
Money Talks: Searching for Justice through Compensation for Personal Injury and Death

Deborah R. Hensler

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Deborah R. Hensler, *Money Talks: Searching for Justice through Compensation for Personal Injury and Death*, 53 DePaul L. Rev. 417 (2013)

Available at: <https://via.library.depaul.edu/law-review/vol53/iss2/9>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

MONEY TALKS: SEARCHING FOR JUSTICE THROUGH COMPENSATION FOR PERSONAL INJURY AND DEATH

*Deborah R. Hensler**

“There’s no value, there’s no value for Gricelda. If gold is the best we have in this world, she was gold. If there’s something better than gold, she was that too.”

Michael James, whose wife Gricelda died in the World Trade Center on September 11, 2001¹

INTRODUCTION

It’s a familiar scenario. The victims of a defective product, medical malpractice, or catastrophic accident, or their surviving relatives, stand before the television cameras explaining why they have decided to sue. *It’s not the money*, they say. *Money cannot compensate us for our lost health, our emotional distress, our fears about what the future may hold in store. Money cannot bring back our loved ones. But we need to understand why this happened. We need to find out who was responsible. We need to make sure this never happens again.*² Some viewers may nod sympathetically: surely many of the victims need whatever money they can obtain from a lawsuit to pay medical bills, cover wage losses, provide for the health and education of children who have lost a parent. Other viewers may have a more cynical reaction: here is yet another group of greedy litigants, looking for someone to blame for life’s misfortunes, seeking to take a turn at the “tort lottery.”³

* Judge John W. Ford Professor of Dispute Resolution, Stanford Law School. Thanks to Julie McGuire, Jacqueline Curnutte, Erin Archerd, and Chien-Ying Yu for excellent research assistance.

1. Elizabeth Mehrin & Geraldine Baum, *Putting a Price on September 11th’s Human Loss*, L.A. TIMES, Aug. 21, 2002, at A1.

2. See, e.g., Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92 (Belkin quotes a coal miner’s widow who filed suit against Jim Walter Resources after her husband was killed in an accident in a mine owned by the company: “It’s not about the money . . . I don’t want this to happen to anyone else’s husband. I want the company to make things safer. But the money is the only thing you are allowed to sue for.”) *Id.*

3. Litigation critics have popularized the idea that tort litigation is a form of lottery. See, e.g., PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 200, 202 (1988); Eric Peters, *Captious Spin on the Wheel of Misfortune*, WASH. TIMES, June 10, 1996, at A17.

What happens next is often a mystery. Some lawsuits are dropped and, of those that proceed, most settle⁴—often with an agreement that the dollar amount of settlement will not be disclosed.⁵ But, in rare instances, the victims may appear again before the cameras after a jury has awarded them tens or hundreds of millions of dollars. *We have been vindicated*, they say. *The jury has sent a message. The money is not important. It cannot bring back our health. It cannot restore our loved ones to us.*

What are we to make of these scenes? Quite obviously the money is important. If no money were to be had, it would be foolish for victims to sue and impossible in most instances for them to find lawyers to represent them. Indeed, many tort litigation disputes turn less on the question of liability—whether the defendant did something wrongful—than on the question of damages—how much money plaintiffs should get.⁶ Are victims simply putting the best face on their self-interested pursuit of monetary compensation? Or does the money awarded by juries or paid in settlement by defendants have a meaning to victims beyond its value in the marketplace? What is the relationship between money and justice for tort claimants?

The terrible events of September 11, 2001, and the subsequent attempts to compensate and care for those who lost loved ones in the attacks on the World Trade Center and the Pentagon, provide an opportunity to explore how Americans think about the relationships among loss, compensation, and justice. The outpouring of charitable contributions, the establishment of the September 11th Victim Compensation Fund of 2001 (VCF), and publication of the rules that would be used to allocate charitable funds and VCF dollars provoked enormous controversy over the definitions of fair compensation and distributive justice. The controversy over the allocation of charitable

4. See Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002).

5. In 2002, South Carolina became the first federal district court to adopt a rule limiting sealed settlements (See D.S.C. Loc. Civ. R. 5.03(C), available at <http://www.scd.uscourts.gov/Rules/mon.2003/cv/chs.pdf>). See also Eric Frazier, *Judges Veto Sealed Deals*, 24 NAT'L L.J., Aug. 12, 2002, at A1. In some instances, judges have even sealed jury awards of damages. See Margaret Cronin Fisk, *Hey! We Just Won . . . Shhhhhh! An \$112 Million Award in 2001, A Lawyer's Career High Was Ordered Sealed*, 25 NAT'L L.J., Dec. 2, 2002, at A5. For commentary on sealed settlements, see Charles Notebloom, *Courts Get Wise to Harmful Secret Settlements*, TEX. LAW. Oct. 7, 2002, at 46; John Segal, *Sunlight or Shadow: South Carolina Bans Sealed Settlements*, 228 N.Y. L.J., Dec. 2, 2002, at S6.

6. For example, in their study of jury trials in Pima County, Arizona, Shari Diamond and Neil Vidmar found that defendants did not contest liability in 18% of cases reaching verdict. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1872 n.54 (2001).

contributions was widely reported by the media. Thousands of people, including victims and nonvictims, submitted comments on the proposed rules for the VCF to Special Master Kenneth Feinberg, which were mounted on the VCF website. In this Article, I analyze this commentary to explore how injury and wrongful death victims and the public think about the relationship between money and justice. Part II discusses the theoretical and practical perspectives on compensation that shaped my analysis. Subpart A reviews instrumental and expressive theories of compensation. Subpart B suggests how these theories may play out in practice, drawing on plaintiffs' statements about their motivation for litigating, as reported in book and newspaper accounts of actual civil damage lawsuits. Part III turns to the response to the September 11th attacks, focusing on concerns about how to compensate those who lost family members in the attacks. Subpart A discusses media accounts of the charitable and government responses to the losses suffered as a result of the September 11th attacks, focusing on the theories of compensation displayed in these accounts. Subpart B presents the results of my analysis of comments submitted to Special Master Feinberg, focusing on differences in interpretations of distributive justice between the members of the general public who submitted comments to the Special Master and those who lost family members in the attacks. Part IV discusses the implications of the analysis for the broader public policy debate over tort damages.

II. PERSPECTIVES ON COMPENSATION

Despite their seeming centrality to tort litigation, there has been little systematic research on accidental injury victims, and the research to date has focused on victims' decisions to claim, rather than their subjective valuations of their losses.⁷ We know very little about how accident victims who sue think about how much money they should

7. Although the conventional view of Americans is that they are highly litigious, to date, empirical research has found the opposite. Most people who are injured in accidents, in which there was another party who could have been construed as the injurer, never attempt to collect compensation from that party. Except in the case of automobile accidents, Americans usually attribute accidents that cause injuries to "fate," "nature," or their own clumsiness, laziness, or inattention. And even when their injuries are quite serious or quite costly, most Americans do not think of suing another person or entity unless they blame that person or entity for what occurred. See DEBORAH HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURY IN THE UNITED STATES* (1991). It is not clear why some people blame others for their misfortunes, while other similarly situated persons do not, although researchers have suggested that "scripts"—learned social responses—may explain higher rates of claiming in automobile accidents, by comparison with other accidents. See Robert MacCoun, *Blaming Others to a Fault?* 6 CHANCE 18 (1993).

and do ultimately get.⁸ There has been considerably more research about how juries decide tort cases and award damages.⁹ Juries are instructed to consider specific types of damages (e.g., past medical expenses, work loss) when deciding what amount of compensation to award to successful plaintiffs. Empirical research shows that compensatory damage awards are correlated with injury severity, which in turn is correlated with economic loss,¹⁰ suggesting that jurors generally follow these directions. In contrast, when deciding what amount to award for nonmonetary loss (general damages), juries are given little or no guidance. Perhaps not surprisingly, there is wide variation in the general damages components of jury verdicts.¹¹ Vidmar argues that, rather than reflecting an absence of specific guidelines, variability in general damages may reflect jurors' careful analysis of legitimate elements of nonmonetary loss (e.g., disfigurement, loss of consortium, hedonic damages) and their analysis of the highly varied consequences of such nonmonetary losses for plaintiffs.¹² But there has been little research on how jurors think about the task of setting a value on the noneconomic component of personal injury or death. Nor do we know what the relationship is between jurors' and victims' valuations of loss and life.

8. Most tort litigants are represented by lawyers, and it is reasonable to suppose that their lawyers shape their expectations about the economic value of their suits. E. Allan Lind et al. found that a majority of tort litigants got less than they had anticipated at the beginning of the suit. But Lind et al. did not explore how litigants arrived at their assessments of how their losses should be valued for compensation purposes. See E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* (1989).

9. For reviews of recent findings, see Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002). Researchers have explored, *inter alia*, how defendant characteristics affect liability decisions (see, e.g., Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121 (1996)); the degree of variability in compensatory awards, conditional on injury severity (see, e.g., Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1989)); and how cognitive biases (e.g., "anchoring") and group dynamics affect punitive damages awards (see, e.g., David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998)).

10. See, e.g., Bovbjerg et al., *supra* note 9; see also PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* (1985). But jurors may sometimes take into account other legally inappropriate factors such as insurance and attorney fees. See also Diamond & Vidmar, *supra* note 6.

11. See, e.g., Bovbjerg et al., *supra* note 9.

12. Vidmar, *supra* note 9.

A. Theories of Compensation

1. Deterrence

Over the past several decades, tort scholarship has been dominated by economic analyses. Law and economics scholars argue that the primary purpose of tort damages is deterrence, not compensation.¹³ From a deterrence perspective, arriving at the proper level of compensation for accidental injury and wrongful death victims is a matter of determining what amount of damages should be imposed on wrongdoers *ex post* in order to assure that *ex ante* potential wrongdoers will weigh the costs of injury against the benefits of productive activity. Performing this calculation requires making complex behavioral assumptions about risk-taking and risk-avoiding behavior of injurers and victims, victims' disposition to claim, and other legal actors' decisions, including lawyers, judges and juries. Victims' valuations of their losses enter into deterrence analyses only to the extent that *ex ante* such valuations deter the victims' own risky behavior.¹⁴

2. Corrective Justice

We might anticipate that tort scholars who champion a corrective justice rationale for tort compensation—a rationale that is deontological rather than utilitarian—would be more interested than deterrence theorists in the victim's perspective because it is the victim who has suffered the injustice that needs correcting.¹⁵ But corrective justice theorists' arguments for when victims deserve compensation depend (at least in some versions of the theory) on their beliefs about when harmdoers should have to pay those whom they injure. Hence, while they may begin with a concern about victims, corrective justice theorists often move on rather quickly to questions surrounding

13. For a review and synthesis of this literature, see Richard Craswell, *Instrumental Theories of Compensation: A Survey*, 40 SAN DIEGO L. REV. 1135 (2003).

14. Some analysts have considered the possibility that victims' estimations of their losses *ex ante* and *ex post* may differ. See, e.g., Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773 (1995); Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995). But these analyses are not based on empirical inquiries into actual victims' valuations of their losses.

15. Corrective justice theory lacks the coherence that derives from economists' single-minded pursuit of social welfare maximization. Some corrective justice theorists view the rejection of economic analysis of torts as a core principle; others embrace some aspects of economic analysis while viewing them as having only secondary importance. For a discussion of the history of modern corrective justice theory, see George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279 (2002).

harmdoers¹⁶—which leaves them very much in the same territory as deterrence theorists.¹⁷

Most corrective justice scholars have not invested much energy in parsing different kinds of losses or in thinking about how victims themselves might value different kinds of losses.¹⁸ But philosopher Jean Hampton argues that distinguishing among different kinds of losses is essential to deciding when the law ought to exact retribution from harmdoers and when mere compensation for harmful behavior may suffice.¹⁹ Hampton argues that only behavior that inflicts moral injury is deserving of retribution.²⁰ Wrongful injury to material worth can be corrected by compensating the injury victims for their material losses. Hampton defines moral injury as a denial or diminishment of a person's intrinsic value, a failure to recognize certain "entitlements"

16. Victims have also received surprisingly little attention in criminal law scholarship, despite their prominence in the public discourse on crime. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 *BUFF. CRIM. L. REV.* 51 (1999).

17. See, e.g., Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349 (1992). In his early writings, Coleman argued that the situations of the injurer and injured could be considered separately. See Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 *CHI-KENT L. REV.* 451 (1987). However, later, Coleman became persuaded that the relationship between injurer and victim (termed variously "connectedness" and "correlativity") was central to the notion of corrective justice. See Jules L. Coleman, *Adding Institutional Insult to Personal Injury*, 8 *YALE J. ON REG.* 223 (1991); Jules L. Coleman, *The Practice of Corrective Justice*, 37 *ARIZ. L. REV.* 15 (1995). Under the principle of "correlativity," corrective justice contains an element of distributive justice: the wrong that has to be "corrected" is the misallocation between the wrongdoer's gains (from his illegitimate behavior) and the victim's consequential losses. But this distributive element is arguably different from distributive justice defined as a macro-level allocation of societal resources. See Fletcher, *supra* note 15.

18. What amount wrongdoers should pay victims—whether they should disgorge their ill-gotten gains or cover victims' losses, and what should happen if the two are not equivalent—has been the subject of scholarly debate. See Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 *DUKE L.J.* 277 (1994) (considering whether the losses imposed on the wrongdoer's victim can be conceptualized as equivalent to the gains enjoyed by the wrongdoer as a result of his sanctionable behavior). Weinrib distinguishes between "material" conceptions of gain and loss—defined as actual resources obtained and gained as a result of the injurer's behavior—and "normative" conceptions—defined as the "discrepancy between what the parties have and what they should have according to the norm governing their interaction." *Id.* at 282-83. But whether losses and gains are defined in terms of material or norms, corrective justice theorists' perspective is what ought to be required of the wrong-doer, rather than what might be deserved by the victim.

19. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1666 (1992).

20. Hampton's theory of retribution is not limited to criminal punishment but rather encompasses all efforts to vindicate the moral value of the injured victim; indeed, she suggests that in some instances the award of punitive damages in civil lawsuits might better satisfy this objective than criminal punishment. *Id.* at 1687-89. (discussing Marc Galanter and David Luban's analysis of the jury's punitive damage award in the Ford Pinto Case). See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 *AM. U. L. REV.* 1393 (1993).

that are associated with the person's value.²¹ Importantly, Hampton's theory of moral injury is grounded on an objective assessment of the affront to dignity, an assessment that rests on the *social meaning* of the harm or wrongful act.²² Whether the victims themselves understand or recognize the affront is not relevant to deciding whether the law should aim at retribution.²³

Although, for Hampton, the idea of moral injury is central to a theory of retribution, but not central to a theory of compensation, the notion of dignitary injuries may in fact be important to understanding how tort victims think about compensation. Whether or not they regard their injuries themselves as affronts, tort victims may evaluate offers of compensation and awards, not just in terms of how well these offers and awards match material losses, but also how well they accord with their sense of personal dignity.²⁴

3. *Distributive Justice*

Experimental psychologists and behavioral economists have found that, in a wide variety of social contexts, people evaluate monetary exchanges in terms other than, or in addition to, economic self-interest.²⁵ Psychologists who study people's preferences for, and assessment of, the fairness of different schemes for allocating scarce resources have found that individuals do not always favor distribution rules that maximize their self-interest. In many circumstances, people prefer distribution rules that equalize the ratios between individuals' contributions to group activity—for example, hours worked or level of effort—and outcomes (e.g., wages) across group members. People may even prefer a merit or contribution-based distribution principle when its adoption would lead to they themselves receiving less of some scarce resource than they would otherwise.²⁶ When individuals

21. Hampton, *supra* note 19, at 1674, 1678. As Hampton explains, her notion of moral worth is equivalent to Kant's egalitarian definition of human worth. Hampton suggests that the "entitlements" to respect that derive from humans' value as "ends in themselves" might also be understood as "rights" but does not develop that point further in this paper.

22. *Id.* at 1677-78.

23. *Id.* at 1671.

24. As indicated above, Hampton's theory of retribution does not require that the victim of wrongdoing recognize an affront. In contrast, I focus on victims' subjective assessments of compensation offers and awards. However, in practice, the difference may collapse if a victim's subjective assessment is based on her understanding of how others will interpret the meaning of the offer or award.

25. For a review of this literature, see Ernst Fehr & Urs Fischbacher, *The Economics of Reciprocity* (on file with author). See also Dale Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOLOGIST 1, 1053 (1999).

26. See J. Stacy Adams, *Inequity in Social Exchange*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (Leonard Berkowitz ed., 1965); MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE*:

find themselves in situations that they view as inequitable—for example, because those whom they view as more meritorious receive lesser rewards than those whom they view as less meritorious—they will take actions to resolve these inequities, sometimes including actions that reduce their own rewards.²⁷ These findings suggest that people evaluate distributive outcomes in terms of their social meaning, as well as in terms of economic self-interest.²⁸

Preferences for different distributive justice principles vary with the social context in which resources are to be allocated.²⁹ In task-oriented contexts, such as the workplace, most people prefer equitable or contribution-based distribution. But in contexts in which individuals' group identification outweighs concern about individual effort—for example, church groups or other social organizations—people may prefer to distribute benefits (and costs) equally among group members. Dividing resources and expenditures equally avoids making invidious comparisons among members that might threaten group solidarity. In intimate caring relationships, such as the relationship between parents and young children or adult children and their elderly parents, people may wish to distribute resources according to need, without regard to merit or equality concerns. Because objectively similar social contexts may be perceived differently according to circumstance, it may be possible to manipulate individuals' distributive justice preferences by changing their perceptions of context.

A SOCIAL-PSYCHOLOGICAL PERSPECTIVE (1985). For a review of the extensive social psychological research on distributive justice, see Karen A. Hegtvedt & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 93 (Joseph Sanders & Lee Hamilton eds., 2000). Unfortunately, there has been little effort to date to apply distributive justice theory to empirical research on legal disputes.

27. Hegtvedt & Cook, *supra* note 26, at 96. Individuals may resolve perceived inequities by exaggerating their own contributions—a self-interested move—or by devaluing their own contributions (so as to rationalize a lesser reward). See Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151 (1973).

28. Sociologists and psychologists have written about the noneconomic meanings of money. See, e.g., VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994) (discussing how class, gender, and other socio-economic variables affect the way money is perceived and handled); ADRIAN FURNHAM & MICHAEL ARGYLE, *THE PSYCHOLOGY OF MONEY* (1998) (discussing attitudes towards money and patterns of behavior in obtaining, spending and saving money). But these works do not treat the question of how tort compensation is interpreted by plaintiffs.

29. Although there is empirical evidence that social context affects preferences for different distributive justice principles, other factors also affect allocation preferences, including: identity of the allocating decision-maker (e.g., gender); the activities in which the group is engaged (e.g., cleaning up the family home versus celebrating a family holiday); and the cultural context in which the allocation is taking place (e.g., Americans appear to have a stronger preference for equitable allocations than Northern Europeans or Southeast Asians). It is hard to discern clear explanations for allocation preferences from the hundreds of studies that have been conducted. Nor has anyone developed a compelling theoretical framework in which to subsume the myriad and other conflicting study results. See Hegtvedt & Cook, *supra* note 26.

The tort system's approach to determining damages—striving to make the faultless injured plaintiff (or the dependents who lost a family member as a result of someone else's wrongful action) "whole"—does not fit precisely any of the three common definitions of distributive justice. (Hence, perhaps, the attractiveness of the law-and-economics deterrence rationale for damage calculations.) The contribution or equity principle dominates the calculation of what it takes to make the injured plaintiff whole, the need principle plays a modest role, and the equality principle is nowhere to be seen. Liable tort defendants are required to pay for plaintiffs' lost market value (e.g., wage loss, market value of household contributions, etc.), for past and future medical needs (including medical bills, rehabilitation, and physical aids) and for nonmonetary losses (e.g., "pain and suffering"). In principle, there is no adjustment to the market value calculation—arguably a measure of social contribution or merit—to reflect need or equality concerns. Plaintiffs whose annual earnings were in the tens of millions prior to injury are owed all of that amount (if they experienced full wage loss and were not deemed negligent themselves), and plaintiffs who earned below minimum wage prior to injury are owed only that amount.³⁰ Insurance adjusters routinely calculate pain and suffering damages as a multiple of economic loss,³¹ so that in ordinary litigation these damages mainly reflect the market's assessment of the injured person's worth as well. And, under the collateral source rule, the fact that a plaintiff's needs will be covered by disability, health, or other insurance is not factored into the calculation of damages owed to that plaintiff.

In wrongful death cases, state statutes specify how economic loss is to be calculated. Typically, loss calculations reflect estimates of the decedents' future earnings and contributions to their households. Need may be factored into the damages calculation by subtracting the deceased's own consumption of resources from the amount deemed to represent the deceased's lost future contributions to the household. But equity principles shape both the definition of contribution (e.g., the deceased's wage and benefits package) and the definition of consumption (e.g., the deceased's expenditures, which surely reflect wages and benefits). Rather than imposing a societal definition of

30. In practice, damage awards for plaintiffs at the high end of the income distribution may be capped by defendants' insurance limits or for other reasons. See, e.g., ELIZABETH KING & JAMES SMITH, *ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS* (1988). But settlement amounts do roughly track economic loss. See, e.g., DANZON, *supra* note 10.

31. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 108 (1980).

need on the damage calculation, the tort system accepts the market's definition of worth.³²

Notwithstanding tort doctrine and practice, the need and equality principles of distributive justice may be brought back into the calculation of damages by jurors, if their perceptions of tort victims—as fellow workers or fellow members of a closely-knit community or as members of their extended “family”—influence their awards. Such considerations may help to explain “outlier” jury awards—for example, the award of \$150 million by a Mississippi jury to six asbestos workers who claimed asbestos related injuries but no functional impairment.³³

4. *Procedural Justice*

In most circumstances, tort victims themselves are not in a position to evaluate the distributive justice of tort outcomes because they have little information about how similarly situated plaintiffs fare.³⁴ “Routine” tort settlements rarely make the news; it is only the largest settlements and verdicts that catch the attention of the media.³⁵ Social psychological research on the perceived fairness of dispute resolution and other transactional procedures suggests that laypeople may use their intuitions about the fairness of procedures as a proxy for assessing outcome fairness in situations when they cannot compare their

32. The controversy over the VCF's rules for calculating damages reflected, in part, differences in expert opinions about how to translate legal definitions of loss in wrongful death cases into economic calculations. Although experts differ in their procedures for performing loss estimations, their estimates rest on the human capital approach to valuing life. See KING & SMITH, *supra* note 30.

33. *Mississippi Jury Returns \$150M Verdict Against AC&S, Dresser Industries, 3M Corp.*, MEALEY'S LITIG. REP.: ASBESTOS, Nov. 9, 2001, at 4.

34. Plaintiffs' ability to compare compensation offers may be enhanced in high profile liability cases. For example, when Libya offered \$2.7 billion in compensation to 270 families who lost relatives in the 1988 aircrash over Lockerbie, Scotland (which was attributed to Libyan agents), France objected to the settlement on the grounds that it would give more money to the Lockerbie families than to the families who lost relatives in a 1989 aircrash in Niger that was also traced to the Libyan government. See Craig Smith, *Libya To Inflate Amount Paid in '89 Bombing*, N.Y. TIMES, Sept. 1, 2003, at A7. The 1999 Niger settlement totaled \$33 million in compensation for 170 deaths. Felicity Barringer, *U.N. to Weigh Proposal To End 1988 Penalties Against Libya*, N.Y. TIMES, Aug. 19, 2003, at A13. As a condition for lifting sanctions against Libya, as specified in the Lockerbie settlement, the French government demanded that Libya provide additional money to the Niger aircrash victims. *Id.*

35. See Donald S. Bailis, & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEH. 419 (1996). Because the media over-reports plaintiff victories and high jury awards, including punitive damage awards, tort victims may tend to overestimate the value of their claims.

outcomes to others'.³⁶ Like distributive justice, procedural justice is interpreted socially: perceptions of procedural fairness are strongly linked to concerns about self-worth, defined in relation to social group standing.³⁷

Perhaps plaintiffs view settlement offers and jury verdicts as indicating their relative group standing and assess these offers—and how “fair” or “just” the offers or verdicts are—in relation to what the amounts signal about plaintiffs’ and their loved ones’ social “market value,”³⁸ rather than in relation to their actual losses, both economic and noneconomic. Such views might have particular import in wrongful death and catastrophic neonatal injury cases when defendants and juries are explicitly called upon to place a value on the deceased or catastrophically injured person’s life. When plaintiffs perceive tort outcomes as signaling that society does not place a high value on the lives of these loved ones, they may experience a moral injury or affront to their personal dignity.³⁹ Conversely, they may seek high settlement or awards to confirm that their loved one’s life had value.

B. *How Plaintiffs Think About Tort Compensation*

What little we know about how tort victims think about their losses⁴⁰ comes to us from book-length depictions of tort lawsuits and news reports.⁴¹ In these accounts, victims talk about their need for money, but also about their desires for accountability. They also talk

36. See Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW, *supra* note 26; E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993).

37. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 230 (1988).

38. Margaret Radin has written about how “universal commodification” rhetoric shapes people’s attitudes and behaviors in a wide range of contexts. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

39. The idea that legal outcomes have noninstrumental or expressive purposes and consequences has figured prominently in recent legal scholarship. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

40. The “we” here refers to those of us who do not practice tort law. Plaintiffs’ lawyers obviously have considerable experience discussing loss and compensation with their clients. However, I am not aware of any empirical research on claimants’ valuation of their losses that has been conducted using plaintiffs’ attorneys as sources.

41. Mass tort litigation especially has spawned a number of marvelous books on the evolution of civil damage lawsuits, drawing on interviews with key participants, as well as court documents. See, e.g., MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996); MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* (1985); JOSEPH SANDERS, *BENEDICTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* (1998); RICHARD R. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON BANKRUPTCY* (1991); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

about how monetary offers of settlement confer (or withhold) social standing on their injured or lost loved ones—and, by extension, on them. Because most of these plaintiffs are only aware of their own circumstances (or of a few other people in similar circumstances), they rarely compare their experiences to others’.

Of course, the voices of these victims are filtered through the reporters’ ears, which may well have been tuned to pay more attention to some of the victims’ statements than to others. Moreover, the victims themselves, knowing they are speaking “for the record” may naturally attempt to present themselves in the best light possible. Nonetheless, what victims tell reporters offers some indications of the ways in which victims think about their losses.

Few of the plaintiffs in these narratives deny having an interest in getting money to compensate them for their economic and emotional losses. Speaking about the settlement of a lawsuit on behalf of her severely impaired son who allegedly was injured at birth, Donna Sabias says:

I didn’t feel like we had answers . . . I felt, okay, now we can pay our bills.⁴²

Another time she recalls telling her lawyer:

No amount of money is going to justify what’s happened to this family.

But she also recalls telling the lawyer that money could provide material support that would help to ameliorate the family’s situation.⁴³

Although money is an objective, plaintiffs claim to have other objectives as well. Talking to his lawyer about what he wants from the lawsuit on behalf of his son, Tony Sabias says:

Show me an admission of guilt, . . . and I don’t want a thing.⁴⁴

Discussing whether to settle a suit brought on behalf of his young son, who died of leukemia, allegedly as a result of drinking contaminated water in Woburn, Massachusetts, Richard Toomey says:

I didn’t get into this for the money. I got into this because I want to find them guilty for what they did. I want the world to know that.⁴⁵

Responding to a \$2.7 billion settlement of claims against Libya arising out of the 1988 bombing of an airliner over Lockerbie, Scotland, Stephanie Bernstein, who lost her husband in the crash said:

42. BARRY WERTH, DAMAGES: ONE FAMILY’S LEGAL STRUGGLES IN THE WORLD OF MEDICINE 210 (1998).

43. *Id.* at 312.

44. *Id.* at 367.

45. JONATHAN HARR, A CIVIL ACTION 442 (1995).

I'm very pleased. It says in front of the whole world that the Libyan regime ordered this and that they're responsible.⁴⁶

Plaintiffs see making defendants pay money as a means towards these nonmonetary ends. Writing about the death of her husband allegedly as the result of medical negligence, Sandra Gilbert says:

[M]oney isn't the issue But accountability is. How do you ensure accountability without punitive damages? How do you keep irresponsible doctors from killing people if they don't have to pay for their mistakes? I mean, no sum of money can replace my husband, but⁴⁷

But plaintiffs often learn that settlements do not serve their ends. Talking about the settlement of the Agent Orange class action lawsuit, Vietnam veteran Michael Ryan says:

The settlement doesn't establish the truth. How am I supposed to explain to Kerry [his daughter] what happened to her? Where was her day in court?⁴⁸

Only rarely do these accounts show us vengeful plaintiffs.⁴⁹ But occasionally plaintiffs invoke the concept of corrective justice, describing their desire to hurt defendants, as they have been hurt. Talking about what motivated her to sue the manufacturer of the Dalkon Shield, a plaintiff says:

I felt that the A.H. Robins Company knew what they were doing to these women. They knew. I wouldn't care if I hadn't gotten two cents out of it, if the publicity would make people realize what a crummy company that is.⁵⁰

But often plaintiffs find they cannot hurt defendants enough. Discussing settlement of her claim against the Woburn, Massachusetts toxic tort defendants, Dana Robbins says:

[S]ix point six million . . . I don't think that hurts them enough.⁵¹

Another Woburn plaintiff says:

I hate them, those people who put the stuff into the ground. Why can't they lose a son or daughter? Taking their money is not going to hurt them.⁵²

46. Lynette Clemetson, *Lockerbie Victims' Relatives See Glimmer of Hope*, N.Y. TIMES, Aug. 16, 2003, at A6. Some of the Lockerbie victims' families objected to the terms of the settlements, which offered more money to the families if the United States lifted sanctions against Libya. *Id.*

47. SANDRA M. GILBERT, *WRONGFUL DEATH: A MEDICAL TRAGEDY* 217 (1994).

48. SCHUCK, *supra* note 41, at 171-72.

49. There is, in fact, little reason to believe that tort victims generally are motivated by retribution or revenge. See HENSLER ET AL., *supra* note 7.

50. MINTZ, *supra* note 41, at 13.

51. HARR, *supra* note 45, at 443.

52. *Id.* at 150.

Sandra Gilbert writes of the doctors whom she believes caused her husband's death:

[E]ven if we define payments for a family's pain and suffering as in some sense punitive damages . . . it is questionable whether any kind of punishment can inflict upon [the doctors] will mean very much to any of [them] personally. Not one of [them are] out of pocket because of Elliot's death; not one of [them have] ever been asked to apologize to me, much less compensate me for my loss.⁵³

Speaking of the proposed settlement of the Lockerbie air crash claims, Susan Cohen, who lost her daughter in the crash, says:

My daughter is dead, and he [Libyan leader Muammar el-Qaddafi] is not, and there is nothing they can say, no amount of money, that can restore what I've lost.⁵⁴

Sometimes in these accounts people struggle to explain the relationship between obtaining money for lost lives or injuries and justice. Such issues have been central to accounts of the litigation against Swiss banks and German industry on behalf of holocaust victims. Discussing his reasons for leading the effort to obtain compensation for holocaust victims, Israel Singer says:

What we are doing today is rehumanizing these individuals posthumously and saying that the grand theft that took place in fifteen countries was not permissible. That rehumanization and rebreathing of life into these people, into these dry bones, is what our activity is all about. It's not about money.⁵⁵

But after multi-billion dollar settlements have been reached with Swiss banks and German corporations, he is not certain that he achieved his aims:

It hasn't produced something lasting [he says]. I am proud of the fact that I got 92,500 new pensions for Eastern Europeans, where people were struggling. Those people's lives have been changed immeasurably. But maybe I didn't succeed in what I wanted to do. Maybe these dollars are all I got, and I didn't succeed in getting all I wanted. Just one billion dollars of the money are important, but the other five or six billion, I don't know how important they are.⁵⁶

Talking about the money offered to settle claims of Holocaust victims, Auschwitz survivor Jamie Rothman says:

It's not justice. Whenever you touch the subject, and you put the money and the suffering together, it's not the way to do it.⁵⁷

53. GILBERT, *supra* note 47, at 332.

54. Clemetson, *supra* note 46.

55. JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIMS' FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST 2* (2002).

56. *Id.* at 381-82.

57. *Id.* at 1.

After receiving his own share of the settlement, he still feels the same way:

The point is always the same Too little, too late. But if it had been earlier or larger, it would have been no more moral.⁵⁸

Commenting on the settlement of the Lockerbie air crash claims against Libya, Dan Cohen, who lost a daughter in the crash said:

This is supposed to be about justice and the truth. Instead, what the Libyans proposed amounted to a bribe.⁵⁹

Beyond compensation, beyond accountability, perhaps even beyond justice, there is the sense that money confers meaning, acknowledgment of what has happened, of what has been lost. Talking about his ineligibility for a victims' compensation fund established for those injured and killed by the Washington, D.C. snipers in 2002, Paul Ruffa says:

They keep saying that mine was just a robbery. I got shot six times. To me it was not just a robbery It's all about acknowledgement, it's not about money, although money is money. It's about acknowledging that it was more than just a robbery. He tried to kill me first⁶⁰

Writing of her husband, Sondra Gilbert asks:

How would one calculate a sum to replace the dead person? Would some jury decide on, say, \$100,000 for his hands, \$50,000 for his beard and his thick dark eyebrows, \$75,000 for his hazel eyes?⁶¹

Anguished, angry, or disappointed, the voices of plaintiffs heard in these accounts captured the attention of authors and reporters. But how often do those who have been injured by others through no fault of their own think about obtaining compensation so as to punish those who harmed them or deter future wrongdoers? Do people compare their misfortunes to others when deciding what, if anything, they are owed for their misfortune by those who harmed them or by society generally? Does the experience of tort litigation—becoming a legal victim—somehow change how people interpret what has happened to them or how they assess what is owed them? The losses wreaked by the September 11th attackers provided an occasion for a national discourse on society's obligations to victims and the role of the tort system in meeting these obligations.

58. *Id.* at 387.

59. Clemetson, *supra* note 46.

60. Jayson Blair, *Peace and Answers Eluding Victims of the Sniper Attacks*, N.Y. TIMES, Feb. 10, 2003, at A1.

61. GILBERT, *supra* note 47, at 217.

III. THE MEANING OF MONEY.

Because the statute authorizing the September 11th Victim Compensation Fund of 2001⁶² was adopted so quickly, Congress missed (or avoided) the opportunity for a public debate about who should be eligible for compensation, how that compensation should be allocated, and who should pay the costs of compensation.⁶³ Congress quickly decided that all those who lost family members in the attacks on the World Trade Center and the Pentagon and the air crash in Shanksville, Pennsylvania would be compensated by taxpayers, and that state tort law (with a few notable exceptions) would provide the model for allocation.⁶⁴ Detailed eligibility and loss assessment rules were left to a special master (whose role was specified in the statute) to determine.⁶⁵ But the public debate over fairness that Congress avoided when it passed the statute arose quickly thereafter.

A. *Giving Away Money:*⁶⁶ *The Public Debate*

Even before Special Master Kenneth Feinberg was appointed, the rationale for the Fund was being questioned, and after his appointment the debate ratcheted sharply upward. In the three months following the attacks, the *New York Times* published seventy articles (including opinion editorials and letters) dealing with victim compensation.⁶⁷ By September 14, 2001, the *Times* had a letter from a reader worried by the “disgusting thought” that victims would be generating “billions in legal fees for lawyers who represent them,” and asking

62. Air Transportation Safety and System Stabilization Act, tit. 4, Pub. L. 107-42, 115 stat. 230 (2001).

63. For discussions of the legislative history and public policy rationales for government compensation of the September 11th victims, see Robert S. Peck, *The Victim Compensation Fund: Born From a Unique Confluence of Events Not Likely to be Duplicated*, 53 DEPAUL L. REV. 209 (2003) and Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627 (2003). See also Belkin, *supra* note 2.

64. For discussions of the VCF's rules, see Kenneth P. Nolan & Jeanne M. O'Grady, *The Victim Compensation Fund—Looking a Gift Horse in the Mouth*, 53 DEPAUL L. REV. 231 (2003).

65. Air Transportation Safety and System Stabilization Act § 404(a)(2). Attorney General John Ashcroft appointed Kenneth Feinberg Special Master on November 26, 2001. See U.S. Dept. of Justice, *Attorney General Ashcroft Names Special Master To Head September 11th Compensation Program* (Nov. 26, 2001), available at www.usdoj.gov/victimcompensation/dojpr2.pdf (last visited Sept. 13, 2003).

66. I borrow this subtitle from my former colleague Mark Peterson's article on mass tort claiming facilities. See Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, LAW & CONTEMP. PROBS., Autumn 1990, at 113.

67. The first *New York Times* article on compensating victims' families appeared on September 20, two days before Congress passed the Air Transportation Safety and System Stabilization Act.

Congress to provide financial support as a substitute for “insurance and lawsuits.”⁶⁸ Within two weeks of Congress’s adoption of the VCF, the *New York Times* was reporting that the Fund had already “begun to generate both resentment and confusion about its ultimate fairness and effectiveness.”⁶⁹

Concurrent with the debate over the Fund, there was mounting controversy over the role of charitable organizations in compensating the victims of the September 11th attacks.⁷⁰ The *New York Times* published 168 articles (including editorials and letters) on charitable responses to September 11th between September 12 and December 31, 2001.⁷¹ As millions of dollars in donations arrived on their desks from all parts of the globe, charitable organizations struggled to devise rules for assisting the victims. Some charitable organizations reached out beyond the immediate victims to those who had not been at the attack sites but nonetheless suffered significant economic losses, and many organizations offered a variety of forms of assistance. The multiplicity of organizations involved in the charitable effort raised significant coordination issues.⁷² Moreover, as the VCF’s rules began to take shape, questions arose about how the charitable organizations’ activities would intersect with the Fund’s decisions.⁷³

A central question in the public debate was how to allocate government and charitable funds among victims whose situations prior to the attacks were vastly different. As time progressed, some also questioned the appropriateness of treating September 11th victims and their losses differently from the victims of other terrorist attacks or from victims of misfortune more generally.⁷⁴ “Why is it right for a

68. Tom Olson, *Letter to the Editor*, N.Y.TIMES, Sept. 16, 2001, at 4-10.

69. See Diana B. Henriques & David Barstow, *A Nation Challenged: Victims’ Compensation; Fund for Victims’ Families Already Proves Sore Point*, N.Y.TIMES, Oct. 1, 2001, at A1.

70. For discussion of charitable contributions to September 11th victims, see Robert A. Katz, *Too Much of a Good Thing: When Charitable Gifts Augment Victim Compensation*, 53 DEPAUL L. REV. 547 (2003).

71. Some of these articles also referred to the Victim Compensation Fund. Some articles related to the September 11th charities referred to Islamic organizations that were suspected of aiding terrorists. My search excluded these articles but unintentionally may also have excluded articles about Islamic organizations that were attempting to aid the terrorists’ U.S. victims.

72. See, e.g., *Editorial, Charity and Red Tape*, N.Y.TIMES, Oct. 30, 2001, at A16; Frank Bruni, *Show Us the Money*, N.Y.TIMES, Dec. 16, 2001, § 6 (Magazine), at 60.

73. See David Barstow & Diana B. Henriques, *A Nation Challenged: The Charities; Debate Over Rules for Victims Fund*, N.Y.TIMES, Nov. 6, 2001, at A1.

74. By the end of November, legislation had been introduced in Congress providing compensation to victims of other terrorist events. See Diana B. Henriques & David Barstow, *A Nation Challenged: The Federal Fund; Officials Move to Aid Families of Embassy Bombing Victims*, N.Y.TIMES, Nov. 30, 2001, at B9. See also *September 11th Compensation: The Impossibility of Making Whole*, ECONOMIST, Apr. 12, 2003, at 65-66; Elizabeth Kolbert, *The Calculator: How*

New York stockbroker's widow to be given millions of dollars and not a poor farmer's family in Oklahoma?" asked a woman who had lost her four-year-old daughter in the 1995 attack on the Murrah Federal Building in Oklahoma City.⁷⁵

Commentary on the government program and on charitable giving invoked all of the different concepts of distributive justice that social psychologists have observed in their research. Invoking the *equity* principle, some families of rescue workers argued that they deserved a larger share of charity than other victims' families because their relatives sacrificed their lives to save others,⁷⁶ and some families of private security officers who lost their lives in the World Trade Center said that it was unfair that they had received so little from various private and public funds compared to the families of firefighters.⁷⁷ Families of civilian victims argued that many were called to heroic acts on September 11th. "Nobody got up to the floors where my husband was," one victim's wife was quoted as saying. "Don't tell me there weren't people up there trying to do heroic things. They had to be their own heroes and help each other."⁷⁸

Invoking the *equality* principle, some families argued that all victims, or all victims within a certain group, should get paid the same amount, and some charities paid equal benefits to victims, without regard to need.⁷⁹ "I just believe everyone should be treated equal," said the wife of a private security guard who died in the attacks, "I don't think one should get more than the other. We're all in it together."⁸⁰ "This is not equal," said Kathleen Teanor, the Oklahoma mother who

Kenneth Feinberg Determines the Value of Three Thousand Lives, NEW YORKER, Nov. 25, 2002, at 49.

75. Belkin, *supra* note 2, at 95. Kathleen Treanor, the Oklahoma mother quoted in Belkin's article, eventually filed a lawsuit charging that Congress violated the Fourteenth Amendment's Equal Protection Clause when it established the September 11th compensation fund. Seeking answers herself for the disparate treatment accorded victims of different misfortunes, reporter Belkin asked, "Are we a country . . . [that] treats compensation [for injury and death] matter-of-factly, as a way to address a surviving family's basic needs? Or is money for us a metaphor, meant to signal our regret?" *Id.* at 149.

76. David Barstow, *A Nation Challenged: The Charities; Those Who Lost Homes or Jobs Are To Get \$2,500 Grants*, N.Y.TIMES, Dec. 12, 2001, at B11.

77. Steven Greenhouse, *A Nation Challenged: Compensation: Survivors See Inequity in Aid to Families of Guards Who Died*, N.Y.TIMES, Dec. 16, 2001, at B7.

78. David Barstow & Diana B. Henriques, *A Nation Challenged: The Families; Gifts to Rescuers Divide Survivors*, N.Y.TIMES, Dec. 2, 2001, at A1.

79. Barstow, *supra* note 76. (reporting that the September 11th Fund would pay 20,000 New Yorkers who lost jobs or residences as a result of the September 11th attacks \$2,500 apiece, and families who lost relatives in the attacks \$10,000 apiece, without regard to need or to receipt of other charitable contributions).

80. Greenhouse, *supra* note 77.

lost her daughter in the Murrah building but received no government compensation as a result.⁸¹

Others invoked the *need* principle—although at the same time endorsing the contribution principle. “We cannot possibly overpay the family of the uniformed services,” the *New York Times* quoted the head of a network of charities as saying, “But there are other people—those who don’t have any other resources—who need to be considered, too.”⁸² Appeals to the need principle were not limited to those at the lower ends of the income scale. With families of firefighters and other public safety personnel in the limelight and seemingly the beneficiaries of extraordinary charity, some relatives of civilian victims felt left out. “We just want to be recognized as needing, as well,” said the widow of an executive who lost his life in the World Trade Center.⁸³ Others called for compensation for gay partners of victims—excluded from many benefit and charity programs—and for undocumented immigrants.⁸⁴

Observers cautioned that claimants (and the public) should not expect the new Fund to conform precisely to any of these definitions of distributive justice.

[I]t is essential that the public understand the fund’s basic purpose. It is not charity. It is a Congressionally mandated alternative to litigation that could have driven the airlines into bankruptcy—a pot of money of undetermined size that is designed to substitute for awards that victims’ families would have received had they taken the airlines to court . . . Mr. Feinberg will be obliged to treat people as if they had actually gone to court. That, in turn, means huge differences in the final awards . . . a young stockbroker’s family will obviously receive far more than, say, the wife of a middle-aged janitor.⁸⁵

But some questioned the “obviousness” of such consequences:⁸⁶

81. Belkin, *supra* note 2.

82. Jim Dwyer & Diana B. Henriques, *A Nation Challenged: Death Benefits, Money for Families of Attack Victims Could Vary Widely*, N.Y. TIMES, Sept. 20, 2001, at A1. Critics of the VCF also voiced procedural justice concerns, rejecting the proposition that funds might be allocated systematically, according to a grid, rather than on an individualistic basis. See William Glaberson, *A Nation Challenged: Compensation Claims; Federal Plan for an Aid Formula Is Criticized*, N.Y. TIMES, Nov. 7, 2001.

83. Barstow & Henriques, *supra* note 78.

84. See, e.g., Denny Lee: *Aid For Gay Terror Victims*, N.Y. TIMES, Dec. 17, 2001, at F2; Steven Greenhouse, *A Nation Challenged: Compensation; Legal Residency Sought for Undocumented Victims’ Families*, N.Y. TIMES, Dec. 18, 2001, at B7.

85. Editorial, *The Victims’ New Referee*, N.Y. TIMES, Dec. 1, 2001, at A26.

86. Sondra Leftoff, *Letter to the Editor*, N.Y. TIMES, Dec. 21, 2001, at A28.

Death would seem to level the playing field Yet the potential distribution of the victims' fund for the Sept[ember] 11th tragedy makes it clear that this expectation remains illusory.

The children of those who perished need all the help they can get in moving forward. But those children already at the margins of society will have that legacy imprinted on their future, as the compensation they are entitled to in this settlement [the fund] reflects the earning ability of their deceased parent.

In the extreme, compensation for such children will be less than one-fifth of that which their most affluent counterparts will be entitled to. This is one more tragedy within the tragedy they face.

As he pondered the rules for allocating damages, Special Master Feinberg was conscious of competing definitions of justice. As the *New York Times* reported in early December, 2001:⁸⁷

[P]erhaps no question hangs over Mr. Feinberg and his every decision more ominously than the matter of fairness. A large part of each award will be calculated by using estimates of a victim's lifetime earnings, and so differing assumptions will have to be made about the earning power of a bond trader and a dishwasher. The former earned more but might have retired or burned out earlier; the latter earned less, but almost certainly would have worked most of his life.

These disparate employment histories will necessarily require awards of vastly different sizes—a fact that may not be palatable to the public, Mr. Feinberg acknowledged. But he must somehow ensure that people in similar circumstances are treated similarly.

Mr. Feinberg has indicated that one possible partial solution to the question of fairness could be to make sure the damages for “pain and suffering” are calculated to ensure that every family gets some minimum amount, regardless of its lost breadwinner's paycheck⁸⁸ Mr. Feinberg agrees that the equity⁸⁹ hurdle is daunting, although he will not yet commit to how he will try to overcome it.

One year later, the Special Master was still ruminating over the question of how to deal with families' with vastly disparate life circumstances.

It's a problem It's a philosophic problem, and it's a financial problem. What to do with some of these people . . . with incomes of a million or two million. Are there no limitations? . . . [S]hould the

87. Diana B. Henriques, *A Nation Challenged: Compensation; Holding the Victims' Purse Strings, Uneasily*, N.Y. TIMES, Dec. 11, 2001, at B1.

88. The Special Master's thought here did not accord with traditional tort damage principles, and his rule implementing this principle was later the target of much criticism. See *infra* text accompanying note 92.

89. The *New York Times* reporter here seems to be using a common definition of equity as equality, or similar treatment for similarly situated people, rather than using the more specialized definition found in the distributive justice literature. See discussion *supra*.

taxpayer and this program subsidize a \$10 million lifestyle and a \$10 million tax-free award?⁹⁰

That Feinberg seemingly was troubled by the disparate outcomes produced by incorporating tort principles in VCF rules troubled many tort lawyers who saw in Feinberg's comments, not a questioning of the justness of such outcomes, but rather a desire to save taxpayers' money.⁹¹

As time passed, some observers began to see victims' families as motivated more by greed than a desire for justice.⁹² In response, the victims' families variously sought to explain why they *needed* financial assistance and why they *deserved* it. "My ex-husband's will left everything, including \$1 million life insurance policy, to the new wife, and once that is offset, then the children are left with less than \$200,000 each for their father's death," said one claimant.⁹³ "We're made to feel bad for wanting everything that was promised by Congress. When we were paying 50 percent of our money to the government in taxes, did anyone have a problem with that?" said another.⁹⁴ "The idea is to compensate me so my life style doesn't change, and my life style is different from a guy washing dishes," said a third. "I don't live in a two-hundred-and-fifty-dollar-a-month apartment. I live in a place that costs me five thousand dollars a month in mortgage payments."⁹⁵

Those who lost family members in the attack also struggled to explain what money paid in compensation says about the meaning of their loved ones' lives.

You'll hear it said many times here that people don't care about the money, and it's true, we don't But somehow the higher the amount, the more value they put on your loved one's life, the more meaning it has. So I would like them to say we all get a trillion dollars, just so I know my son was worth a trillion dollars⁹⁶

90. Belkin, *supra* note 2.

91. *Id.*

92. See, e.g., Elsie Miller, *Letter to the Editor*, N.Y. TIMES, Sept. 19, 2002, at A34. In her letter, Miller stated:

Although I can sympathize with the personal losses suffered by families of the 9/11 victims, I am a bit dismayed by their continued push for more money from the fund After all, the compensation given to families of fallen soldiers and others who have surrendered their lives in service to America is a mere pittance compared with the amounts most victims' families will receive.

Id.

93. Belkin, *supra* note 2, at 94.

94. *Id.* at 148.

95. Kolbert, *supra* note 74.

96. *Id.* at 48.

“They told me that my daughter was not worth as much as a New York victim, and that’s an ugly, ugly thing to say,” said the mother who lost her child in the Oklahoma City bombing.⁹⁷

For these victims, money came to mean, not just the wherewithal to cover their needs, nor a means of assuring accountability, nor even an expression of society’s compassion for their plight, but rather, what the lives of their children were worth in the eyes of the community.

B. Questions of Fairness: Individual Perspectives

Media reporting and commentary on the establishment of the VCF, its proposed rules for distributing compensation funds and charitable donations, and other activities, offer a window into people’s thoughts about compensation for injury and death. Whether the victims of the September 11th attacks were more or less deserving of help than the victims of other tragedies, and what kinds of help, of what magnitude, should be offered, by whom, and to whom, were all questions that were hotly debated. But as is true of narrative histories of ordinary tort litigants’ experiences, the media reports were shaped by the perspectives of the reporters who decided whom to interview, whose views to write about and what aspects of those views to highlight.

After Special Master Feinberg published the initial notice of administrative rulemaking regarding the September 11th Victim Compensation Fund of 2001, the VCF was inundated with public comments. In all, the VCF received 6,363 comments in response to the Initial Notice of Rule-making, 3,315 comments in response to the publication of the Interim Rule, and 2,953 comments in response to the Final Rule.⁹⁸ More than three quarters of those who submitted comments framed their concerns in terms of “justice” or “fairness.”⁹⁹

The comments submitted to the Special Master provide a different sort of window into people’s thoughts about compensation and damages. As is true of the media reports, the comments submitted to the Special Master do not constitute a statistically representative sample

97. Belkin, *supra* note 2, at 95.

98. See www.usdoj.gov/victimcompensation (last visited Apr. 15, 2003). Comments through April 5, 2002 were posted on the site. Some of the comments were received after the deadlines for commenting; indeed, the overwhelming majority of comments on the Initial Notice (5,557 of 6,363) were received after the deadline. Note that the total of 12,631 comments may represent fewer people, as some people may have submitted multiple comments in one or more waves. We drew the first and second samples in Summer 2002.

99. Determined by searching the full database, at <http://www.usdoj.gov/victimcompensation> (last visited Apr. 15, 2003). Using a search string that included “fair,” “fairness,” “justice,” “unfair,” “unfairness,” and “unjust,” I found 8,149 matches. Those who submitted comments on the interim Final Rule were less likely to frame their comments in terms of justice or fairness; only 62% (2,061 of 3,315) used such terms in their comments.

of the general population. Rather, they reflect the views of those who cared enough about the VCF and its rules to write to the Special Master. But the selectivity inherent in the comments is that of the commentators; there is no intermediary between the commentators and us.

All of the comments submitted to the VCF were ultimately posted on the VCF's website. These comments provide a unique public database for exploring how people feel about compensation for misfortune and damage assessment, albeit under highly unusual circumstances. The Special Master's office redacted names and identifying information. But many comments include information that indicates whether the commentator is related to a victim of the terrorist attacks or has some other direct personal relationship to the September 11th events—for example, someone who was in the World Trade Center or Pentagon, but survived the attacks. (Below I term those who lost loved ones in the attacks “victims’ survivors.”) Some commentators indicated that they had lost family members in other catastrophic accidents, terrorist attacks, or in the military; others characterized themselves as “concerned citizens.” This information provides an opportunity to explore how responses to the VCF varied, depending on the relationship of the commentator to the Fund. With the help of my research assistants, I analyzed the comment data, focusing on what commentators had to say about distributive justice.

1. Method

In the first data collection stage, we used a random number generator to select 450 comments for coding: 150 responses to the Notice, 150 responses to the Interim Rule, and 150 in response to the Final Rule. Because the first two waves of comments included many form letters, in a second stage, we randomly sampled additional individual nonform letter responses to the Initial Notice and Interim Rule, with the goal of obtaining a minimum number of 150 individual responses to each. In all, we sampled 635 comments (including form letters), 256 responding to the Initial Notice, 229 responding to the Interim Rule, and 150 responding to the Final Rule. Because each sample wave was selected using a random number generator, we can combine the individual responses from the two sampling stages for responses to the Notice and to the Interim Rule, to represent the universe of responses to each of those (Notice and Interim Rule) respectively.¹⁰⁰ We devel-

100. This approach yields an unbiased sample and unbiased sub-samples. However, because the separate sub-samples had different probabilities of selection (i.e., sampling fractions), the data must be weighted to yield accurate estimates of population distributions. The figures and

oped and implemented a protocol for coding all of the responses, which allowed us to determine the proportion of commentators who expressed various views on compensation, loss, and damage assessment.

Our initial analysis indicated that the distribution of comments submitted by those who identified themselves as victims' survivors was quite different from the distribution of comments submitted by general members of the public and others. Because unidentified members of the general public, rather than those more closely connected to the attacks, submitted most of the comments, our first and second stage samples yielded a relatively small number of the latter. Therefore, in a final stage of data collection, we drew an additional sample of comments submitted by people who identified themselves as victims' survivors using a text search string to identify and select these comments from the VCF website. In all, we selected 263 comments by victims' survivors, all of which were submitted in response to the Interim Rule.¹⁰¹ We coded these comments using the same protocol that we had applied to the randomly sampled comments, but added some other variables to the protocol to permit additional analyses. Below, I report our findings.

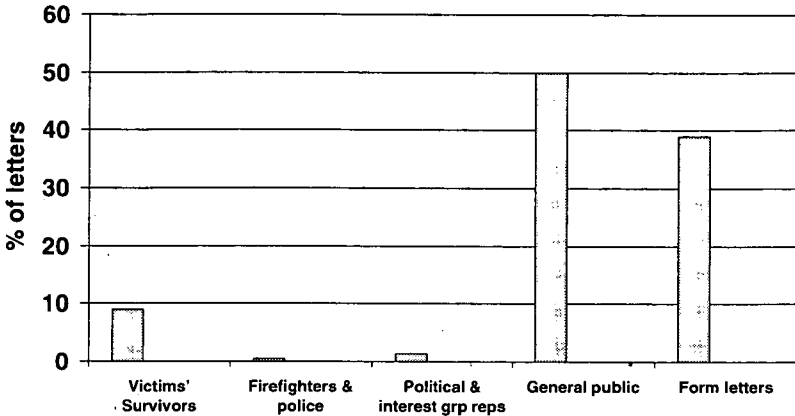
2. *Who Wrote to the Fund*

About half of all comments came from the general public: individuals with no personal connection to the events of September 11th and no self-declared eligibility for compensation. That so many people without a direct personal interest in the program would bother to write and submit comments may seem surprising, but other analysts have found similar patterns in public comments on administrative rules¹⁰² (see Figure 1).

tables that follow present these weighted data. Because measures of statistical significance are sensitive to sample size and applying weights has the effect of increasing sample size, Chi-square tests were performed on the unweighted data.

101. We identified and coded the final set of comments in Summer 2003. Because the method of selecting these comments differed from the method used in the earlier phases, we could not combine these comments with the survivors' comments sampled in those phases. Technically, the sample selection method used for these comments was purposive rather than random; however, we have no reason to believe that the results would differ significantly for a strictly random sample.

102. See Mariano-Florentino Cuellar, *Rethinking Public Engagement in the Administrative State*, at 28-30 (2003) (unpublished draft article on file with author). Cuellar finds that the numbers of comments submitted in response to rule-making varies dramatically from as many as 700,000 responding to FDA's proposed regulations on advertising cigarettes to minors to a few hundred in response to more specialized financial regulations. But even in response to more specialized rule-making, it is not uncommon to find that a majority of comments are submitted by members of the general public.



Source: Weighted sample of all comments.

FIGURE 1

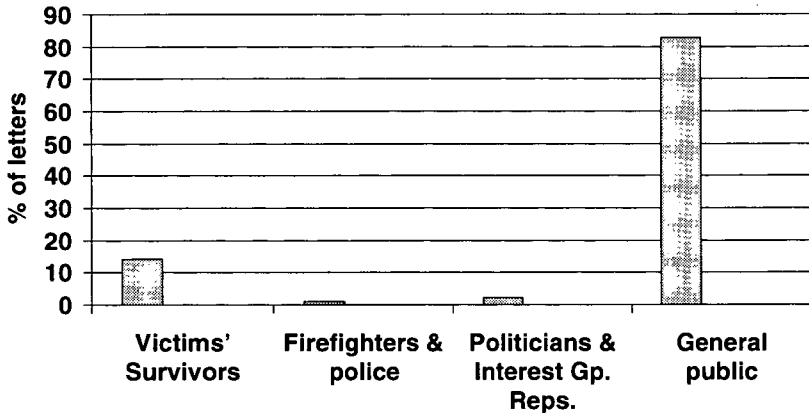
Almost as many of the comments were submitted by form letters, which resulted from organized advocacy campaigns undertaken by certain groups. The majority of form letters in our sample were from groups protesting feared unequal treatment of partners of gay and lesbian victims of the attacks, many of which were submitted as a result of a campaign by Amnesty International. We also identified letters from other groups favoring equal treatment of gays and lesbians, from groups concerned about how low-wage workers would be treated, and from national advocacy groups for crime victims, as well as from unidentified groups opposing equal treatment of gay and lesbian victims.¹⁰³ The proportion of form letters was highest among responses to the Initial Notice.¹⁰⁴

When we exclude form letters from the distribution, we still find that comments submitted by members of the general public predominate. Members of the general public submitted about 80% of the individual comments; victims' survivors submitted about 14%. Sympathetic firefighters, police, and other safety personnel submitted a small fraction of the comments; elected officials and representatives of interest groups submitted another small fraction (see Figure 2).

103. We identified as "form letters" all those comments that replicated verbatim or near to that the words of other comments. We infer that all such comments result from advocacy campaigns by membership organizations. However, not all commentators identified such organizations as the source of their submissions.

104. Seventy percent of the responses to the initial notice that we sampled were form letters, whereas 52% of responses to the interim rule were form letters, a statistically significant difference. (Chi-square = 296, $p < .001$) We found a negligible number of form letters among comments on the Final Rule.

Members of the general public were most likely to respond to the Initial Notice (42%) and the Final Rule (36%). Survivors' victims were most likely to respond to the Initial Notice (36%) and to the Interim Rule (62%), perhaps suggesting that their comments were more likely to have instrumental objectives than the comments of the public generally.¹⁰⁵



Source: Weighted sample of individual comments

FIGURE 2

3. *Calls for Fairness and Justice*

Those who lost loved ones in the terrorist attacks and those who held themselves out as protectors of victims' interests were substantially more likely than members of the general public to frame their comments in terms of "justice" or "fairness" (see Figure 3).¹⁰⁶ Those who responded to the Initial Notice were more likely to write about fairness concerns than those who responded in later waves (34% of the former, compared to about 20% of the latter).¹⁰⁷

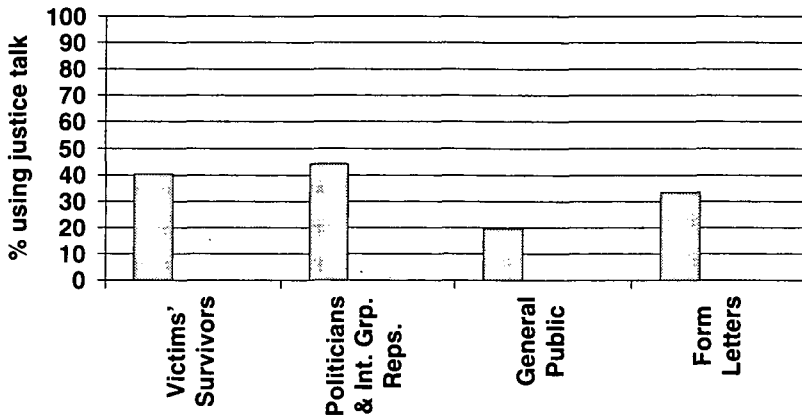
Form letter writers were more likely to frame their comments in terms of "justice" or "fairness" when commenting on the Initial Notice than when commenting on the Interim Rule (45%, compared to 5%).¹⁰⁸ Those who identified themselves as relatives or partners of victims were also more likely to frame their comments in terms of

105. Chi-square = 72.38, $p < .001$.

106. Chi-square = 12.807, $p < .05$. Of course, a reader of these comments might interpret many comments as raising justice or fairness concerns. With this variable, we sought to distinguish those commentators who themselves used fairness or justice language to frame their concerns.

107. Chi-square = 14.35, $p < .001$.

108. Chi-square = 35.965, $p < .001$.



Source: Weighted sample of all comments

FIGURE 3

“justice” or “fairness” when commenting on the Initial Notice, than when commenting on the Interim Rule (50%, compared to 37%), but these differences were not statistically significant.¹⁰⁹ (Recall that more of those in our sample commented on the latter rather than the former.)¹¹⁰ Only one fifth of the members of the general public framed their comments in terms of “justice” or “fairness,” regardless of the stage of the process at which they responded.

4. Views on Eligibility

The comments submitted to the Fund echoed the public debate over who should be compensated by the Fund. There were two dimensions to this debate, one regarding who among the victims’ survivors—gay partners, first wives, fiancés, fetuses, illegal aliens, or others—should receive compensation,¹¹¹ and the other regarding whether *any* of the September 11th victims deserved the special compensation offered them by the federal government. Three quarters of the comments discussed whether one or more types of people should be included or excluded from the compensation program. About two thirds of those who addressed this issue argued for the inclusion of one or more groups, while one third argued for exclusion. (The coding scheme permitted both inclusive and exclusive remarks.) In con-

109. Chi-square = 1.866, $p > .10$.

110. Among those in our special victims’ survivor sample, 46% framed their arguments in terms of “justice” or “fairness.”

111. In addition, some commentators discussed whether businesses harmed by the attacks and their aftermath should receive compensation. Businesses are not eligible to receive compensation from the VCF.

trast, only 5% of the comments discussed the appropriateness of compensating September 11th victims without similarly compensating victims of the Oklahoma City bombing, the previous bombing of the World Trade Center, or the victims of military conflicts. Among the small fraction of commentators who compared September 11th to other events, most argued that the September 11th victims should be denied compensation, rather than that similar compensation should be afforded others.

As shown in Figure 4, the form-letter writers accounted for a substantial fraction of the comments on inclusion and exclusion (see Figure 4). The victims' survivors were more likely to discuss how much they should get than whether others should be eligible as well. Although many commentators framed comments on inclusiveness and exclusiveness in fairness terms, there was no systematic relationship between calls for "fairness" and discussions of eligibility.

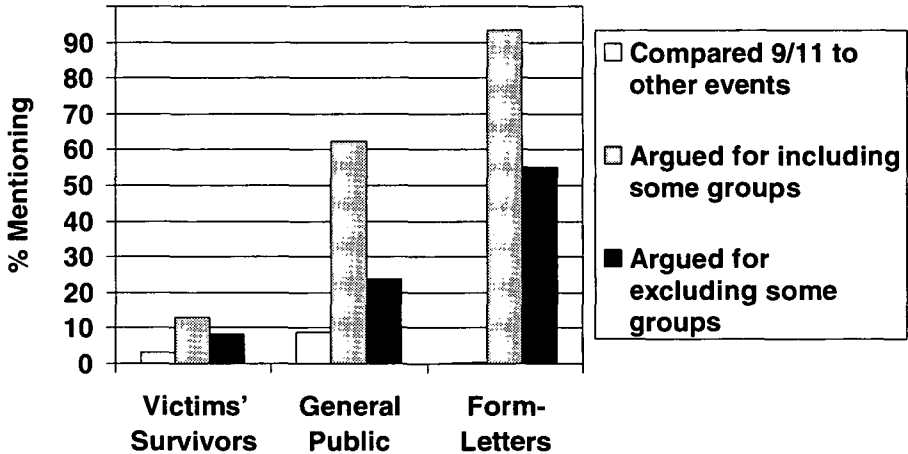


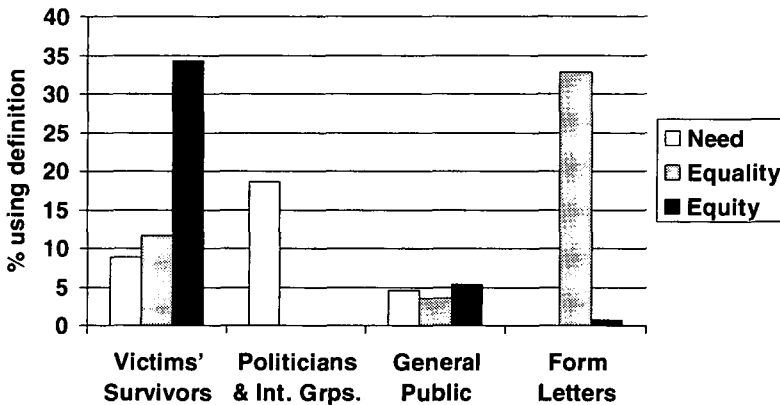
FIGURE 4

5. Perspectives on Distributive Justice

Whether or not they said their assertions about what the Fund should do were related to concerns about "justice" or "fairness," many of the commentators adopted one or more of the fairness perspectives that theorists have prescribed and empirical social psychologists have observed. Using the language of *equity*, some argued that the Fund should ensure that those who gave the most to save others would be most generously compensated. Others wrote about the need for the rules to ensure that families of victims whose economic contributions prior to death had been deemed most valuable by the marketplace would be compensated proportionately by the Fund. Using the

language of *equality*, some argued that the Fund should treat all of the victims' survivors similarly, without regard to whether the survivors were spouses or children recognized as legitimate heirs under law. Others argued that rich and poor alike should receive the same compensation, as they had all suffered equally from the same event. And some argued that the Special Master should develop rules that were sensitive to the economic needs of the victims' survivors, without regard to difference in economic or other contributions.¹¹²

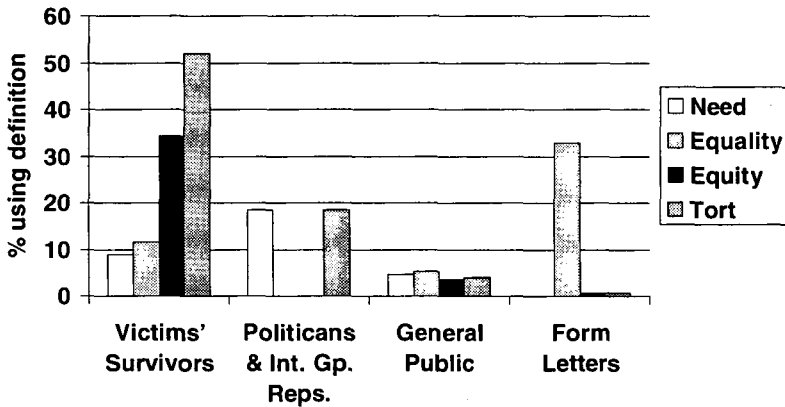
As Figure 5 illustrates, the different commentator groups differed substantially in their preferences for different definitions of distributive justice (see Figure 5). One third of form letter writers, many of whose comments pertained to the ability of gay partners of victims to obtain compensation, framed their arguments in terms of equality, as compared to 12% of victims' survivors and 5% of the general public. More than a third of the victims' survivors, on the other hand, asserted that equity required that they receive more than less meritorious survivors. Only 4% of the general public and 1% of the form-



Source: Weighted samples of comments.

FIGURE 5

112. In the main coding process, we did not attempt to identify distributive justice concerns pertaining to the allocation of compensation *within* families (or other sets of individuals with intimate ties to the victim). After being alerted to this issue, we added a variable to the coding protocol that we applied to our supplemental sample of victims' survivors. Only 5% of this latter sample discussed distributive justice within family or other intimate groupings. One illustrative comment argued that all family members—parents and siblings, as well as the dependent spouse and children—deserved “equal recognition under the law for the loss that we all equally have.” Others worried that family members would deprive them of legitimate compensation: “What happens if the victim is my mother and I am not on good terms with my stepfather? . . . Is there any way for me to join in this program without him being a part of it?”



Source: Weighted samples of comments

FIGURE 6

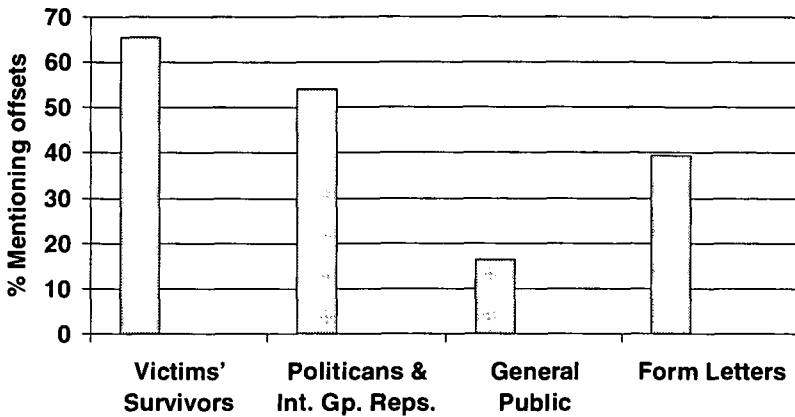
letter writers made similar arguments. Interest group representatives were most likely to make equality arguments.¹¹³

Although they frequently framed distributive justice arguments in terms of equity, victims' survivors were even more likely to argue for incorporating tort principles in the VCF's rules (see Figure 6). Survivors also were more likely than other groups to frame arguments in terms of tort principles; the only other group that mentioned tort principles at all frequently were the politicians and interest group representatives who wrote to the Special Master.¹¹⁴ Survivors' penchant for tort arguments predated the publication of the Interim Rules; 58% of those who commented on the Initial Notice and 46% of those who commented on the Interim Rules made tort-based arguments. (Because our sample of victims' survivors is quite small, these differences are not statistically significant. Our special sample of victims' survivors was drawn solely from responses to the Interim Rule.)

That the debate over the VCF was framed substantially by tort principles was vividly illustrated by the frequency with which commentators discussed the collateral source rule. Although it seems unlikely that most Americans were aware of the rule before controversy over its application to the Fund erupted, 30% of all those who wrote to the Special Master mentioned the rule. Two thirds of victims' survivors wrote about the rule, and it was mentioned as well in a substantial

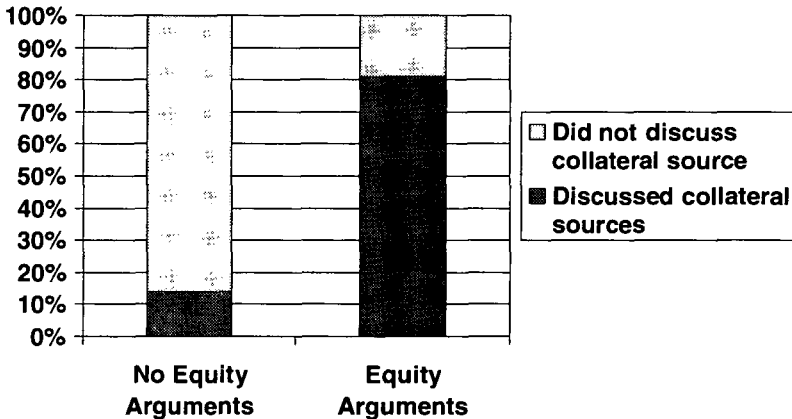
113. The group differences for all three variables are statistically significant. For need, Chi-square = 10.729, $p < .05$; for equity, Chi-square = 85.613, $p < .001$; for equality, Chi-square = 54.408, $p < .001$.

114. Chi-square = 180.71, $p < .001$.



Source: Weighted samples of comments

FIGURE 7



Source: Weighted sample of individual comments only

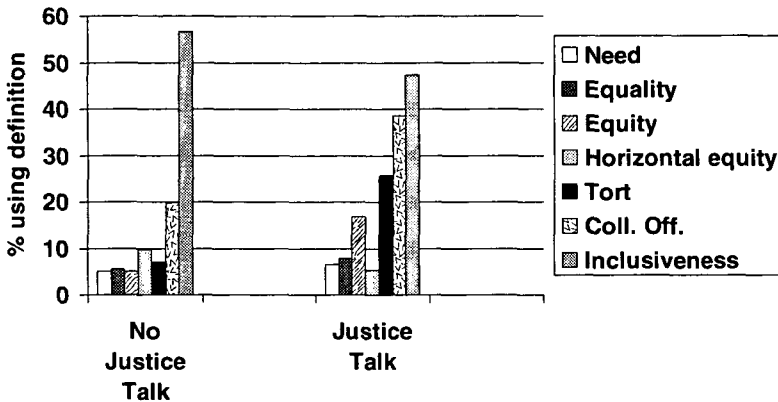
FIGURE 8

fraction of other letters (see Figure 7).¹¹⁵ Those whose comments largely reflected a preference for equity principles of distributive justice were significantly more likely than others to voice opinions on the collateral source offset rule (see Figure 8).¹¹⁶

An examination of the frequency of different fairness perspectives—equity, equality, need, and tort—among comments that made

115. Differences across groups were statistically significant. Chi-square = 155.98, $p < .001$.

116. Chi-square = 40.11, $p < .001$. Opinion was overwhelmingly against the collateral offset provisions, as evidenced by the form letters urging elimination of the provision. But some had more nuanced views, urging offsetting some but not all collateral sources. Among those who favored equitable principles of distribution, *no one* supported application of the collateral offset rule.



Source: Weighted sample of individual responses only

FIGURE 9

explicit references to “fairness” and “justice” and those that did not suggests how strongly tort principles came to frame the debate over how to distribute the Fund’s compensation dollars (see Figure 9). Of all of the fairness perspectives we recorded, inclusiveness—arguing for expanded eligibility for VCF compensation—was the most popular. But as time passed, it was the collateral source offset specifically and tort notions more generally—and the equitable principles that tort seemed best to represent—that came to stand for principles of fairness and justice.

6. *Procedural Justice*

Critics of the tort system’s handling of mass claims often point to the absence of individualized due process, and some lawyers had expressed concern about the appointment of Kenneth Feinberg as Special Master because of his history of designing mass tort claims resolution programs that relied on “grids” and other administrative devices. But less than 5% of the comments submitted to the Special Master—about half from victims’ survivors—pertained to procedural issues. Victims’ survivors (and some lawyer members of the public) objected to asking claimants to commit themselves to the administrative compensation process before knowing with certainty how much they would receive from the Fund; a few others expressed dissatisfaction with the limited opportunity for hearing and the lack of an appeals process.

Survivor critics of the administrative process were seemingly more concerned about the formulae that the Special Master adopted for determining damages than about any lack of opportunity for process it-

self. One woman who identified herself as the fiancée of someone killed in the World Trade Center pleaded for *more* rules to govern the distribution of compensation within victims' families.¹¹⁷ Another woman who lost her husband in the attacks wrote:

In a wide variety of air crash and terrorism cases, judges, juries and mediators commonly have provided non-economic damage awards well into the seven-figure range. My children have to go through the rest of their life without the man that was helping to shape them into productive, honest citizens of this country. He's no longer here to laugh and play with them, swim and vacation with them, be their soccer and softball coach. Is their pain only worth \$50,000?¹¹⁸

The lack of attention to process is striking given the frequency with which commentators framed their other concerns about the VCF in terms of tort principles; it also suggests that those who argued for application of tort principles to the VCF were motivated more by a desire to maximize financial outcomes than by a desire for a "day in court."

7. *Corrective Justice*

Less than 10% of the victims' survivors submitted comments discussing the government's, airlines', or other private entities' (e.g., the Port Authority) responsibility for the September 11th attacks or their consequences. Some argued that the negligence of some or all of these entities justified higher compensatory damages or punitive damages. Others seemingly simply wanted to put their views of others' culpability for their losses on the record. Only a few explicitly linked such concerns to a desire to litigate (see Figure 10).

8. *Acknowledgment of Worth*

Only 5% of the victims' survivors' comments discussed the morality of assigning a dollar value to individual life—one called it "inhuman"—or the social meaning of setting a particular dollar value on their loved one's life. Some wrote that the value set on their child's,

117. Comment N002420, Jan. 19, 2002 ("In all fairness if the fiances/domestic partner are going to be denied the opportunity to apply for the Victims Compensation Fund on our own, it should be determined how the settlement should be divided when there is a fiancée/domestic partner involved. It is very difficult to discuss these financial matters with the family and it might be helpful if there are distribution regulations set to protect people in these situations.").

118. N002489, Jan. 17, 2002. Claimants' focus on substantive rules rather than process is consistent with social psychological studies suggesting people may use procedural justice assessments as a "heuristic" for assessing fairness of dispute resolution processes when they have no benchmarks to assess outcome fairness. See Lind, *supra* note 36. The ability for claimants to compare outcomes across perceived like situations distinguished the VCF from ordinary tort litigation.

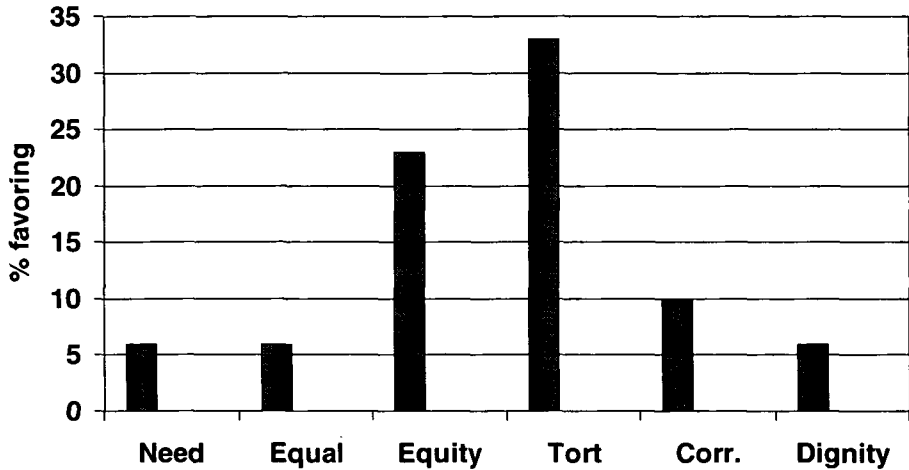


FIGURE 10

parent's, or spouse's life was an "insult" to his or her "memory," "lifetime's worth," or "heroic deeds."¹¹⁹ Conversely, one argued that more money would "dignify the value of [his] brother's pain and suffering."¹²⁰ Others saw the compensation that they could expect under the VCF's rules as "trivializing" their own loss and anguish or "making light" of their own memories. One took issue with the notion that under the rules "Bill Gates is worth more than 180,000 human beings,"¹²¹ another with the idea that "[his] mother's life is not worth the same as the next person's."¹²² One argued that "surely" his brother's salary "does not indicate the value of his life,"¹²³ another that "one

119. See e.g., comment N000436, Dec. 24, 2001 ("The mere pittance that the government thinks my mother's life is worth is an insult to our family and should be to all of the caring and thoughtful Americans who emptied their pockets to help the victims' families."), N002288, Jan. 22, 2002 ("no amount of money could ever compensate for the loss of my son, but do not insult his memory and all his heroic deeds by offering such low token amounts for his lifetime's worth . . ."), [N]002171, Jan. 21, 2002 ("It seems impossible to put a money value on the life of a child that you have given birth to, raised, loved, encouraged and supported to do and given his best in life. did just that and he gave his best. He gave himself. Please don't insult his memory.")

120. N000716, Dec. 22, 2002 ("Or at least dignify the value of my Brother's pain and suffering to a respectable figure.")

121. N001401, Jan. 7, 2002 ("The reason there are such gross disparities in the projected settlements is that the proposed regulations include so little compensation for loss of human life! It is instructive to realize that Bill Gates is worth more than 180 thousand human beings using the Master's logic.")

122. N001349, Jan. 4, 2002 ("How can anyone say that my mother's life is not worth the same as the next person's?")

123. N1497, Jan. 10, 2002 ("My brother died with a \$1.05 in his wallet, surely that does not indicate the value of his life, neither does his 36K salary.")

billion dollars” could not “fix” the loss of his father.¹²⁴ A mother who lost her daughter in the attacks saw the task before the Special Master as impossible:

How can anyone say how much someone’s pain is worth and whose pain is greater? . . . I attended the meeting [apparently explaining the compensation rules] . . . but I left in disgust. I can’t help but believe that her life is worth less because she didn’t make a great salary [She] was my strength, she picked me up when I was down Had you known [her daughter], you would have liked her from the start As I see it, and have felt from the beginning, my daughter is not important [in the eyes of the program because] she had no husband, children nor was she a policeman nor fireman . . . [but] she does have a family that loves her and needs her . . . the pain is the worst pain imaginable and only those that go through it would know, so again please tell me how you can tell me what my pain is worth?¹²⁵

Some may interpret these more expressive comments simply as instrumental strategies for framing claims for more money—indeed, most are offered as rationales for changing the Fund’s rules so as to award more money to the commentator. But the frequent comparative judgments—to Bill Gates, others’ mothers’ and just “other people” writ large—seem also to display a discomfort with the difference in values placed on people’s lives that is not often expressed in contemporary American society. By assigning a value to each survivor’s loss—a task assigned him by the Act—the Special Master became the message for society’s assessment of each victim. The notion that all members of the society are equal was revealed as a social fiction, and the lesser value of some was revealed for all to see.

IV. RETHINKING TORT DAMAGES FOR NONECONOMIC LOSS

“Money talks.” Money is a medium of exchange for labor and products. But it is also a medium for conveying social meaning. Voluntary monetary transfers can demonstrate individuals’ acceptance of responsibility for the consequences of wrongdoing, sympathy for those less fortunate than they, solidarity with members of their community who have suffered misfortune, or obligation to family members or others. Socially mandated transfers—in the form of fines, civil damages, alimony, child support, social security payments, or taxes—express group norms. Norms establishing the *amount* of money that should be paid in these different circumstances also convey meaning

124. N000209, Dec. 21, 2001 (“My family will be missing most importantly my father one billion dollars can’t fix that.”), comment N000139, Dec. 20, 2001.

125. N000139, Dec. 20, 2001.

about *how large an obligation* one set of people has to another and about *how much recipients deserve* from these others. Whenever money changes hands, it carries with it multiple messages about personal and social relationships and about personal and social worth. But these messages are so embedded in the culture that many people rarely stop to consider them.

Tort law foregrounds questions of monetary worth. However, contemporary tort doctrine, shaped primarily by economic theory, discounts the social meaning of tort damages. The goals of risk-spreading and deterrence demand a proper accounting of economic losses resulting from wrongful injury and death not an articulation of contextualized social obligations and personal worth. Tort plaintiffs' reactions to their litigation experiences and litigation outcomes suggest that they have more diverse goals. They want money to cover their losses, but they also want defendants to accept responsibility. They want defendants to change their practices. In instances of wrongful death, they want the community to recognize the enormity of their own personal loss and the value of the person who has died. It *is* the money that tort plaintiffs are after when they sue—but it's not *just* the money.

Viewed from an expressive social normative perspective, assigning the task of valuing loss and life to a jury constituted of members of the community makes sense. But then holding the jury's behavior to economists' assessments of the monetary value of nonmarket activity and of the value of life, ignoring how those assessments may differ from the community's, does not.

Realizing the social value of loss estimation and life valuation requires not just community participation but also public process. As tort litigation retreats further and further from the courthouse and from public view, the social meaning of tort damages is harder for all—plaintiffs, defendants, and the public—to discern. Only rarely does the contemporary tort system provide a public stage for assigning responsibility and valuing loss and life. In practice, the tort system has become a privatized fault-based administrative scheme that relies on experts to calculate the economic costs of injury and death, adjust this calculation to reflect various legal factors and add an amount for “pain and suffering” that is determined by a formula. Perhaps it is not surprising that in the increasingly rare circumstances in which juries determine damages, their decisions—particularly with regard to noneconomic damages—surprise the experts.

With the publication of rules for determining compensation for victims of the September 11th attacks, the social meaning of loss and life

in contemporary American life assumed center stage. Because Congress mandated a tort-based compensation scheme, rather than a need-based scheme or a program that provided equal compensation for all eligible victims, the Special Master was required to adopt a compensation scheme that reflected the vastly different market values of the September 11th victims. In sharp contrast to the private negotiations of conventional tort litigation, because the September 11th program was publicly mandated, the compensation rules and the consequences of the rules for the victims' families, all of whom had suffered the same *personal* loss, were displayed for all to see.

The responses to the publication of the VCF rules suggest there is widespread support for the underlying "make whole" principle of tort damages. Ironically, the government's plan to preclude tort litigation—albeit in circumstances in which many experts believed tort damages would be difficult to obtain—called forth an outpouring of support for tort's approach to assessing loss. Even in the context of catastrophic injury, when the nation's sense of community seemed to be at its height—and psychological research suggests equality- and need-based compensation would attract strong support—equitable principles of distributive justice trumped principles of equality and need. Special Master Feinberg's efforts to introduce a modicum of equality into the September 11th compensation scheme by distributing equal amounts of pain and suffering damages to victims' survivors received little support from the general public—and virtually none from the survivors themselves. Those who wrote to the Fund and who spoke to the media were united in their belief that they *deserved* compensation amounts that reflected their precatastrophe economic status (and potential to rise higher in the future), without regard to how this might advantage them compared to other victims. Widespread support for paying tort-like damages to the September 11th victims, underscored by opposition to the collateral source offsets mandated by Congress but not required in tort litigation in many jurisdictions, indicates the difficult challenge that faces those who advocate substituting administrative compensation programs for tort in circumstances ranging from automobile accidents to occupational exposure to asbestos.

The debate over the VCF's compensation rules also highlights the difficulty faced by those who advocate adopting "need" as the principle for allocating government-subsidized compensation, in a society accustomed to vast disparities in life-styles. Americans apparently have little difficulty limiting support for those in need whom they deem nonmeritorious, such as welfare mothers. But those who lost loved ones in the September 11th attacks were universally viewed as

meriting support (although not necessarily to the exclusion of, or in preference to, others). And these victims had highly subjective views of “need.” What looked like extravagant lifestyles to lower-income commentators on the VCF rules were perceived by higher-income victims as the very “needs” that merited compensation from the Fund. To those who might question the fairness of providing them with so much, while others would be provided with much less, these more affluent victims simply responded that the latter “needed” less to sustain their own life styles. At least initially, the public seemed sympathetic with these victims’ perspectives.¹²⁶

In sum, tort principles of compensation, with their indifference to equality and only half-hearted attention to need, seem well-positioned to support Americans’ apparent preference for the economic inequality that many view as the product of meritocratic norms. But the September 11th victims’ survivors anguish about placing a value on their loved ones’ lives strikes a chord that is at odds with this general preference, one that is heard as well in more ordinary tort plaintiffs’ reactions to the tort litigation process. However they may feel about disparities in wealth in American society, and tort principles generally, when victims are forced to confront the dollar value placed on their own loved ones’ lives, they recoil in dismay. *How can this life—and my pain—they ask, be worth so little? How can they be worth less than others’ lives and pain?*

For many people, the mere act of translating human life to money is morally reprehensible. But few victims are ready, therefore, to turn away money. The September 11th victims’ survivors’ comments suggest that they looked to what others were getting as a measure of the justness of their own compensation. Those who under the VCF rules would obtain the most compensation saw this outcome as only just. But those who would achieve less felt morally affronted, unwilling to accept the notion that the lives of their loved ones were worth less than those of other victims—or less than that of others in society, such as Bill Gates.

What do the debate and commentary on compensating victims of the September 11th attacks teach us about damages in ordinary tort litigation? Because there has been so little research on how tort plaintiffs view damages, and because jury behavior research until recently did not focus on damage calculations, we do not know how concerns

126. As Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289 (2003), suggests in her contribution to this Symposium, over time the public may have changed its views of survivors’ merit, and their willingness to subsidize large compensation payments.

about moral worth might affect ordinary tort plaintiffs' views or juror decision-making. Widespread reporting of high salaries, bonuses, and other economic rewards paid to executives, athletes, movie-stars, and other celebrities may affect how plaintiffs and jurors view the value of life. *If CEOs are worth hundreds of millions of dollars, plaintiffs and jurors may ask, why is this father or this mother or this child not worth the same, morally speaking?* Whereas large punitive damage awards may reflect a desire on the part of some jurors to "send the defendant a message," large awards for noneconomic damages may occur in contexts in which jurors want to make a statement about the moral value of the lives of others like themselves. Statutory curbs on noneconomic damages that seek to stifle such desires, if and where such desires exist, strike at the central moral function of jury decision-making. The controversy over the VCF's rules highlights the ongoing social importance of this function.

