizing individuals from returning to work,¹⁷⁸ FPUC benefits were predominantly viewed positively as most Americans favored their renewal.¹⁷⁹ Additionally, the RECP is now viewed favorably as there is broad bipartisan support for extending the duration of the RECA Trust Fund—the program's termination date was recently extended by two years¹⁸⁰—and for recognizing broader populations of individuals impacted by radiation exposure.¹⁸¹ By contrast, the CICP has been subjected to substantial criticism and various reform efforts.¹⁸²

In sum, efficacious social insurance programs provide adequate compensation, have robust appeals processes, do not overly focus on fraud,

176. See Frank Newport, *Social Security and American Public Opinion*, GALLUP (June 18, 2019), <https://news.gallup.com/opinion/polling-matters/258335/social-security-american-public-opinion.aspx> [<https://perma.cc/4YXR-8WZC>] (reporting that many Americans seriously doubt the financial future of Social Security); *Social Security: Criticisms*, ENCYCLOPEDIA BRITANNICA (July 29, 2022), <https://www.britannica.com/topic/social-security-government-program/Criticisms> [<https://perma.cc/8GE4-AGAJ>] (“It has been argued that the high cost of social security is in part responsible for the low levels of economic growth in industrialized societies since 1973.”).

177. See Newport, *supra* note 176 (“Americans consistently say that they want Social Security benefits retained with no cuts, confirming why Social Security is called the third rail of politics—the public simply does not want it touched.”); Elise Gould, *Social Security Is the Most Effective Anti-Poverty Program in the U.S., In One Chart*, ECONOMIC POL’Y INST.: WORKING ECONS. BLOG (July 30, 2013, 12:05 PM), <https://www.epi.org/blog/social-security-effective-anti-poverty-program/> [<https://perma.cc/ME8H-K9WW>] (“Social Security is, by far, the most effective anti-poverty program in the United States.”).

178. See Greg Iacurci, *It Pays to Stay Unemployed. That Might Be a Good Thing*, CNBC, <https://www.cnn.com/2020/05/09/it-pays-to-stay-unemployed-that-might-be-a-good-thing.html> [<https://perma.cc/3FGP-T7L9>] (June 10, 2020, 9:05 AM) (reporting that “[c]ritics say the policy serves as a disincentive to return to work” but that labor economists have said “it’s necessary given the extraordinary health and economic crises at hand”).

179. See Ariel Edwards-Levy, *Poll: Americans Favor Renewing \$600 Unemployment Benefits*, HUFFPOST, https://www.huffpost.com/entry/poll-americans-support-600-unemployment-benefits-congress_n_5f29e8a9c5b6a34284c0a85d [<https://perma.cc/ET84-H6H9>] (Aug. 17, 2020) (“Public support for renewing expanded unemployment benefits far outweighs opposition . . .”).

180. See *Radiation Exposure Compensation Act*, U.S. DEP’T. OF JUST., <https://www.justice.gov/civil/common/reca> [<https://perma.cc/NHX2-UNYW>] (Aug. 5, 2022) (“On June 7, 2022, the President signed into law the RECA Extension Act of 2022. This law extends the termination of the RECA Trust Fund and the filing deadline for all claims for two years from its date of enactment.”).

181. See *LETTER: Western Governors Support Radiation Exposure Compensation Act Amendments of 2019*, W. GOVERNORS’ ASS’N. (Oct. 11, 2019), <https://westgov.org/letters/article/letter-western-governors-support-radiation-exposure-compensation-act-amendments-of-2019> [<https://perma.cc/HBJ6-UJNN>] (describing the Western Governors’ Association’s support of the bipartisan RECA Amendments of 2019, which sought “recognition of broader populations impacted, the expanded definition of ‘affected area’ for downwind states, and the extension of the Radiation Exposure Compensation Trust Fund for 19 years”).

182. See *supra* Introduction and Part I.

and, as a result, are generally met with public support. The CICIP must take into account its efficacy in order to be successful. This is the area where the CICIP receives much of its critique. Reform efforts should recognize adequacy of compensation, appeals, fraud, and public perception as critical considerations for the CICIP's design. Moreover, these efficacy concerns are particularly relevant for the CICIP, which has yet to fully compensate a single one of the thousands of COVID-19 vaccine injury claims pending before it.¹⁸³

The scale and severity of the COVID-19 crisis has seemingly overwhelmed the CICIP, and like many of our nation's institutions, the CICIP will need to adapt to the challenges presented by COVID-19 in order to make it out of the pandemic intact. While it is important to recognize that the CICIP operates in a different context than the other social insurance programs, it is similarly important to realize that the program does not exist in a vacuum. Though lacking in several areas, the CICIP bears striking resemblance to the United States' other social insurance programs and is best conceptualized as a form of social insurance. Further still, Americans are accustomed to certain design principles within their social insurance programs, and the CICIP can respond to the novel coronavirus without reinventing the wheel. The CICIP will benefit from learning from its more mature sister social insurance programs and drawing on their design principles to develop reform.

III. Extracting Design Principles and Proposing Reforms to the CICIP

This Part extracts design principles from social insurance programs to propose reforms to the CICIP. The four objectives of social insurance—social solidarity, broad and predictable eligibility, efficiency, and efficacy—shape the process of these programs.¹⁸⁴ In some ways, the CICIP already reflects the design principles of these programs. In other ways, the CICIP inadequately meets the established objectives of social insurance. This Part proposes reforms to ameliorate issues associated with the CICIP's provisions for filing, timing, compensation, appeals, and attorney's fees. This Part will also briefly discuss two considerations that should not motivate CICIP reform, namely changes to the CICIP's inquisitorial structure and considerations of fraud. In outlining the landscape for reforms, this Part aims to better align the CICIP with its more mature sister social insurance programs.

A. *Ease of Filing*

Naturally, the filing requirements for a social insurance program vary depending on the injury or condition the program seeks to compensate. Most have minimal obstructions at the filing stage and in fact make it relatively painless to receive benefits. For instance, applications for Social Security and

183. *See supra* notes 80–82 and accompanying text.

184. *See supra* Part II.

unemployment insurance can both be submitted online.¹⁸⁵ Social Security or unemployment insurance decisions can even be appealed online.¹⁸⁶ Research shows a trend of people in the United States sending fewer pieces of mail over the last decade.¹⁸⁷ Moreover, for at least a decade, Americans have turned to government websites in large numbers to access information and services.¹⁸⁸ Thus, in order to facilitate easy filing of claims and appeals, social insurance programs generally follow the models of Social Security and unemployment insurance and permit quick and efficient electronic filing and appeals.

The CICP already permits individual requesters to file an initial request for benefits online.¹⁸⁹ However, the program does not permit a request for reconsideration of a CICP benefits determination to be filed online. At present, if a requester is unsatisfied with their CICP decision, they may ask the Associate Administrator of the Healthcare Systems Bureau of the Health Resources and Services Administration (HRSA) for reconsideration of their CICP decision to a qualified independent panel within sixty days.¹⁹⁰ This request must be made in writing and mailed to the HRSA headquarters.¹⁹¹ Demanding that a request for reconsideration be submitted via mail is unduly burdensome and inefficient. In order to better reflect the efficiency objectives of social insurance, the CICP should permit a request for reconsideration of a CICP benefits determinations to be filed online.

B. *Timing*

One significant benefit of compensation programs over traditional litigation is that these programs more quickly and efficiently compensate legitimate claims of injury. On average, tort cases take sixteen months to

185. *Apply for Social Security Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/forms/> [<https://perma.cc/P4XL-N5LW>]. This is the case for unemployment benefits in Texas and many other states. *E.g.*, *Applying for Unemployment Benefits*, TEX. WORKFORCE COMM'N, <https://www.twc.texas.gov/jobseekers/applying-unemployment-benefits#howToApply> [<https://perma.cc/W54W-Q44Z>] (July 14, 2021) (“Apply online at Unemployment Benefit Services by selecting Apply for Benefits.”).

186. *Disability Benefits: Appeal a Decision*, *supra* note 164 (“You can request an appeal online for a reconsideration, a hearing by an administrative law judge, and a review by the Appeals Council, even if you live outside of the United States.”).

187. Drew Desilver & Katherine Schaeffer, *The State of the U.S. Postal Service in 8 Charts*, PEW RSCH. CTR. (May 14, 2020), <https://www.pewresearch.org/fact-tank/2020/05/14/the-state-of-the-u-s-postal-service-in-8-charts/> [<https://perma.cc/52DQ-7WNB>].

188. *See* Aaron Smith, *Government Online*, PEW RSCH. CTR. (April 27, 2010), <https://www.pewresearch.org/internet/2010/04/27/government-online/> [<https://perma.cc/DGV6-ASDF>] (“As government agencies at all levels bring their services online, Americans are turning in large numbers to government websites to access information and services.”).

189. *Filing for Benefits*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/cicp/filing-benefits> [<https://perma.cc/6UJ9-9QXW>] (Apr. 2022).

190. *Frequently Asked Questions*, *supra* note 41.

191. *Id.*

reach a resolution.¹⁹² By contrast, it typically takes about six weeks to receive a decision on a disability benefits application through Social Security.¹⁹³ Unemployment benefits are also typically received within a few weeks of filing for benefits.¹⁹⁴ A decision on an application for RECA benefits must be made within twelve months, or the applicant is automatically approved for benefits.¹⁹⁵ A hallmark of good social insurance programs is that they are designed with a recognition of the importance of quickly and efficiently compensating applicants for benefits.

In order to facilitate social solidarity and efficacy objectives, the CICIP should alter the starting point and length of its limitations period. At the moment, individuals injured by the countermeasures have just one year *from administration* of that countermeasure to file for compensation through the CICIP.¹⁹⁶ In contrast, individuals injured by a covered vaccine have three years *from their first symptom* to file a petition for compensation through the VICP.¹⁹⁷ The CICIP should adopt the VICP's starting point of a requester's first symptom and extend the time to file to three years. These changes would afford requesters more time to bring requests under the CICIP. In implementing this change, the program would be better able to compensate individuals negatively affected by COVID-19 vaccination, thereby fostering increased social solidarity and efficacy.

Additionally, the CICIP should adopt the approach of the RECP and place a one-year limit on the amount of time that a request for benefits can be pending within the CICIP before a decision must be made.¹⁹⁸ In doing so, the CICIP would be better positioned to more quickly compensate individuals for their injuries. However, the CICIP should not adopt the RECP's design in having compensation automatically vest in the requester at the end of this period.¹⁹⁹ This approach is not well suited to the CICIP as the CICIP does not adopt the lump-sum approach of the RECP.²⁰⁰ Instead, the CICIP should permit an individual to bring a tort suit in federal or state court if a

192. See NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 28 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/VW5C-M2NM>] (“On average, tort cases took the longest time to resolve (486 days).”).

193. Csiszar, *supra* note 139.

194. This is the case in Texas. See *Learning the Result of Your Application for Benefits*, TEX. WORKFORCE COMM'N, <https://www.twc.texas.gov/jobseekers/learning-result-your-application-benefits> [<https://perma.cc/T69L-V729>] (July 14, 2022) (“It takes about four weeks from the date you apply for benefits to know if you are eligible for benefits.”).

195. See SZYMENDERA, *supra* note 145.

196. HICKEY & WARD, *supra* note 35, at 7.

197. *Id.*

198. See *supra* note 146 and accompanying text.

199. See *supra* note 146 and accompanying text.

200. See *supra* note 122 and accompanying text.

determination on their request has not been made within a year. This reform is more tailored to the CICIP and would better reflect the social solidarity and efficacy objectives of social insurance.

C. *Eligibility Requirements*

Ideally, eligibility requirements for social insurance programs should be exclusively categorical as this best fosters predictability. However, where programs contain a noncategorical, alternative eligibility scheme (such as the CICIP), temporary exceptions to expand and simplify eligibility should be recognized in light of circumstances such as COVID-19. Social insurance programs should not require individual claimants to adhere to complex and rigorous causation requirements. To assume conformity with our nation's other programs, social insurance programs should instead adopt broader, more predictable causation requirements such as the VICP's "preponderance of the evidence" causation standard.²⁰¹ It is unclear that deserving individual requesters can effectively meet a more rigorous standard—particularly without being afforded financial assistance to retain experienced counsel.

As a preliminary matter, a COVID-19 Countermeasures Injury Table should be created to afford CICIP requesters categorical eligibility. Further, the CICIP's statutory requirement that eligibility determinations (when *not* covered by the Countermeasures Injury Tables) be based on "compelling, reliable, valid, medical and scientific evidence" should be amended such that these determinations could instead be made on a broader and more predictable "preponderance of the evidence" standard. This reform would reduce the standard of proof for CICIP requesters to the level required by claimants in the VICP. Additionally, this reform would continue to allow the CICIP to have a more flexible alternative eligibility standard to pair with the Countermeasures Injury Tables. Just as COVID-19 necessitated changes to the eligibility requirements of unemployment insurance under the CARES Act, so too is this proposed reform's expansion and simplification of the CICIP's eligibility requirements spurred by COVID-19. Moreover, this reform better aligns the CICIP with the broad and predictable eligibility objectives of social insurance.

D. *Compensation*

In order to facilitate the social solidarity and efficacy objectives of social insurance, programs should be designed to adequately compensate eligible requesters. While some programs like Social Security and unemployment insurance tailor compensation to particular claimants, and others like RECA provide uniform compensation for categories of claimants,

201. *See supra* note 68 and accompanying text.

all are designed to fully and adequately compensate their participants in order to ameliorate the societal harms that generated the programs. This is a critical design feature of successful social insurance programs and the hallmark critique of unsuccessful programs.

In determining what types of compensation would be appropriate for CICIP requesters, it is critical to recall that the VICP and CICIP are generally designed to ameliorate functionally identical injuries—namely predominantly vaccine injuries.²⁰² It naturally follows that fully compensating each program’s participants would necessitate substantially similar, if not identical, types of recoverable damages. Thus, the CICIP should be statutorily reformed to expand its range of compensable damages. At the moment, a CICIP requester is only allowed to recover reasonable medical expenses, lost employment income, and death benefits.²⁰³ Moreover, lost employment income benefits are limited to \$50,000 per year under the CICIP but are uncapped under the VICP.²⁰⁴ These limitations contravene the CICIP’s express goal of providing “adequate” compensation.²⁰⁵ The CICIP should follow the VICP’s lead and uncap lost employment benefits and permit eligible requesters to recover damages for pain and suffering. These changes will allow CICIP requesters to recover a broader swath of damages that better reflect the various ways an individual can be affected in the rare event of vaccine injury. Thus, this reform will result in a more efficacious program and will further social solidarity objectives through this collective effort to more adequately remediate a societal harm.

E. Appeals Processes

As discussed earlier, the VICP, Social Security, unemployment insurance, and RECA all have robust appeals processes. Moreover, each of these social insurance programs eventually enables dissatisfied claimants to appeal decisions on their benefits applications to a federal or state court. This is an important design principle as more public trust and social solidarity is likely to be afforded to a compensation program that is willing to be checked by a court than one that is not. Although some social insurance programs are designed to prevent excess litigation, concerns of vexatious litigation should not preclude claimants from having the ability to eventually have their claims heard by a court. These appeal processes ensure that social insurance programs are efficacious in their benefits determinations and afford these

202. *See supra* Part I. Of course, not all countermeasures are vaccines, but the bulk of claims that the CICIP receives are related to vaccines.

203. HICKEY & WARD, *supra* note 35, at 7

204. *See supra* notes 69–71 and accompanying text.

205. 42 U.S.C. § 247d–6e(a).

programs an air of legitimacy that bolsters public confidence and social solidarity.

The CICIP should be statutorily reformed to authorize appeals of benefits determinations to federal and state courts. The CICIP was created to prevent countermeasure litigation from stymieing vaccine development and public health efforts.²⁰⁶ Giving requesters the option to appeal a CICIP benefits determination to a court would not contravene this goal. CICIP requesters should only be able to bring their cases in court after fully exhausting their options in the CICIP. Thus, this reform merely asserts that, like the VICP, the CICIP be the mandatory *initial* mechanism by which individuals seek compensation for injury but not the *exclusive* mechanism.²⁰⁷ This reform would instantly improve the CICIP's woefully inadequate appeals process and be a part of building towards a more efficacious process for countermeasure injury compensation.

F. Attorney's Fees

A social insurance program can be designed in a manner that does not require benefits applicants to enlist the assistance of an attorney. Retaining an attorney is often financially burdensome and time consuming.²⁰⁸ Thus, in the event that an attorney is necessary, a social insurance program should provide for attorney's fees regardless of whether a petitioner is determined to be eligible to receive benefits.²⁰⁹ However, it could be argued that doing this creates a perverse incentive for attorneys to encourage clients with no chance of receiving benefits to apply to these programs. It could also be argued that providing compensation for attorney's fees is not necessary when other reforms are implemented. Regardless of the merit of these critiques, at minimum, a social insurance program should follow RECA and assert a maximum percentage of benefits that attorneys can withdraw from claimants for their services, such that claimants are still afforded the bulk of any benefits for which they are eligible.²¹⁰ Clear and deliberate provisions on attorney's fees facilitate efficient resolution of benefits determinations.

While many social insurance programs afford attorney's fees, or have provisions related to attorney's fees, the CICIP merely states that it "is not authorized to provide reimbursement for attorneys' fees," and that requesters "may elect to use an attorney; however, [they] are responsible for any costs

206. See *supra* subpart I(A).

207. See *supra* subpart I(B).

208. See generally Antone Johnson, *Why Are Lawyers so Expensive Even with the Excess Supply of Lawyers?*, FORBES (Mar. 6, 2012, 2:55 PM), <https://www.forbes.com/sites/quora/2012/03/06/why-are-lawyers-so-expensive-even-with-the-excess-supply-of-lawyers/> [https://perma.cc/L65U-44SE] (describing why lawyers can be too expensive for clients).

209. The VICP operates in this manner. See *supra* subpart I(B).

210. See *supra* note 152 and accompanying text.

incurred from using one.”²¹¹ This is inadequate. The CICIP should be statutorily reformed to provide reasonable attorney’s fees for requesters irrespective of their ultimate benefits determination. Alternatively, the CICIP should provide that attorneys and representatives who assist individuals in the CICIP process may not require as payment more than a reasonable percentage—perhaps 2%—of those individuals’ full benefit amounts.²¹² Either reform would be an improvement on the current system and would enable requesters to obtain guidance in navigating the program, thereby facilitating efficiency objectives of social insurance.

G. *Inquisitorial Structure*

The CICIP should retain its inquisitorial, rather than adversarial, structure. Most compensation programs—including all programs discussed in this Note, with the exception of the VICP—adopt an inquisitorial structure.²¹³ Further, the VICP has been roundly criticized for its adversarial nature.²¹⁴ The opposing parties, hearings, and evidentiary disputes in VICP proceedings may unnecessarily lengthen and complicate the process for obtaining compensation.²¹⁵ Of course, proponents of the VICP’s system might argue that these same concerns can be expressed about the adversarial nature of our justice system more generally. However, that argument fails in the context of considering reforms to vaccine injury compensation programs—these programs are designed with the express purpose of avoiding traditional litigation.²¹⁶ Regardless, while it could be true that adversarial dispute-resolution models are generally preferable to inquisitorial models, increasing the length and complexity of CICIP proceedings would be antithetical to the stated goals of the program. Other reforms stated here would be more conducive to promoting the goals of the program and to promoting social solidarity.

H. *Fraud Considerations*

While fraud is always a legitimate concern when designing a program that provides compensation to individuals, an overconcern for fraud can

211. *Frequently Asked Questions*, *supra* note 41.

212. It may be that a 2% cap is reasonable here. Indeed, as discussed above, RECA caps attorney’s fees at 2%. However, determining a precise percentage is beyond the scope of this Note. The thrust of this suggested reform is that there should likely be *some* cap on attorney’s fees such that requesters will not be unduly deprived of the bulk of any benefits that they are awarded.

213. *See Meyers*, *supra* note 25, at 839 (noting that the VICP is not based upon a nonadversarial, inquisitional model).

214. *Id.* at 805 (discussing governmental concern with delays in resolving VICP cases and the “overly adversarial nature” of the program).

215. *See supra* subparts I(B)–(C).

216. *See supra* Part I.

cripple a social insurance program, as was seen with the initial implementation of RECA.²¹⁷ The primary focus of a social insurance program should be to compensate legitimate claimants, not to avoid compensation for bad actors. Moreover, the objectives of social insurance in ameliorating social harms should predominate over concerns of potential duplicity. Fraud is inevitable, but a well-designed program is able to sustain some ordinary level of fraud without needing to cease or significantly alter operations.²¹⁸ Considerations of fraud should not preclude the CICP from implementing necessary reforms and adopting these well-established social insurance design principles. Instead, CICP reform should be driven by objectives of social solidarity, broad and predictable eligibility, efficiency, and efficacy.

Conclusion

COVID-19 vaccines, and the vaccination effort more generally, have been indisputably essential to our nation's public health response to the global pandemic. While the vaccines are remarkably safe, the sheer number of individuals who have been vaccinated has produced thousands of individuals who claim injury as a result of vaccination. These individuals cannot sue vaccine manufacturers or administrators and instead must resort to seeking compensation through the CICP.

Unfortunately, the CICP—like many institutions—was not designed with a threat of the magnitude and severity of COVID-19 in mind. Moreover, the CICP has yet to fully compensate an individual for a COVID-19 vaccine injury. In these ways, the CICP is woefully deficient. Social solidarity and public confidence in government systems are critical to our ability to respond to future pandemics and public health crises. Conceptualizing the CICP as social insurance permits us to extract and apply design principles and objectives from prominent social insurance programs in considering reforms to this increasingly important federal program. Fostering public confidence in the CICP is certainly worthwhile in and of itself, but doing so also has the potential to foster public confidence in vaccination efforts and assist in reducing vaccine hesitancy.

217. *See supra* notes 172–174 and accompanying text.

218. *See supra* notes 172–175 and accompanying text.

Appendix

*Suggested Statutory Changes:**42 U.S.C. § 247d–6e(b)(1)*

“If the Secretary issues a declaration under 247d–6d(b) of this title, the Secretary shall, after amounts have by law been provided for the Fund under subsection (a), provide compensation including reasonable attorney’s fees to an eligible individual within one year of a complete request for compensation for a covered injury directly caused by the administration or use of a covered countermeasure pursuant to such declaration. If the Secretary is unable to make a determination on whether an individual is eligible for compensation within the time period set out in this paragraph, that individual may, notwithstanding any contrary provision in this section, bring suit in state or federal court for any compensation authorized by this section.”

Or alternatively

“If the Secretary issues a declaration under 247d–6d(b) of this title, the Secretary shall, after amounts have by law been provided for the Fund under subsection (a), provide compensation to an eligible individual within one year of a complete request for compensation for a covered injury directly caused by the administration or use of a covered countermeasure pursuant to such declaration. If the Secretary is unable to make a determination on whether an individual is eligible for compensation within the time period set out in this paragraph, that individual may, notwithstanding any contrary provision in this section, bring suit in state or federal court for any compensation authorized by this section. Attorneys and representatives who assist individuals in the CICP process may not require, as payment, more than two percent of those individuals’ full benefit amount.”

42 U.S.C. § 247d–6e(b)(2)

“The compensation that shall be provided pursuant to paragraph (1) shall have the same elements, and be in the same amount, as is prescribed by sections 239c, 239d, and 239e of this title in the case of certain individuals injured as a result of administration of certain countermeasures against smallpox, except that section 239e(a)(2)(B) of this title shall not apply. Notwithstanding anything to the contrary in this section, this paragraph authorizes compensation that includes uncapped lost employment income and damages for pain and suffering.”

42 U.S.C. § 247d-6e(b)(4)

“Except as provided in this section, the procedures for determining, and for reviewing a determination of, whether an individual is an eligible individual, whether such individual has sustained a covered injury, whether compensation may be available under this section, and the amount of such compensation shall be those stated in section 239a of this title (other than in subsection (d)(2) of such section), in regulations issued pursuant to that section, and in such additional or alternate regulations as the Secretary may promulgate for purposes of this section. Notwithstanding any contrary provision of law in this section, [i]n making determinations under this section, other than those described in paragraph (5)(A) as to the direct causation of a covered injury, the Secretary may only make such determination based on ~~compelling, reliable, valid, medical and scientific evidence~~ a preponderance of the evidence.”

42 U.S.C. § 247d-6e(d)(4)

“The remedy provided by subsection (a) shall be exclusive of any other civil action or proceeding for any claim or suit this section encompasses, except for a proceeding under section 247d-6d of this title. However, notwithstanding any contrary provision of law in this section, an individual may appeal to federal or state court a decision regarding their eligibility for compensation, or the amount of compensation they may receive, under the remedy provided by subsection (a) provided that individual has received a final determination.”