

The *Feres* Doctrine: Should It Apply to Atomic Veterans' Children?

I. INTRODUCTION

Although the United States witnessed the advent of atomic warfare in World War II, there was little opportunity during the war to study the effects of nuclear warfare on troop performance. During the 1950's, therefore, the Department of Defense conducted a series of "atomic war games" to determine how troops would perform in the event of a nuclear war.¹ The servicemen who participated in the war games, now known as atomic veterans, were exposed to high levels of harmful radiation without the benefit of protective gear or monitoring devices.² The government never warned the servicemen of the possible harmful effects the radiation exposure could have on the health of their children. Instead, the government stressed that "[m]en exposed to radiation can have normal, healthy children."³ The converse of this statement became painfully apparent to many servicemen when their children were born with severe radiation-induced birth defects.

In recent years, the atomic veterans' children have sought

¹See Favish, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933, 934 (1981). The war games were not the only source of radiation exposure. Other servicemen were exposed to radiation in connection with the government's development of atomic weapons. See *infra* note 71.

²Favish, *supra* note 1, at 949-52.

³*Id.* at 954 (quoting Infantry School Quarterly, Oct., 1955, at 11). The extremeness of the government's actions has been recognized by at least one lower federal court.

"These allegations charge a violation of human rights on a massive scale. The plaintiffs seek to prove, and we must at this state assume that they can, that civilian and military officials of the government, acting without legal authority and with no sufficient legitimate military or other purpose, conducted a human experiment upon soldiers subject to their control, without their knowledge, permission or consent, by exposing them to radiation which those officials knew to be dangerous [sic]

Indeed the complaint alleges conduct which would violate the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremberg Code. The international consensus against involuntary human experimentation is clear. *A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt."

Hinkie v. United States, 715 F.2d 96, 98 n.3 (3d Cir. 1983) (quoting *Jaffee v. United States*, 663 F.2d 1226, 1248-50 (3d Cir. 1981) (Gibbons, J., dissenting)).

recovery from the government for their injuries by bringing actions under the Federal Tort Claims Act (FTCA).⁴ The major issue in this type of litigation is whether these children have any right to actions under the FTCA for the injuries they suffered due to their fathers' radiation exposure.⁵ The FTCA, passed by Congress in 1946, waived the government's immunity from tort actions brought against it by private citizens.⁶ Accompanying the waiver of immunity were a number of exceptions,⁷ two of which applied directly to servicemen.⁸ In the 1950 case of *Feres v. United States*,⁹ the United States Supreme Court interpreted these two FTCA exceptions as barring actions brought by servicemen for injuries that were incident to their service in the armed forces.¹⁰ Twenty-seven years later in *Stencel Aero Engineering Corp. v. United States*,¹¹ the Court extended this rule, known as the *Feres* doctrine, to preclude recovery by third parties whose injuries were derivative of a serviceman's nonactionable injuries.¹²

Since the *Stencel* decision, a number of lower federal courts have struggled with the proper application of the *Feres* doctrine to children of servicemen exposed to radiation while on active military duty.¹³ A classic example of this struggle is found in *Hinkie v. United States*.¹⁴ In *Hinkie*, the United States District Court for the Eastern District of Pennsylvania concluded that a proper application of the factors outlined in the *Stencel* decision would permit the servicemen's children to bring actions under the FTCA for their radiation induced injuries.¹⁵

⁴28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1976) [hereinafter referred to as FTCA].

⁵See *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982).

⁶28 U.S.C. § 1346(b) (1976).

⁷*Id.* § 2680.

⁸*Id.* § 2680(j), (k). The statutory language excludes: "(j) Any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. (k) Any claim arising in a foreign country."

⁹340 U.S. 135 (1950).

¹⁰*Id.* at 146.

¹¹431 U.S. 666 (1977).

¹²*Id.* at 674. For general information on the doctrine, see Jacoby, *The Feres Doctrine*, 24 HASTINGS L.J. 1281 (1973); Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241 (1982); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979).

¹³See, e.g., *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982).

¹⁴524 F. Supp. 277 (E.D. Pa. 1981), rev'd, 715 F.2d 96 (3d Cir. 1983).

¹⁵524 F. Supp. at 285.

However, the Third Circuit Court of Appeals reluctantly reversed the district court opinion on the basis that the *Feres* doctrine's protection of military discipline barred such actions.¹⁶ Other courts addressing this issue have reached the same result as the Third Circuit Court of Appeals in *Hinkie*.¹⁷

While there appears to be no conflict among the circuit courts as to the application of the *Feres* doctrine to servicemen's children, the Supreme Court has never specifically addressed the issue. Until either the Supreme Court or Congress takes some type of action to deal with the problems of atomic veterans' children, the issue will remain an important and vital one.

This Note examines the propriety of extending the *Feres* doctrine to preclude atomic veterans' children from recovering for birth defects caused by their fathers' exposure to radiation during military service and suggests that the majority of lower federal courts that have dealt with this issue have not taken the proper approach. The application of the *Feres* doctrine to third parties is a judicial expansion of the FTCA exceptions. Therefore, courts should carefully review the policies and rationales underlying the *Feres* doctrine before expanding the doctrine to prohibit actions by the atomic veterans' children. When such an examination occurs, as in the district court opinion in *Hinkie*, it leads to the conclusion that the doctrine should not be extended to preclude FTCA actions by the atomic veterans' children. This Note examines the various theories that the children could assert and concludes that even if courts allow the children a right of action under the FTCA, the burden of proof the children must meet is likely to create a substantial bar to recovery. Therefore, this Note suggests that Congress should consider creating a compensation fund that is available to atomic veterans' children upon a minimal showing of causation, unless the government can prove that its actions did not cause the birth defects. In lieu of this specific legislation, Congress should consider redrafting the FTCA military exceptions so that servicemen's families have the right to bring actions against the government for

¹⁶715 F.2d 96, 98-99 (3d Cir. 1983). This focus on the effects such actions would have on military discipline is understandable in light of *Chappell v. Wallace*, 103 S. Ct. 2362 (1983). In *Chappell*, the Court determined that the *Feres* doctrine was a valid doctrine in light of "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel." *Id.* at 2367. However, *Chappell* dealt with a situation in which five enlisted men were seeking damages, declaratory judgment, and injunctive relief against several officers on a combat naval vessel. Thus, the Court's concern with discipline in that particular circumstance is understandable. The Court also noted that the servicemen involved had administrative remedies available to them under the Uniform Code of Military Justice. *Id.* at 2366.

¹⁷*See, e.g., Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

physical injuries they sustain due to the government's negligence, even when those injuries are derivative of the servicemen's injuries.

II. BACKGROUND: FROM *BROOKS* TO *STENCEL*

The doctrine of sovereign immunity developed from the ancient notion that "the King can do no wrong" and that it was contrary to notions of sovereignty to allow a King to be sued in his own courts.¹⁸ The doctrine became embodied in American law under the rationale that "there [could] be no legal right as against the authority that makes the law on which the right depends."¹⁹ In 1946, Congress passed the Federal Tort Claims Act²⁰ to mitigate the hardships created by sovereign immunity and to provide citizens injured by government activities a forum in which they could seek recovery for their injuries.²¹ The FTCA requires that actions against the government be brought in the federal courts but provides that liability be determined under the local law of the place where the act giving rise to the injury occurred.²²

In waiving immunity, Congress carved out certain exceptions where an injured party would not have a right of action against the government.²³ Two of these exceptions have been deemed to apply directly to servicemen and involve claims that arise from combat duty or in a foreign country.²⁴ The legislative intent behind these two exceptions is, at best, ambiguous because there is no legislative history available for review.²⁵ As a result, the courts have little to guide them in interpreting and applying the servicemen's exceptions.

Three years after the passage of the FTCA, the Supreme Court

¹⁸W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970 (4th ed. 1971); see also Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U.L. REV. 527 (1980).

¹⁹*Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

²⁰See *supra* note 4.

²¹H.R. REP. NO. 1287, 78th Cong., 1st Sess. 2 (1946). The hardships created by sovereign immunity were in the nature of remediless injuries due to the lack of a forum in which to seek recovery. See Note, *supra* note 18, at 531.

²²28 U.S.C. § 1346(b) (1976).

²³*Id.* § 2680.

²⁴*Id.* § 2680(j), (k). See *supra* note 8.

²⁵*Feres v. United States*, 340 U.S. 135, 138 (1950). The Court in *Feres* did, however, interpret the legislature's intent as denying servicemen the right to action. The Court reasoned that because the FTCA required that state law be applied, the situs of the servicemen's injury would dictate their right to recovery. Because the law of the states varied, recovery would be non-uniform which indicated an irrational plan of recovery. In addition, the Court noted that the federal character of the relationship between servicemen and the government required that federal law govern rather than whatever state law might be applicable. Because no federal law recognized recovery by servicemen, their actions could not be pursued in state courts that might allow recovery. *Id.* at 143-44.

decided the case of *Brooks v. United States*.²⁶ In *Brooks*, two servicemen were on furlough when a negligently operated Army truck struck their private car. One serviceman was killed and the other sustained serious injuries. The Court allowed recovery, holding that the FTCA exceptions relating to servicemen did not apply in this case because the servicemen's injuries were not incidental to their service in the armed forces.²⁷ The Court did not address the application of the exceptions to servicemen who were not on leave, but merely stated that "[w]ere the accident incident to . . . Brooks' service, a wholly different case would be presented."²⁸ One year later the Court had the opportunity to address this very situation in *Feres v. United States*.²⁹

In *Feres*, the Court examined the issue of whether servicemen on active duty and not on furlough could bring suit under the FTCA for injuries sustained due to the negligence of other members of the armed forces.³⁰ The Court first found that the servicemen's injuries were incident to their service.³¹ It is interesting to note that, although the Court stated the injuries were incident to service, it never explained why. The Court only commented that the servicemen were on active duty. The Court's assumption seemed to be that being on active duty and not on leave constituted "incident to service."³²

After determining that the injuries sustained were incident to service, the Court interpreted the two FTCA exceptions applicable

²⁶337 U.S. 49 (1949).

²⁷*Id.* at 54. The Court of Appeals for the Fourth Circuit had indicated that the servicemen were "on leave or furlough, engaged in their private concerns and not on any business connected with their military service." 169 F.2d 840, 841 (1948). Therefore, the Court deemed the injuries not to be incident to service. 337 U.S. at 54. In its analysis, the Court noted that many previous tort claims bills had been introduced into Congress between 1925 and 1935 and all but two had contained exceptions denying recovery to servicemen. The Court reasoned that because the FTCA omitted these general exceptions and included specific exceptions, Congress could not have intended that all claims by servicemen be excluded. *Id.* at 51.

²⁸337 U.S. at 52.

²⁹340 U.S. 135 (1950). *Feres* was a consolidation of three cases, *Feres v. United States*, *Jefferson v. United States*, and *United States v. Griggs*. The *Feres* case involved an action brought against the government for the negligent death of a serviceman who died in a barracks fire. *Jefferson* involved a negligence action against the government brought by a discharged serviceman who had had abdominal surgery while in the service. Eight months after the initial surgery and after his discharge, the plaintiff was operated on again. During the second surgery a 30-by-18 inch towel, marked "Medical Department U.S. Army," was discovered and removed from the plaintiff's stomach. The *Griggs* case was also a negligence action and alleged the serviceman had died while on active duty because of "negligent and unskillful medical treatment by army surgeons." *Id.* at 136-37.

³⁰*Id.* at 138.

³¹*Id.*

³²*Id.*

to servicemen to mean that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service."³³ In reaching this conclusion, the Court, relying on *United States v. Standard Oil*,³⁴ determined that a federal relationship existed between the servicemen and the government and that federal law should govern this relationship.³⁵ In *Standard Oil*, the Court had determined that a federal relationship existed when federal policy, affecting the government's legal interests and relations, was involved.³⁶ Specifically, the Court noted that the government-soldier relationship was "distinctively and exclusively a creation of federal law" and there was "no good reason" why the government's rights and liability should depend on various state rulings.³⁷ Because of the federal character of the relationship and the anomalous results that would occur if state law were applied, the Court concluded that federal law, not state law, should apply where the government-soldier relationship existed.³⁸

Applying this rationale in *Feres*, the Court determined that no action for servicemen existed under the FTCA because no federal law recognized the type of recovery the servicemen sought, and because the FTCA was intended only to waive immunity from recognized causes of action and not to create any new liabilities for the government.³⁹ The Court also suggested that the existence of the Veterans' Benefit Act⁴⁰ indicated that Congress intended to deny recovery under the FTCA for injuries incident to military service.⁴¹ This denial of servicemen's rights to bring tort actions under the FTCA against the government for service-related injuries is now known as the *Feres* doctrine.

Four years after *Feres*, the Supreme Court qualified the application of the *Feres* doctrine in *United States v. Brown*.⁴² In *Brown*, a

³³*Id.* at 146.

³⁴332 U.S. 301 (1947). In *Standard Oil*, the government was seeking indemnification from a third-party tort-feasor for injuries to a serviceman.

³⁵340 U.S. at 143-44. See *supra* note 25.

³⁶332 U.S. at 309.

³⁷*Id.* at 310.

³⁸*Id.* at 310-11.

³⁹340 U.S. at 142-44. In applying the *Standard Oil* rationale, the Court in *Feres* did not make any policy distinctions between denying the federal government indemnification from a third party for injuries to a serviceman, see *supra* note 36, and denying a serviceman recovery from the federal government. A consideration of the distinctions may have led to a different result in *Feres*.

⁴⁰The pertinent provisions of the Veterans' Benefit Act for this Note may be found at: 38 U.S.C. §§ 361-362 (1976) (compensation for service); *id.* §§ 601-654 (connected death, hospital, domiciliary, and medical care); *id.* §§ 701-788 (life insurance); 10 U.S.C. §§ 1071-1087 (1976) (insurance for retired military personnel).

⁴¹340 U.S. at 144.

⁴²348 U.S. 110 (1954).

serviceman had been discharged from the service because of a knee injury incurred while he was on active duty. Six years after his discharge, Brown went to a Veterans Administration hospital to have surgery on his knee. During the operation a defective tourniquet was used, and Brown suffered permanent injury to the nerves in his leg. Brown received increased compensation under the Veterans' Benefit Act, but he also brought an action against the government under the FTCA. The district court dismissed his case on the basis that the Veterans' Benefit Act was his exclusive remedy.⁴³ The court of appeals reversed, and the Supreme Court granted certiorari because it was unclear whether *Brooks v. United States*⁴⁴ or *Feres v. United States*⁴⁵ should apply.⁴⁶

The Court in *Brown* held that *Brooks*, not *Feres*, was controlling because Brown was not on active duty nor subject to military discipline when the negligent act giving rise to the injury occurred.⁴⁷ The Court determined that allowing the cause of action would not affect military discipline, because the special relationship between the soldier and his superiors no longer existed.⁴⁸ The majority rejected the "but for" rationale urged by the dissent⁴⁹ and permitted Brown to bring his action against the government under the FTCA.⁵⁰ In allowing the suit, the Court looked at the time the government's negligence occurred, not the time of the original injury which was incident to service and thus would have barred recovery.

In 1977, the Supreme Court expanded the *Feres* doctrine, in *Stencel Aero Engineering Corp. v. United States*,⁵¹ to preclude recovery by third parties when the claim arose because of a serviceman's injury. In *Stencel*, the Supreme Court denied recovery to a third-party manufacturer seeking indemnity from the United States for damages it may have had to pay to a serviceman for a service-related injury. The serviceman was injured when the egress life support system of his fighter aircraft, which had been manufactured by the third party, malfunctioned.⁵² In denying recovery, the Supreme Court stressed

⁴³*Id.* at 110-11.

⁴⁴337 U.S. 49 (1949).

⁴⁵340 U.S. 135 (1950).

⁴⁶348 U.S. at 110-11.

⁴⁷*Id.* at 112.

⁴⁸*Id.*

⁴⁹*Id.* at 114 (Black, J., dissenting). Justice Black argued that "but for" the veteran's military service, the injury would not have occurred; therefore *Feres* should bar recovery. *Id.*

⁵⁰*Id.* at 113.

⁵¹431 U.S. 666 (1977).

⁵²The serviceman sued Stencel as the manufacturer of the ejection system and Stencel cross-claimed against the United States. Stencel charged that any malfunction was due to faulty "specifications, requirements, and components provided by the United States or other persons under contract with the United States." *Id.* at 668.

three factors. First, the Court looked to the distinctively federal character of the relationship between the United States and its servicemen.⁵³ Although federal law governs this relationship, liability under the FTCA is determined by state law.⁵⁴ Therefore, the Court determined that the government's liability for servicemen's injuries would depend on where the servicemen were stationed when their injuries occurred, and government liability should not depend on such a fortuitous factor.⁵⁵ The second factor concerned the Veterans' Benefit Act's establishment of "a statutory 'no fault' compensation scheme which provided generous pensions to injured servicemen,"⁵⁶ and created "an upper limit of liability for the Government as to service-connected injuries."⁵⁷ Finally, the Court cited

"[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."⁵⁸

After identifying these three factors as the underlying rationales of the *Feres* doctrine, the Court applied the factors to Stencel's third-party claim.

The Court in *Stencel* established that the relationship between the government and Stencel, as a supplier of ordnance, was "distinctively federal in character."⁵⁹ Therefore, the same rationale applied to Stencel as to the servicemen, and federal law, not the state law of the situs of the injury, should apply when determining whether an action could be brought under the FTCA.⁶⁰ The Court went on to reason that where

⁵³*Id.* at 671. The federal character of the government-soldier relationship and the existence of the Veterans' Benefit Act were both factors the Supreme Court relied on when it denied recovery in *Feres*. 340 U.S. at 143-44.

⁵⁴See *supra* text accompanying note 22.

⁵⁵431 U.S. at 671-72. See *supra* text accompanying notes 35-39.

⁵⁶431 U.S. at 671.

⁵⁷*Id.* at 673. The court in *Stencel* relied on *Feres* in determining that the Veterans' Benefit Act was a factor to be considered in granting or denying servicemen the right to action under the FTCA. *Id.* at 671.

The Veterans' Benefit Act provides no compensation to the servicemen's children for their birth defects. 38 U.S.C. §§ 314-315, 331-337, 611-613 (1976). While some of these sections do allow dependents to receive certain types of medical benefits, or allow the veteran to receive increased benefits, none of them grant the dependents any compensation based on their own injuries. All recovery is based on the severity of the serviceman's injury. See at §§ 314-315. Also, before the veteran collects additional benefits for his dependents, he must have a disability rating of "not less than 50 per centum." *Id.* § 335.

⁵⁸431 U.S. at 671-72 (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

⁵⁹431 U.S. at 672.

⁶⁰*Id.* See *supra* text accompanying notes 38-39, 55.

a suit concerned an injury sustained by a soldier while on active duty, the effect the action would have on military discipline would be the same regardless of whether the suit was brought by the soldier or by a third party.⁶¹ The Court stated that, in either case, the trial would involve the second-guessing of military orders and "would often require members of the Armed Services to testify in court as to each other's decisions and actions."⁶²

The fact that the third party could not recover under the Veterans' Benefit Act was considered, but not accepted, as a controlling factor.⁶³ Instead, the Court stated that the Veterans' Benefit Act was designed to provide an upper limit to the government's liability for service-related injuries, and allowing the third-party claim would circumvent this "essential [feature] of the Veterans' Benefit Act."⁶⁴ It was determined that Stencel had no basis to claim this result was unfair because its relation with the United States was based on a commercial contract.⁶⁵ In addition, Stencel had sufficient notice of the risk that such third-party actions might be barred by *Feres*, and Stencel could have considered this risk when it negotiated its contract with the government.⁶⁶ The Court concluded that because all three factors applied to Stencel, its third-party action was barred by the *Feres* doctrine.⁶⁷ The Court's broad interpretation that the FTCA exceptions exclude servicemen's claims which are incident to service has led to a general denial of recovery to third parties when their action is based on a serviceman's nonactionable claim. However, the third-party claim in *Stencel* was not summarily dismissed without consideration of the relationship between the government and Stencel or an application of the factors underlying the *Feres* doctrine. Unfortunately, this same consideration has not been given to the claims of atomic veterans' children.

III. THE CHILDREN'S RIGHT TO TORT ACTIONS UNDER THE FTCA

A. *The Lower Courts' Reasoning for Denial of Recovery*

The United States Supreme Court has not yet determined whether the *Feres* doctrine, as extended by *Stencel*, not only precludes the servicemen's claims for "incident to service" injuries, but also any derivative claims brought by the servicemen's children. Several federal circuit courts, however, have addressed this issue and have determined that servicemen's children are barred from bringing suit under the

⁶¹431 U.S. at 673.

⁶²*Id.*

⁶³*Id.* at 673.

⁶⁴*Id.*

⁶⁵*Id.* at 674.

⁶⁶*Id.* at 674 n.8.

⁶⁷*Id.* at 674.

FTCA.⁶⁸ The analysis that the majority of the federal courts have used is to first hold that the veterans are not entitled to recover under the FTCA because their injuries are incident to service. Then, the courts note that the children's injuries are derivative of the veterans' injuries and therefore the children have no right to bring an action under the FTCA.⁶⁹ In reaching this conclusion, the courts never directly apply the rationales underlying the *Feres* doctrine to the children, but rather bar the children's actions on the basis of the rationales' application to the servicemen.

*Lombard v. United States*⁷⁰ is one of the most recent decisions affirming the view that the *Feres* doctrine bars children from bringing tort actions for birth defects allegedly caused by their fathers' exposure to radiation while in active military service.⁷¹ In *Lombard*, the serviceman had been exposed to radioactive materials between 1944 and 1946. After leaving the service, he had four children. All four children suffered "moderate to severe congenital defects as a direct consequence" of the father's chromosomal injuries from the radiation exposure.⁷² Before deciding the main issues presented, the *Lombard* court examined the *Feres* decision and its progeny. The court noted that although the FTCA was a waiver of government immunity, the Supreme Court had determined that the FTCA did not waive sovereign immunity when servicemen brought actions for service-related injuries.⁷³ The court then noted three factors which underlie the *Feres* doctrine.⁷⁴ These three factors were outlined in *Stencel Aero Engineering Corp. v. United States*⁷⁵ and generally are referred to as the *Stencel* factors.

The three *Stencel* factors, as noted earlier, are the distinctly

⁶⁸See, e.g., *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

⁶⁹See *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).

⁷⁰690 F.2d 215 (D.C. Cir. 1982).

⁷¹It should be noted that the radiation exposure in this instance was not due to participation in nuclear war games but rather resulted from Lombard's participation in the "Manhattan Project." *Id.* at 216. The "Manhattan Project" was a research project aimed at the development of the world's first atomic weapon. *Monaco v. United States*, 661 F.2d 129, 130 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

⁷²690 F.2d at 228 (Ginsburg, J., concurring in part and dissenting in part).

⁷³690 F.2d at 218. See *supra* text accompanying note 33.

⁷⁴690 F.2d at 218-19.

⁷⁵431 U.S. 666, 671 (1977). The *Lombard* court actually does not refer to the three factors as derived from *Stencel*, but rather cites various sources for the factors. 690 F.2d at 219 (citing *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977); *United States v. Muniz*, 374 U.S. 150 (1963); *United States v. Brown*, 348 U.S. 110 (1954); *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc)). However, because *Stencel* draws the three fac-

federal character of the relationship between the government and the members of its armed forces, the uniform system of compensation provided by Congress in the Veterans' Benefit Act, and the harmful effects that servicemen's tort actions would have on military discipline.⁷⁶ The *Lombard* court directly applied these factors to the veteran, but only indirectly applied them to the children.⁷⁷ The court determined that because Lombard's injury was incident to service and because the *Stencel* factors were applicable in this situation, the veteran was barred from suit under the FTCA.⁷⁸ After making this determination, the court turned to the children's claims and was primarily concerned with whether the children's injuries were derivative of their father's in-service injury. The court used the "genesis" test to conclude that the children's injuries were derived from the father's "incident to service injury."⁷⁹

The "genesis" test, propounded in *Monaco v. United States*,⁸⁰ focuses on when the negligent act causing the injury occurred, not the point when the injury actually happened or appeared.⁸¹ The *Monaco* court determined that the negligent act, not the injury, was the proper focal point when dealing with injuries to servicemen's children.⁸² In *Monaco*, a veteran who had been exposed to radiation during active service⁸³ later had a daughter born with a severe birth defect because of the genetic change that the radiation exposure had caused in her father.⁸⁴ The *Monaco* court reasoned that, because the daughter's injury was derivative of the negligent act to her father and was not

tors together, this Note will focus on the *Stencel* decision and its reasoning supporting the factors.

⁷⁶See *supra* notes 51-67 and accompanying text.

⁷⁷690 F.2d at 221.

⁷⁸*Id.*

⁷⁹*Id.* at 223.

⁸⁰661 F.2d 129 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). The "genesis" test was originally formulated in *Monaco v. United States*, No. 79-0860 (N.D. Cal. Nov. 2, 1979), and then was picked up by the District Court for the Eastern District of New York in *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 781 (E.D.N.Y. 1980). Then in *Monaco*, the United States Court of Appeals for the Ninth Circuit reapplied the test in affirming the district court decision. 661 F.2d at 133. It is also interesting to note that the circuit court in *Monaco* cited the *In re Agent Orange* decision in support of its decision to deny Monaco's daughter the right to sue for her injuries. *Id.* at 134.

⁸¹661 F.2d at 133.

⁸²*Id.* at 132-33.

⁸³In this case the radiation exposure occurred while Monaco was sitting on bleachers above a laboratory in which research for the development of the first atomic weapon was being conducted. Monaco was never apprised of his exposure to radiation until 1971 when he was informed that he had radiation-induced cancer of the colon. *Id.* at 130.

⁸⁴*Id.* Denise was born with an arterio-venous anomaly. An arterio-venous anomaly is a congenital defect located in the brain consisting of tangled masses of interconnected arteries and veins. HARVEY, JOHNS, OWENS, & ROSS, *THE PRINCIPLES AND PRACTICE*

a separate and distinct injury, the determinative injury in deciding whether the child had a right of action would be the genetic change in her father.⁸⁵ Because the genetic change presumably resulted from a negligent act that occurred while the serviceman was on active duty, the injury was incident to service and recovery was precluded by the *Feres* doctrine.⁸⁶

In reaching its conclusion, the *Monaco* court relied on *United States v. Brown*⁸⁷ which had focused on the time the negligent act occurred to find that the serviceman's injury was not incident to service and therefore recovery under the FTCA was permissible. It is ironic that the Court's focus on the negligent act that allowed recovering in *Brown*,⁸⁸ precluded the children from recovering in *Monaco* because the "genesis" of their injuries related to their father's active service days. Thus, what had been an expansion device for recovery in *Brown* became a narrowing device in *Monaco*. This anomaly is even more apparent when it is remembered that the Monaco children, like the veteran in *Brown*, were not subject to military discipline, but unlike the veteran, were denied recovery.

The *Lombard* court adopted the *Monaco* reasoning when it held that the Lombard children's suit was barred by the *Feres* doctrine.⁸⁹ The court determined that the *Feres* doctrine barred Lombard's recovery under the FTCA; that the children's injuries were derivative of their father's injuries; and therefore, under the genesis test, the *Feres* doctrine also barred the children from recovering under the FTCA.⁹⁰ Although this reasoning appears logical at first glance, it is overly simplistic and does not adequately resolve the issues involved in these cases. Therefore, this form of analysis should not be used to bar tort actions by the atomic veterans' children.

B. The Flaw in the Lower Courts' Reasoning

The flaw in the *Lombard* court's reasoning and in the reasoning of the other circuit courts that have barred recovery by children of atomic veterans under the FTCA involves the courts' failure to properly differentiate between two lines of cases dealing with tort recovery by family members of servicemen. The first line of cases involves

OF MEDICINE 1523 (19th ed. 1976). The mass had resulted in "three brain hemorrhages, aphasia and other permanent injuries." 661 F.2d at 130.

⁸⁵661 F.2d at 133.

⁸⁶*Id.* at 133-34.

⁸⁷348 U.S. 110 (1954). See *supra* notes 42-50 and accompanying text.

⁸⁸See *supra* notes 47-50 and accompanying text.

⁸⁹690 F.2d at 223.

⁹⁰*Id.* at 226.

direct injuries to the family members and allows recovery not only by the injured parties but also by the servicemen for consequential damages.⁹¹ The second line of cases deals with injuries which are clearly derivative of the servicemen's injuries,⁹² but are in the nature of emotional injuries, not physical injuries to the third parties.⁹³

In *Hinkie v. United States*,⁹⁴ the district court properly discussed these two lines of cases and concluded that the children of any atomic veteran could bring an action under the FTCA.⁹⁵ The district court reasoned that, although the Hinkie children's injuries were derivative of the serviceman's injury, they were also direct physical injuries and, therefore, did not fit "neatly into either line of cases."⁹⁶ Consequently, the district court in *Hinkie* treated the children's claim as novel, deserving full analysis under the *Stencel* factors. The court expressly rejected the "genesis incident to service" test of *Monaco* as an "oversimplification" that would allow courts to "avoid the necessary analysis of policies underlying the *Feres* doctrine which the Supreme Court requires in determining its application to novel cases."⁹⁷

⁹¹See *Hinkie v. United States*, 524 F. Supp. 277, 280 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983). An example of these types of cases include a situation where a sergeant was able to bring an action under the FTCA for injuries to his wife resulting from negligence in the delivery of a child in an Army hospital. *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950). Note that under a "but for" analysis, *see supra* note 49, recovery probably would have been denied, as but for the serviceman's active duty status the woman would not have been in an Army hospital.

⁹²See *Hinkie v. United States*, 524 F. Supp. 277, 280-81 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983).

⁹³*Id.*; *see De Font v. United States*, 453 F.2d 1239 (1st Cir.), *cert. denied*, 407 U.S. 910 (1972) (serviceman's wife's action for mental anguish and child's action for loss of companionship); *Wisniewski v. United States*, 416 F. Supp. 599 (E.D. Wis. 1976) (serviceman's wife's action based on government's failure to diagnose and treat husband's illness, which resulted in husband's illness causing marital disharmony).

⁹⁴524 F. Supp. 277, 280-81 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983). Hinkie had been exposed to radiation during the 1955 Army nuclear testing in Nevada. Hinkie later had two sons, Paul and Timothy, both of whom suffered from severe birth defects. Paul's defects included "Rubenstein-Taybies Syndrome, lack of joints in his thumbs, constant uncontrollable twitching of his eyes, severe mental retardation and photophobia." *Id.* at 279. Timothy was born "with severe and disabling birth defects, including but not limited to the lack of an esophagus and esophageal fistula which caused him pain, mental anguish and his death on January 7, 1966." *Id.*

⁹⁵*Id.* at 284. Even though the district court's decision was eventually reversed on appeal, this author believes the reasoning and analysis used by the district court is the appropriate approach to follow and will therefore discuss the court's opinion at length.

⁹⁶*Id.* at 281.

⁹⁷*Id.* at 282. In the subsequent appeal to the Third Circuit, the Court of Appeals failed to address this aspect of the problem and reversed on the basis of the effect the suits would have on military discipline. 715 F.2d 96, 97 (3d Cir. 1983). For a discussion of this factor, *see infra* notes 122-43 and accompanying text.

The *Lombard* court, noting these two lines of cases, rejected the view that the children's injuries did not fall neatly into the derivative injury type cases. The court observed that the "direct injuries" allowing recovery involved no injury to the servicemen, whereas the "derivative injuries" all resulted from a direct injury to the servicemen.⁹⁸ The *Lombard* court concluded that the facts in *Hinkie* clearly fell under the "'derivative injury' line of cases"⁹⁹ because the children's injuries resulted from the father's injury. The problem with this conclusion is that the *Lombard* court failed to consider the "direct physical injury" aspect of the children's cases. Because the children have suffered direct physical injuries themselves, although derivative of the fathers' injury, the children's cases should be treated as novel and separately scrutinized under the *Stencel* factors. By acknowledging the derivative but physical nature of the atomic veteran's children's injuries, the district court in *Hinkie* permitted this type of scrutiny to occur. Such scrutiny is desirable because of the children's novel situation and, therefore, the district court's approach in *Hinkie* is the better reasoned and more just approach.

C. *Do the Stencel Factors Apply to Claims of Atomic Veterans' Children?*

The *Lombard* court used the *Stencel* factors to analyze the relationship between the servicemen and the government and concluded that the *Feres* doctrine was applicable to and barred recovery by the children.¹⁰⁰ The district court in *Hinkie v. United States*¹⁰¹ reached a contrary result by applying the three *Stencel* factors directly to the children's claims.¹⁰² The relationship between the children and the government does not justify expanding the *Feres* doctrine to bar recovery by the atomic veterans' children. None of the three *Stencel* factors, which form the underlying rationales for the *Feres* doctrine, apply to the children's claims.

1. *The Distinctly Federal Character of the Relationship.* — The first

⁹⁸690 F.2d at 225.

⁹⁹*Id.* The *Lombard* court also noted that the district court opinion in *Hinkie* was in conflict with its own circuit court's decision in *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981) (en banc). Although this is true, the validity and persuasiveness of the district court's reasoning in *Hinkie* is a force that the courts have failed to adequately deal with.

¹⁰⁰690 F.2d at 218-26. The court did not expressly apply the *Stencel* factors to the children's claims but rather applied the factors to the father's claims and denied him recovery. The children then were barred from recovery because their injuries were declared derivative of their father's. Thus, the *Stencel* factors were applied to the children's claims albeit in an indirect manner. *Id.*

¹⁰¹524 F. Supp. 277 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983).

¹⁰²*Id.* at 282-85. See *supra* notes 94-97 and accompanying text.

Stencel factor is based on the distinctly federal character of the relationship between the soldier and the government, which is governed by federal law.¹⁰³ As the district court in *Hinkie* noted, there is no distinct federal relationship between the child and the government because the child is simply a civilian.¹⁰⁴ The court pointed out that had a civilian living near the nuclear test sites brought an action against the government, the suit would have been allowed and state law would have been applied.¹⁰⁵ Thus, the argument that suits should be barred because the government's liability should not depend on the differing state laws¹⁰⁶ carries little weight because precisely the same factor determines civilians' rights to recover against the government. This result is especially true for FTCA actions because the FTCA explicitly dictates that state law is the applicable law.¹⁰⁷

The government can argue that for the sake of uniformity servicemen should be limited to recovery under the Veterans' Benefit Act, and their children should not be allowed to recover under varying state laws for derivative injuries.¹⁰⁸ Perhaps this argument carries some weight because the Veterans' Benefit Act does at least provide a mechanism by which the servicemen can seek recovery for their injuries,¹⁰⁹ however, applying this rationale to bar the children's right

¹⁰³431 U.S. 666, 671 (1977).

¹⁰⁴524 F. Supp. at 282-83.

¹⁰⁵*Id.* at 283.

¹⁰⁶*See Feres v. United States*, 340 U.S. 135 (1950).

¹⁰⁷*See supra* note 22 and accompanying text.

¹⁰⁸*See supra* note 35 and accompanying text.

¹⁰⁹38 U.S.C. § 610 (Supp. V 1981). The remedies provided the servicemen under the Veterans' Benefit Act have, in the past, been totally inadequate. As of 1981, the Veterans' Administration had almost a 99% denial rate on compensation claims for injuries alleged to have been caused by radiation exposure in nuclear tests. Favish, *supra* note 1, at 957. According to the National Veterans Law Center, over 2000 claims for compensation related to the war games have been rejected by the Board of Veterans Appeals while only 13 claims have been granted by the Board. Washington Post, Aug. 11, 1982, at A12, col. 2.

Congress recently enacted an amendment to the Veterans' Benefit Act that may make the servicemen's recovery for radiation exposure injuries easier. 38 U.S.C. § 610 (Supp. V 1981). The amendment was designed to provide health care to veterans who were exposed to either radiation during the war games or Agent Orange and other chemical defoliants used in Vietnam. The problems of recovery facing both types of injured veterans were similar, such as proving their injuries were indeed the result of exposure to radiation or chemical defoliants. The amendment may eliminate this burden as the drafters intended to grant health care to the veteran "if it is found that the veteran, during active duty, *may* have been exposed to dioxin or was exposed in Vietnam to any toxic substance in a herbicide or defoliant used in connection with military purposes there, or to radiation from the detonation of a nuclear device." 127 CONG. REC. S11572 (Oct. 16, 1981). Congress also provided that the veteran's service records need only show that he was in Vietnam during the period the chemicals were used in order to recover under the Act, thus eliminating the difficulty in determining

to a tort action is totally unfounded. To begin with, as the district court in *Hinkie* noted, the children are not servicemen, and they have no federal relationship to the government other than perhaps being citizens of the United States.¹¹⁰ Secondly, while the servicemen do have a remedy under the Veterans' Benefit Act, the children have no remedy left to them except a questionable state action against the manufacturer of the weapons involved.¹¹¹ Requiring the children to bring an action against the weapons manufacturer, but not the government, is analogous to telling a person who is negligently shot by an individual to sue the manufacturer of the bullet and not the person who was mishandling the weapon. There is serious doubt whether a case against a weapons manufacturer would be successful because the manufacturing of the weapon was not the negligent act that led to the injuries.¹¹² Similarly, it is the misuse of the weapons, mismanagement of the nuclear tests, and the government's negligence in failing to warn the men of the dangers that caused the children's injuries. Thus, if the children are barred from suing the government then they actually are barred from any recovery at all, and the government is

actual usage patterns of Agent Orange and other dioxin-contaminated defoliants and herbicides in Vietnam. *Id.* at 11574. Radiation veterans need only show that their injury is a type that radiation could cause, such as cancer as opposed to a broken leg. The presumption regarding Agent Orange, however, is effective for only about a two-year period until the first report of a Veterans' Administration epidemiological study is submitted. This study is being conducted pursuant to section 307(b)(2) of Public Law 96-151. After the report comes out, it has been suggested that Agent Orange veterans also will have to show their injuries are of the type Agent Orange would cause. Presently such a showing is not necessary barring any obvious false claims such as a broken leg. 127 CONG. REC. S11572-74 (Oct. 16, 1981).

¹¹⁰524 F. Supp. at 282-83. In *Hinkie*, the two children were not even born when *Hinkie* was on active duty. *Id.* at 282.

¹¹¹Even this approach is not possible where the exposure is a result of the government's research on the "Manhattan Project" because the government was the manufacturer, *see supra* note 71, unless perhaps some sort of dual capacity doctrine were adopted, allowing the government to be sued as the manufacturer of the weapons. See *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952), for a description of the dual capacity doctrine.

¹¹²The approach of suing the government contractor has been attempted in connection with the chemical Agent Orange. The manufacturers of Agent Orange raised not only the defense that any negligence was the government's but also the government contract defense. This latter defense, argues that, because the government controls and dictates the manufacturing and use of the weapon or chemical, the manufacturer is immune from liability because the government is acting in a capacity that renders it immune from liability under the theory of sovereign immunity and the *Feres/Stencel* doctrine and this immunity is passed on to the manufacturer. Hanes, *Agent Orange Liability of Federal Contractors*, 13 U. TOL. L. REV. 1271, 1274-76 (1982). Hanes predicts that the manufacturers will succeed under the government contract theory. *Id.* at 1279. Thus, it is unlikely that a suit against the manufacturers of atomic weapons would be successful because of the government contract and the lack of negligence on the part of the manufacturer.

freed from assuming responsibility for injuries resulting from its negligence.

2. *The Veterans' Benefit Act as an Upper Limit to Governmental Liability.*—The second *Stencel* factor states that the Veterans' Benefit Act establishes the upper limit of the government's liability for service-related injuries.¹¹³ Again, this is not applicable where the children of servicemen are concerned. The government has no liability at all towards the children under the Veterans' Benefit Act because it does not cover their injuries.¹¹⁴ The children are suing for physical injuries *they* sustained, not for injuries the servicemen sustained. If the children involved were the children of civilians, they would be able to bring actions under the FTCA for their own injuries.¹¹⁵ However, under the reasoning of the *Lombard* court, the children of servicemen are barred from seeking recovery for their injuries. This result allows the government to place the entire burden of its negligence on the shoulders of the servicemen, who are actually among the injured parties, and their families. This result contravenes both tort law and the FTCA.

One of the basic goals of tort law is the "allocation of losses arising out of human activities."¹¹⁶ Usually the tort-feasor is held liable when he has departed from a reasonable standard of care.¹¹⁷ Application of the *Feres* doctrine to the atomic veterans' children, however, precludes them from even bringing an action against the government to determine if liability exists.¹¹⁸ The FTCA waives government immunity from suit for negligent acts or omissions of federal employees acting in the scope of their employment.¹¹⁹ The government's liability is to be "in the same manner and to the same extent as a private individual under like circumstances."¹²⁰ Because the object of both tort law and the FTCA is to allocate losses to the tort-feasor, the atomic veterans' children should be permitted to bring actions against the government based on the children's own physical injuries, just as any other civilian could. In this way, both the objectives of tort law and the FTCA would be furthered.

Also, because the children receive no benefits under the Veterans' Benefit Act, there is no problem of a double recovery. The government could compensate the soldiers through the Act, and the children through court actions. Thus, the Act would still serve as an upper

¹¹³431 U.S. at 671.

¹¹⁴See *supra* note 109.

¹¹⁵524 F. Supp. at 283.

¹¹⁶Prosser, *supra* note 18, at 6.

¹¹⁷*Id.*

¹¹⁸See cases cited *supra* note 5.

¹¹⁹28 U.S.C. § 1346(b) (1976).

¹²⁰*Id.* § 2674.

limit to the government's liability for the servicemen's injuries, and the children would be able to seek judicial recovery for their own injuries. Furthermore, allowing the children an action under the FTCA would be consistent with the purpose behind the FTCA which is to alleviate the hardships of sovereign immunity¹²¹ by making the government assume responsibility for the results of its negligent acts.

3. *The Breakdown in Military Discipline.*—The final *Stencel* factor concerning the harmful effects on military discipline if suits are allowed by servicemen's children is unpersuasive for a number of reasons when applied to atomic veterans' children. First, the courts that have relied on this factor¹²² have failed to acknowledge that if a civilian unrelated to a serviceman were injured by the nuclear arms tests, military orders would still come under court review.¹²³ There would still be second guessing of orders, military men testifying for and against each other, and a general review of the military's actions in regard to the events that led to the civilian's injury. The risk of a breakdown in military discipline would be just as great in a case involving a civilian who was not related to a serviceman as one who was related to a serviceman.

Also, the effect on military discipline is only a potential problem and a remote one at that. The actions brought by the children often occur several years after the military orders have been given. "The extended interval between the issuance of the orders and the appearance of the injuries dilutes the argument that an airing in court of . . . family members' claims would occasion genuine harm to the command structure of the armed forces."¹²⁴ In addition, "[s]uits for indirect consequences of military orders, contrary to those for direct consequences, are brought by non-military personnel who are not subject to military authority, and therefore pose less of a threat to the maintenance of military discipline."¹²⁵ Thus, an attenuated threat of a breakdown in military discipline should not act as a bar to the children's right to a tort action under the FTCA.

Finally, some of the courts relying on this factor have improperly stated that the "Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline."¹²⁶ In one such case, *Mondelli v. United States*,¹²⁷

¹²¹See *supra* note 21 and accompanying text.

¹²²See, e.g., *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983).

¹²³See 524 F. Supp. at 284.

¹²⁴*Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part).

¹²⁵Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1265 n.156 (1982).

¹²⁶*Hinkie v. United States*, 715 F.2d 96, 99 (3d Cir. 1983) (quoting *Mondelli v. United States*, 711 F.2d 567, 570 (3d Cir. 1983)).

¹²⁷711 F.2d 567 (3d Cir. 1983).

the court stated that the soundest reason supporting the *Feres* doctrine is the relationship between the soldier and his superiors.¹²⁸ In a footnote, the court noted that of the three rationales outlined in *Stencel*, only the necessity for maintaining military discipline applied in this case,¹²⁹ because the plaintiff was not in the military herself and because the United States conceded that veterans' benefits were not available to her.¹³⁰ Thus the court relied solely on the military discipline factor in concluding that the plaintiff could not pursue an action under the FTCA.

The court acknowledged that "[r]arely does the law visit upon a child the consequences of actions attributed to the parents,"¹³¹ citing the Supreme Court decision of *Trimble v. Gordon*.¹³² However, the court went on to state that the Supreme Court has subordinated the interests of the veterans children to the interest of military discipline.¹³³ Notably, the court cites no authority for this proposition but presumably relies on its earlier discussion of *Stencel Aero Engineering Corp. v. United States*¹³⁴ and *Chappell v. Wallace*¹³⁵ as support for this statement.

While the *Mondelli* court correctly pointed out that the children's actions would question the acts of military personnel,¹³⁶ just as if the veterans brought the actions, the court failed to acknowledge the differences in the situations presented by *Stencel* and *Chappell*. First in *Stencel*, the Court was dealing with a contractual relationship and noted that "[s]ince the relationship between the United States and [Stencel was] based on a commercial contract, there [was] no basis for a claim of unfairness" in the Court's denial of Stencel's indemnity action against the government.¹³⁷ The Court noted that Stencel had an opportunity to take into account the risk of an action against it in negotiating its contract and thereby protect itself.¹³⁸ In the cases involving servicemen's children, however, there is no opportunity for

¹²⁸*Id.* at 568.

¹²⁹*Id.* at 569 n.5.

¹³⁰*Id.* In *Mondelli*, the plaintiff was a 22-year-old civilian who was born with retinal blastoma, a genetically transmitted cancer of the retina. The defect was allegedly caused by the plaintiff's father's exposure to radiation during his participation in nuclear tests while on active military duty. *Id.* at 568.

¹³¹*Id.* at 569. It should be noted that in the radiation cases, the parents involved did nothing but follow orders. Thus, it is absurd to suggest that "the consequences" of the parents acts should be imposed on their children. The veterans in these cases were victims, as were the children.

¹³²430 U.S. 762 (1977) (dealing with the rights of illegitimate children).

¹³³711 F.2d at 570.

¹³⁴431 U.S. 666 (1977).

¹³⁵103 S. Ct. 2362 (1983).

¹³⁶711 F.2d at 569.

¹³⁷431 U.S. at 674.

¹³⁸*Id.* at 674 n.8.

the serviceman or the children to protect themselves against loss through contract negotiations. Thus, presumably a claim of unfairness in result is appropriate and notably several federal courts have conceded that the results reached in these cases appear "harsh" and "unjust."¹³⁹ The language in *Stencel* indicates the Supreme Court's willingness to consider the fairness of the result reached; therefore, lower federal courts should also consider this as a factor.

The *Mondelli* court's reliance on *Chappell* was similarly misplaced. While *Chappell* did affirm the *Feres* doctrine as applied to servicemen, it made no mention of the doctrine's application to servicemen's children.¹⁴⁰ Also the Court was properly concerned with the effects the *Chappell* action would have on military discipline in that the action was brought by enlisted Navy men against their superior officers for alleged acts of discrimination in making duty assignments and performance evaluations.¹⁴¹ It is also significant that the Supreme Court once more noted that other avenues of relief were available to the enlisted men.¹⁴² Thus, there is little or no similarity between the *Chappell* situation and the situation of the atomic veteran's children.

First the children are not servicemen, and while their action may result in a review of military decisions, those decisions were made years ago. Second, the children are not challenging the acts of individual officers, but rather the entire plan, scheme and method utilized by the Army and Department of Defense in conducting the nuclear tests. Thus, the children's legal actions are really urging and encouraging the government, as a unit, to be sure that its actions are taken with the welfare of the men involved in mind. In this regard, the children's legal actions would serve the public policy goal of providing the government an incentive to assure the safety of its troops in non-combat testing situations, especially where hazardous substances are involved.¹⁴³ Third, the children currently have no other means of redress available to them. This factor has repeatedly been mentioned by the Supreme Court and should not be ignored by the lower courts when applying the *Stencel* factor analysis.

Taken as a whole, the reasoning of the Court in *Stencel* for expanding the *Feres* doctrine to a third party's derivative action is not applicable where children of servicemen are concerned. First, there is no distinctly federal relationship that exists between the children

¹³⁹See, e.g., *Hinkie v. United States*, 715 F.2d 96, 98 (3d Cir. 1983); *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983); *Lombard v. United States*, 690 F.2d 215, 227 (D.C. Cir. 1982).

¹⁴⁰103 S. Ct. 2362 (1983).

¹⁴¹*Id.*

¹⁴²*Id.* at 2366-67.

¹⁴³See *infra* note 167 and accompanying text.

and the government; second, the children cannot recover under the Veterans' Benefit Act and, therefore, have no reasonable remedy available to them; third, the effects on military discipline are no different when servicemen's children bring actions than when a civilian unrelated to a serviceman brings such an action. Because the children have no other source of recovery and because the *Stencel* factors are not applicable to them, the *Feres* doctrine should not be extended to bar FTCA actions by the servicemen's children.

IV. ALTERNATE THEORIES ALLOWING RELIEF UNDER THE FTCA

A. Governmental Post-Discharge Negligence

Under the present *Lombard* type derivative injury approach, the atomic veterans' children have been denied recovery under the FTCA. An alternative argument for the children consists of resting their suit on the government's failure to warn the servicemen of the harmful effects of radiation *after* their discharge from the service. This argument was presented in *Lombard* and rejected by the majority.¹⁴⁴ The court concluded that the negligent act began before Lombard's discharge and continued to the present because Lombard conceded "that the Army knew of the potential dangers involved in exposing servicemen to radioactive substances at the time of the exposure itself."¹⁴⁵ The negligent act, therefore, did not occur after Lombard's military service ended. However, the court acknowledged that if the government had learned of the potential dangers after Lombard's discharge and had failed to warn him of the harmful effects, then a separate tort would have occurred and the action would be allowed.¹⁴⁶

Judge Ginsburg's dissent in *Lombard* suggests that Lombard should have been permitted to develop and restate the claim regarding post-discharge negligence.¹⁴⁷ Ginsburg noted that *Broudy v. United States*¹⁴⁸ "suggested that the failure to warn a veteran of radiation's

¹⁴⁴690 F.2d at 220-21.

¹⁴⁵*Id.* at 220.

¹⁴⁶*Id.* The court noted that a district court in the District of Columbia Circuit had allowed such a claim in *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979). The serviceman in *Thornwell* had been given doses of LSD by the government in an attempt to get him to confess to the theft of classified documents. *Id.* at 346.

¹⁴⁷690 F.2d at 230-31 (Ginsburg, J., concurring in part and dissenting in part) (citing *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981)).

¹⁴⁸661 F.2d 125 (9th Cir. 1981). In *Broudy* a serviceman was exposed to radiation during maneuvers near the Nevada nuclear test site. He was never told of the dangers to his health or given an opportunity to decline to participate in the maneuvers. Broudy was discharged from the service in 1960 and was then diagnosed as having low-level radiation induced cancer which resulted in his death in 1977. Broudy's wife and children brought an action under the FTCA claiming the government was negligent in exposing Broudy to the radiation and negligent in failing to warn Broudy of health prob-

potential effects might constitute an independent, post-service negligent act if the government learned of the danger after the veteran left the armed forces."¹⁴⁹ Ginsburg went on to say that Lombard was not informed enough to be able to "state with any degree of precision whether, or the extent to which, the government's knowledge of such risks increased" after Lombard's discharge.¹⁵⁰ Under Judge Ginsburg's rationale, the government's increased awareness of danger after a serviceman's discharge could give rise to a separate tort if the government failed to warn of the dangers of radiation exposure that it subsequently discovered. Thus, atomic veterans' children would be allowed to bring suit for injuries based on the government's post-discharge negligence. The *Lombard* majority seemingly would agree with this result so long as the children can show separate post-discharge negligence.¹⁵¹

One problem with the post-discharge negligence argument is that it would result in inconsistent results because servicemen's children born *before* the servicemen's discharge would still be denied the right to recovery. However, the non-derivative injury argument used by the district court in *Hinkie*,¹⁵² and the willful and wanton negligence argument¹⁵³ should provide all children an opportunity to obtain judicial relief.

B. Workers' Compensation and Willful and Wanton Negligence

The similarities in purpose between the Veterans' Benefit Act and Workers' Compensation Act are striking.¹⁵⁴ The Court in *Stencel* stated that the Veterans' Benefit Act was designed to set an upper limit to the government's liability; thus, under *Stencel* and *Feres*, the benefits received under the Act are considered to be the servicemen's exclusive remedy against the government, although the Act itself does not claim to be an exclusive remedy.¹⁵⁵ In comparison, workers' compensation statutes often expressly provide that the statutory remedies

lems after his discharge. The court dismissed the negligent exposure claim but allowed the post-discharge negligence claim. *Id.* at 126-29.

¹⁴⁹690 F.2d at 230 (citing *Broudy v. United States*, 661 F.2d 125, 128-29 (9th Cir. 1981)).

¹⁵⁰690 F.2d at 230.

¹⁵¹See *supra* text accompanying note 146.

¹⁵²See *supra* notes 91-99 and accompanying text.

¹⁵³See *infra* notes 154-67 and accompanying text.

¹⁵⁴The *Lombard* court acknowledged this similarity in purpose. 690 F.2d at 219. Both Acts provide a no-fault remedy in an employment situation because, in essence, the serviceman is an employee of the federal government. See *supra* note 56 and accompanying text.

¹⁵⁵See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977); *Feres v. United States*, 340 U.S. 135 (1950). See *supra* note 40.

are to be the worker's exclusive remedy for injuries arising out of the employment situation.¹⁵⁶ Yet courts have allowed employees to recover damages beyond the workers' compensation benefits when the employers' "conscious indifference to the physical safety of his men was so outrageous that an intent to injure could be readily inferred."¹⁵⁷ It has been stated that

[a]n employer who knows for a fact that if certain conditions are allowed to exist or if *certain changes* are put into effect, harm will befall a particular employee or any one of a group of employees, is certainly not far removed, in terms of moral blameworthiness, from the boss who "clobbers" a worker with a baseball bat.¹⁵⁸

It can be argued that the government's "conscious indifference" to the servicemen's safety was willful and wanton conduct. The Atomic Energy Commission (AEC) originally was responsible for the safety standards used in the 1950's war games, but this responsibility was turned over to the Department of Defense (DOD), upon the DOD's request, so that the DOD could make the war games more realistic. The DOD felt the AEC standards were too restrictive and wanted to attain conditions more closely resembling those of true war.¹⁵⁹ The

¹⁵⁶Tomita, *The Exclusive Remedy of Workers' Compensation for Intentional Torts of the Employer: Johns-Manville Products v. Superior Court*, 18 CAL. W.L. REV. 27 (1981).

¹⁵⁷Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV. 555, 563-64 (1963). The willful and wanton language often is automatically associated with the concept of punitive damages. However, the two concepts exist separately, and one does not automatically give rise to the other. Willful and wanton conduct may justify awarding punitive damages, imposing broader duties, extending liability, and may avoid the defense of contributory negligence. Prosser, *supra* note 17, at 184-85. In the case of the serviceman's children, the willful and wanton conduct gives the children a right to a tort action against the government when an action may otherwise be denied.

¹⁵⁸Page, *supra* note 157, at 564 (emphasis added); see *Collins v. Dravo Contracting Co.*, 114 W. Va. 229, 171 S.E. 757 (1933).

¹⁵⁹Favish, *supra* note 1, at 944-47 n.39. The AEC required troops to be at least seven miles from ground zero (the point of detonation) at detonation time. The DOD wanted this distance reduced to 7000 yards (3.9 miles). The Washington Post, Aug. 11, 1982, at A12, col. 2, reports one instance where a soldier was actually close enough to be blown from his trench by the force of the blast. The AEC also limited each individual's exposure to 3.9 roentgens (r.) of gamma radiation per 13 weeks. They monitored this level by giving each soldier his own badge and had the troops advance behind AEC monitoring personnel. The DOD wanted to increase the exposure level to 6r. per soldier (in some cases exposure was as high as 100r.) and advance the troops without the hindrance of monitoring personnel. The AEC granted the DOD permission to decrease the distance between the troops and "ground zero" at detonation time, but only if precautions were taken to ensure troop safety. However, they refused to condone the increased exposure level and told the DOD that AEC personnel would be unavailable on the test date so the DOD would have to conduct the monitoring

government was warned that the DOD's relaxation of AEC standards could be dangerous, but the standards were relaxed anyway.¹⁶⁰ The government also had access to several medical publications warning of the hazards related to radiation exposure.¹⁶¹ Yet, the government exposed soldiers to radiation, paying little or no attention to safety precautions, all in the name of realism.¹⁶² This lack of attention to safety standards evidences a "conscious indifference to the physical safety" of the men involved.

Based on such evidence, the courts could read an exception into the *Feres* doctrine, as courts have done in workers' compensation

of radiation levels. In 1953, the DOD assumed full responsibility for safety standards and only gave the AEC a safety plan for informational purposes. A letter dated October 15, 1952, from Major General H. B. Loper to Brigadier General K. E. Fields stated that if "the safety standards of the DOD are less conservative than those established by the AEC, and if accident or criticism result, the DOD will be prepared to make a public announcement of those facts." Favish, *supra* note 1, at 947 n.39. In spite of several complaints put forth by the AEC, no public announcements were forthcoming, and only recently have the facts surrounding the nuclear tests been made known. *Id.* at 933.

¹⁶⁰Favish, *supra* note 1, at 944 n.39.

¹⁶¹See, e.g., Folley, Borges, & Yamawaki, *Incidence of Leukemia in Survivors of the Atomic Bomb in Hiroshima and Nagasaki, Japan*, 13 AM. J. MED. 311 (1952) (discussing the increased incidence of leukemia in the Japanese atomic bomb survivors); Furth & Furth, *Neoplastic Diseases Produced in Mice by General Irradiation with X-rays*, 28 AM. J. CANCER 54 (1936) (discussing increased ovarian tumors and lymphatic cancer among irradiated mice); Martland, *The Occurrence of Malignancy in Radioactive Persons*, 15 AM. J. CANCER 2435 (1931) (discussing the development of cancer in watch dial painters who used radium paint); Muller, *Artificial Transmutation of the Gene*, 66 SCIENCE 84 (1927) (stating that x-rays could cause gene mutations in drosophila flies); Uphoff & Stern, *The Genetic Effects of Low Intensity Irradiation*, 109 SCIENCE 609, 610 (1949) (stating that there was no threshold below which radiation failed to induce mutations).

Although this information at first glance appears harmful to the post-discharge negligence standard, it should be remembered that the importance rests on the degree to which available information changed in reliability, thus increasing awareness or the discovery of new information as to the harmful effects of radiation is enough to create a post-discharge duty to warn. See *supra* notes 144-51 and accompanying text.

¹⁶²During the atomic war games troops were placed anywhere from 12 to 1.5 miles from the explosion site. In one test, the Chief of the Armed Forces Special Weapons project proposed to have an army battalion (approximately 1100 men) dig in as close as permissible to the explosion site. After the explosion, the battalion was to march through the detonation site and join up with an airborne company (approximately 200 men) that was to be dropped in the area of "ground zero." This was done in order to emphasize to the troops "the high degree of safety in entering the area of ground zero immediately following an air burst of atomic bomb." Favish, *supra* note 1, at 946 n.39.

In assuming responsibility for troop safety, the DOD failed to take all the precautions the AEC had taken. Many soldiers did not have their own radiation badges; no protective clothing was issued; decontamination consisted of sweeping contaminated dust off personnel and equipment with brooms; and the soldiers were not warned of the true hazards of radiation exposure. *Id.* at 949-52.

cases,¹⁶³ to allow the children of atomic veterans to seek recovery for their injuries. A similar workers' compensation argument was unsuccessfully used in *Lewis v. United States*¹⁶⁴ by the wife of a serviceman who died in a plane crash. The *Lewis* case, however, did not involve an incident where the government acted in "conscious indifference" to the welfare of the serviceman. Rather, the case was based on the negligent and wrongful acts of government employees in maintaining, operating, and controlling the aircraft.¹⁶⁵ Thus, the case can be distinguished from the radiation cases where the government acted in a manner expressing wanton disregard for the safety of the servicemen involved.

Imposing this type of liability on the government is justified because the government waived its sovereign immunity through the FTCA. Under this waiver of immunity, the government is liable "in the same manner and to the same extent as a private individual under like circumstances," with certain exceptions.¹⁶⁶ The Veterans' Benefit Act and Workers' Compensation Acts are statutory remedies that take away the employee's right to tort actions, but courts do recognize exceptions to this waiver of tort action. The government, having consented to waive its sovereign immunity and be subject to the same liabilities as private individuals, should be treated like a private employer and be liable for acts of negligence that are willful and wanton and display a reckless disregard for human life.

Public policy and tort theory also support a right of action against the government when the government has acted in wanton disregard of servicemen's safety. In tort actions courts focus on the underlying economic theory of compensation; however, the deterrent effect of knowing that liability may result from one's negligent acts is another important purpose of tort law.¹⁶⁷ Servicemen need to have their health and safety protected as much as employees of civilian employers. The actions of the government in the radiation exposure incidents illustrates failure of the government to provide for the safety of the servicemen. By judicially expanding the *Feres* doctrine to deny the atomic veterans' children a right to recover for their injuries, the courts are failing to provide the government any incentive to ensure that the servicemen have adequate protection in future experiments involving potentially harmful substances. Thus, allowing the atomic veterans' children the right to pursue tort actions would promote the public policy of encouraging employers, including the government, to

¹⁶³See *supra* text accompanying notes 156-58.

¹⁶⁴663 F.2d 889 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

¹⁶⁵*Id.* at 890.

¹⁶⁶28 U.S.C. § 2674 (1976).

¹⁶⁷Prosser, *supra*, note 18, at 5.

take reasonable precautions to protect the health of their employees and, thereby, protect the health of the employees' unborn children.

V. THE NEED FOR LEGISLATIVE ACTION

Although the rationale of the district court in *Hinkie*¹⁶⁸ permits the servicemen's injured children to bring an action against the government under the FTCA, it does not solve the burden of proof problem the children will face when their case goes to trial. The elements of negligence are a legally recognized duty to conform to a standard of conduct to protect others from unreasonable risk, a failure to conform to the required standard, a reasonably close causal connection between the conduct and the resulting injury, and an actual loss or damage to the interests of another person.¹⁶⁹ All these elements must be proven before recovery is granted.

One of the greatest problems of proof facing the atomic veterans' children will be establishing a causal connection between their fathers' exposure to radiation and their resulting birth defects. Birth defects can be caused by any number of genetic problems and in utero occurrences, such as the mother's ingestion of a variety of drugs.¹⁷⁰ Often the only evidence available is "circumstantial evidence based upon expert opinion and statistical probabilities."¹⁷¹ In addition to not being able to show that radiation exposure of the father actually caused their injuries, the children may not be able to prove that the father was indeed exposed to radiation.¹⁷² These problems could be solved by shifting the burden of proof for causation from the plaintiff to the defendant.

Courts have permitted such a shift in the burden of proof on causation when an evidentiary void exists and the plaintiff can prove the elements of duty, breach of that duty, and an injury.¹⁷³ It has not been necessary for the defendant to actually have access to a greater volume of information than the plaintiff for the shift to occur.¹⁷⁴ Courts have also held that where a defendant's conduct actually helped create the evidentiary void, the burden of proof would be shifted to the

¹⁶⁸524 F. Supp. 277 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983). *See supra* notes 91-98 and accompanying text.

¹⁶⁹Prosser, *supra* note 17, at 5, 143.

¹⁷⁰*See Favish, supra* note 1, at 964-65, 968-69.

¹⁷¹*Id.* at 964-65.

¹⁷²The government failed to keep central records of war game participants, and millions of general files were destroyed by fire in 1973. *Id.* at 956-57.

¹⁷³*Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948).

¹⁷⁴*Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 593, 607 P.2d 924, 929, 163 Cal. Rptr. 132, 137, *cert. denied*, 449 U.S. 912 (1980).

defendant.¹⁷⁵ In the radiation cases, the government's conduct resulted not only in the soldier's exposure to harmful dosages of radiation, but also in the evidentiary void that now exists. The government knew at the time the atomic war games took place that radiation exposure was harmful to humans and could lead to future problems for both servicemen and their offspring.¹⁷⁶ Knowing this, the government still failed to develop a proper monitoring system to determine each soldier's level of radiation exposure. In fact, the DOD actually lessened the monitoring standards of the AEC.¹⁷⁷ Additionally, the government kept no central file system on the participants of the war games and lost millions of general files in a subsequent fire.¹⁷⁸ The government's actions have resulted in an evidentiary void that makes it virtually impossible for children to prove that their fathers were exposed to radiation and that the level of radiation exposure was sufficient to result in the genetic changes that led to the children's birth defects. Thus, under this fact situation, where the defendant has actually created the evidentiary void, the government and not the children should carry the burden of proof on causation.

However, shifting the burden of proof still may not assure recovery to the children. The government can still argue that even if the servicemen were exposed to radiation, the children cannot prove that their birth defects were caused by that radiation exposure. The government also can claim that even if the injuries were caused by radiation, recovery should not be allowed because it might "open the door for governmental liability to countless generations of claimants having ever diminishing genetic relationship to the person actually injured."¹⁷⁹ These arguments, combined with the federal courts reluctance to deal with this issue,¹⁸⁰ indicate the need for remedial action beyond the judicial level.

Congress has already acknowledged that the nuclear arms tests have resulted in injuries to the servicemen and has extended the Veterans' Benefit Act to compensate the soldiers for these injuries.¹⁸¹

¹⁷⁵*Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465 (1970). In *Haft* a father and son died in the hotel's swimming pool. The hotel had failed to provide a lifeguard for its patrons and it was reasoned that if a lifeguard had been provided, the plaintiff could have used the lifeguard's testimony to prove what actually led to the deaths. Thus, the court viewed the failure to provide a lifeguard as depriving the plaintiffs of a means of proving the facts of the case and shifted the burden of proof to the defendant.

¹⁷⁶See *supra* note 161 and accompanying text.

¹⁷⁷See *supra* notes 159-62 and accompanying text.

¹⁷⁸See *supra* note 172.

¹⁷⁹*In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 781 (E.D.N.Y. 1980).

¹⁸⁰See *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983).

¹⁸¹See *supra* note 109.

A similar "special remedy" could be made available to the children of the servicemen. Under this plan, the children would need to show that their fathers were in the military and took part in the nuclear war games. The children also could be required to prove that their injury is one that radiation exposure could cause. If the serviceman's military records were among those destroyed by fire, the burden of proof could shift to the government, requiring the government to show that the serviceman in question did not participate in the war games and was not exposed to radiation. Even if the serviceman's records are available, the government should have the burden of proving that the soldier's level of radiation exposure could not have caused the injuries because it was the government's failure to keep proper records on individual levels of exposure that created the evidentiary void. Thus, once it is shown that the soldier did participate in the war games and that his child has birth defects that are known to be caused or could be caused by exposure to radiation, the child would be entitled to benefits.

Congress also could limit recovery to the first generation of children.¹⁸² In this way, at least the servicemen's children will be compensated for their injuries, and the compensation will be somewhat uniform. At the same time, the government could avoid liability for "countless generations of claimants." Legislation also would allow the government to avoid lengthy and expensive litigation.

Finally, if Congress does not choose to provide for compensation to the children through special legislation, then Congress should redraft the FTCA to permit recovery by the children in federal courts. The Supreme Court has construed the FTCA as denying recovery for all injuries incident to service.¹⁸³ However, the Act actually denies recovery only under limited circumstances, specifically those injuries arising out of combat activities during time of war or incurred in a foreign country.¹⁸⁴ The lower courts have used the *Feres* doctrine to deny servicemen's children the right to recover under the FTCA. If Congress had intended this type of interpretation, then it would seem that Congress would have made a sweeping denial of recovery rights to soldiers instead of the very specific ones that it made.¹⁸⁵ In view

¹⁸²To further limit the application of this remedy, Congress could even include language indicating that once a serviceman had one child with birth defects, the serviceman would be on notice of the possibility of a problem and should seek genetic counseling. Therefore, any children born later would be said to be born with proper notice to the parents thus barring recovery for subsequent children on the basis of assumed risk. If Congress is unwilling to develop a separate plan for the children, then Congress should consider extending the Veterans' Benefit Act to provide compensation to the children by increasing the serviceman's benefit award.

¹⁸³*Feres v. United States*, 340 U.S. 135 (1950).

¹⁸⁴See *supra* note 24 and accompanying text.

¹⁸⁵See *supra* note 27.

of the Court's development of the *Feres* doctrine, it is time for Congress to address the issue by clarifying the FTCA provisions that deny servicemen the right to bring actions or drafting provisions to allow servicemen's children the right to seek recovery for their injuries in the federal courts.¹⁸⁶

VI. CONCLUSION

The courts should not extend the *Feres* doctrine to deny servicemen's children the right to bring an action under the FTCA for injuries resulting from the government's negligence in exposing servicemen to harmful radiation while on active duty. Although the original negligent act may be incident to service as described in the *Feres* doctrine, none of the underlying rationales of the doctrine, as enumerated by the *Stencel* factors, apply to the children's claims: The children have no special relationship with the government, they currently have no other feasible source of compensation, and suits brought against the government by "atomic children" will not result in a greater breakdown of military discipline than would suits brought by other civilians for injuries resulting from the nuclear weapons tests. In addition, allowing the suits to be brought would further public policy by making the government accountable for the injuries caused by its tortious acts thereby motivating the government to take action to prevent future injuries to its employees.

In those instances where the children are successful in reaching the trial courts, the government should bear the burden of proving lack of causation because the government created an evidentiary void, making it virtually impossible for the children to prove that their fathers were exposed to a level of radiation sufficient to cause the birth defects. Because liability still may be denied based on the failure of the children to establish that their injuries were actually caused by their fathers' exposure to radiation, Congress should develop a compensation scheme for the injured children. The government was grossly negligent in its management of the war games and should assume the responsibility of its negligence instead of placing the burden on the children or their families. Finally, if Congress chooses not to develop a compensation scheme, it should at least re-evaluate the provisions of the FTCA and amend them to permit the servicemen's children to bring an action under the Act. This way, the innocent victims of the government's quest for knowledge can be compensated for their injuries and suffering.

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¹⁸⁶See *Monaco v. United States*, 661 F.2d 129, 134 n.3 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

