

A PSYCHOLOGICAL PERSPECTIVE ON COMPENSATION FOR HARM: EXAMINING THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

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INTRODUCTION

The September 11th Victim Compensation Fund of 2001 (the Fund)¹ established after the terrorist attacks on September 11, 2001 poses a challenge to authorities due to the highly unusual circumstances for which the Fund was created. The goal of this Article is to argue that this challenge neither should nor can be met by directly applying conventional legal standards developed for tort cases, but rather that these legal approaches need to be supplemented by taking into account what is known about the psychology of harm and justice.

We will argue that the Fund has three important characteristics. First, the authorities who established the Fund are not those who caused the harm for which the Fund is providing compensation, and thus, the true perpetrators are not taking blame for the attacks. Second, the Fund involves considerably higher levels of compensation than has been seen in similar cases such as in the Oklahoma City Bombing, but fails to give clear standards for how that compensation should be awarded. Third, the amounts of compensation were decided upon without procedures such as trials, hearings, or fact-finding commissions.

II. DISCONTENT WITH THE FUND AS SEEN THROUGH THE MEDIA

By establishing the Fund only ten days after the terrorist attacks, Congress made a quick response to a major public event and, by many measures, a generous one. Despite this, it is subsequently becoming increasingly clear that relatives of deceased victims have a number of grievances regarding the Fund, and that the Fund has led to wide-

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1. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. § 104 (2003)) [hereinafter September 11th Victim Compensation Fund of 2001].

spread discontent, and even defiance and litigation, by those it was designed to aid.² This discontent was predicted by some and has been subject to media coverage in the nation's leading journals and newspapers that in many ways has supported the relatives' views.³

The first version of the rules for the Fund was criticized by politicians and families for being stingy, but that criticism was addressed in the second version of the rules.⁴ It was evident, however, by June 2002, that the rate of applications to the Fund was slow.⁵ Out of the 3,000 families eligible at that time, fewer than ten had filed a complete application, and around 500 had filed a partial application missing crucial information, such as information about salary from employers.⁶ The slow pace of applications created suspicions that people might actually plan not to apply to the Fund and would file a lawsuit instead. Indeed, by September 2002, more families had signed up for lawsuits than for government relief.⁷

Various explanations have been given for the slow pace of applications. Some families said that they were "not emotionally ready to translate personal devastations into actuarial calculations."⁸ Others complained that they found the thirty page application and the whole procedure too complicated to figure out.⁹ A lawyer who represents fifty families said that people did not believe the process would be fair.¹⁰ People also said they felt the Fund was a "shut up fund"¹¹ and that the government wanted to get this over with as fast as possible, in order to sweep this ugly case under the rug.¹² One woman who filed a lawsuit against the airlines said that she found the concept of the Fund offensive.¹³

The underlying grievances that started to grow by the time the first version of the rules was announced in December 2001, and could be seen developing in news stories, surfaced in three ways from Fall 2002

2. David W. Chen, *Many Relatives, Wary and Anguished, Shun Sept. 11 Fund*, N.Y. TIMES, June 1, 2002, at B1.

3. *Id.* Michael I. Meyerson, *Losses of Equal Value*, N.Y. TIMES, Mar. 24, 2002, § 4 (week in review), at 15; Amanda Ripley, *Life and Worth?*, TIME, Feb. 11, 2002, at 23.

4. Ripley, *supra* note 3, at 23-27; *see also* September 11th Victim Compensation Fund of 2001, *supra* note 1, for the second set of rules.

5. Chen, *supra* note 2.

6. *Id.*

7. Holman W. Jenkins, Jr, *Business World: How Much Do We Owe the 9-11 Victims?*, WALL ST. J., Sept. 25, 2002, at A15.

8. Ripley, *supra* note 3, at 26.

9. Chen, *supra* note 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

to January 2003. First, a widower launched a website¹⁴ devoted to discussion about the alleged unfairness of the Fund and, in particular, to the argument that its Special Master has treated the relatives and victims with a lack of respect.¹⁵ The author of the website claims that the Special Master has too much authority because he both makes the rules and judges by them.¹⁶ He is also accused of not working according to the intentions of Congress when the Fund was established.¹⁷ Second, the company Cantor Fitzgerald issued a detailed report harshly critiquing the Fund.¹⁸ Finally, seven families of victims who worked for Cantor Fitzgerald sued the Special Master of the Fund based on the report's findings.¹⁹

Despite these problems, Kenneth Feinberg, the Special Master for the Fund, said that the deadline in December 2003 was still far away and that he was confident that in the end ninety percent of families would file a claim.²⁰ Whatever ultimately happens, however, it seems clear that the public level of resistance to the Fund has been higher than was originally anticipated.

In this Article, we will argue that the aforementioned discontent with the Fund stems, to a large extent, from the fact that authorities failed to consider the psychology of justice and compensation for harm when establishing the Fund and creating its rules. We will discuss how some of the discontent could have been prevented and how some was probably inevitable due to the nature of the circumstances.

In Part III, we will discuss how people react to harm and, in particular, to harm that stems from immoral acts. We will argue that when people have been victims of *immoral harm* they do not seek material compensation, but instead look for an apology and for ways to restore a moral balance. We will discuss how this poses a nearly insolvable problem for authorities, in the case of the terrorist attacks, because the true perpetrators are unreachable and no authority in the United States is willing to take blame for the attacks.

14. See <http://www.fixthefund.org> (last visited Dec. 19, 2003). See also David W. Chen, *Victims' Kin Find Fault with Overseer of 9/11 Fund*, N.Y. TIMES, Nov. 13, 2003, at B1.

15. *Id.*

16. *Id.*

17. *Id.*

18. Submission of Cantor Fitzgerald, L.P., Espeed, Inc. and Tradespark L.P. to the Special Master of the September 11th Victim Compensation Fund of 2001 and to the United States Department of Justice, available at <http://www.cantorusa.com/bcf/DOJsubmission.pdf> (last visited Dec. 9, 2003).

19. David W. Chen, *7 Families Sue Administrator of 9/11 Fund*, NY TIMES, Jan. 27, 2003, at B1.

20. Chen, *supra* note 2.

Part IV discusses the problems posed by the fact that the Fund is unprecedented in the arena of compensation for harm. We will argue that because authorities probably failed to consider, and certainly failed to explain to people, their rationale for how the rules were structured, the Fund and its enabling legislation fails to create feelings of *distributive justice* amongst the recipients of the Fund.

In Part V, we will argue that the Fund violates people's perceptions of *procedural fairness* because the rules creating the Fund and the amount of compensation given in individual decisions during implementation were determined without the use of mechanisms, such as administrative hearings or other "procedurally fair" forums, for determining how the Fund should operate and how individual cases should be resolved. This violation of procedural fairness has fueled a lack of trust and confidence in the Fund and the Special Master.

In addressing each of these three questions, we will apply the results of psychological research to an important legal issue. However, we want to note that psychologists work to develop general models, while legal scholars seek to address specific legal questions.²¹ Hence, to some extent, our analysis must inevitably miss some of the nuances and contextual complexities unique to this Fund and the tragedy it was created to address. Nonetheless, we feel that there are important insights that can be gained from taking such a psychological perspective.

III. MORAL ACCOUNTABILITY FOR HARM

A. *Dealing with Issues of Moral Accountability is Important*

The following are our main points about moral accountability:

(1) Money can compensate some harms. Other harms require compensation through the allocation of moral responsibility to actors for their actions. The September 11th attack was a type of harm that people respond to by looking for moral accountability. As a result, people were seeking to determine moral responsibility for the event;

(2) The Fund treats the terrorist attacks as the law would treat an "accident" in that it focuses on providing compensation for harm as do civil compensation models.²² Victims are more likely to view the attack as an act of moral turpitude and a symbolic assault on America and, therefore, seek accountability for the occurrence of the event;

21. CHARLES M. JUDD ET AL., *RESEARCH METHODS IN SOCIAL RELATIONS* (6th ed. 1991).

22. DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES: RESEARCH DESIGN AND METHODS* (1991).

(3) The actions of the government in establishing the Fund communicated ambiguous information about whether the government itself was a suitable target for moral blame. On the one hand, the government did not engage in the type of “fact finding hearings” that are typically held after major disasters to identify those responsible for the events, providing a target for the public’s need to hold someone accountable.²³ This prevented labeling some particular government official(s) as careless or negligent, but fueled vague feelings that the Fund was a “cover up” to compensate victims in exchange for not publicly identifying the government authorities whose failures led to the event.²⁴ At the same time, the government itself implied that it was responsible in some way for failing to prevent the tragedy from occurring by compensating the victims because compensation typically flows from feelings of responsibility for harm.²⁵ Whatever the actual motives for compensation, we normally think that people are more likely to feel responsible to provide compensation when they acknowledge some responsibility for the event. By stepping in and offering compensation, the government invited some seeking accountability for the events of September 11th to think that the government was acknowledging that it did not exercise enough care in preventing the tragedy. If the government was trying to protect the airlines, the same logic holds. Unless the government felt that the airlines were in some way responsible, why would it feel the need to shield them from scrutiny in a court of law?²⁶ We normally think that innocence from wrongdoing is a defense in court, so the actions of the government support the inference that someone (possibly the airlines) was negligent.

B. The Legal View of What People Want in Response to Harm

Legislators, as well as legal scholars, tend to assume that what people want when they have been harmed is a fast solution that provides them with a high level of material rewards—monetary compensation—or, at the very least, a “fair” monetary settlement.²⁷ This assumption is evident in how the Fund is structured.

It is true that when an individual or an organization causes harm to others, we usually feel that the harm doer, or society, or both, should

23. Meyerson, *supra* note 3, at 15.

24. *Id.*

25. TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 103-32 (1997).

26. Meyerson, *supra* note 3, at 15.

27. Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claim*, 53 LAW & CONTEMP. PROBS. 199 (1990).

take some action to make things right. While responses to harm doing can take many forms, one of the most common types of response is for the harm doer, or some other agent, to compensate the victim for any damage, potentially including loss of income and pain and suffering.²⁸ Compensation occurs when someone provides material resources, such as money, in response to harm to others.²⁹ People can often make harms completely or partially “right” by some such forms of material compensation.

However, psychological research has shown that people often think beyond issues of the simple existence of, or amount of, compensation to whether or not “justice is being done.”³⁰ In other words, the psychological perspective argues that issues of justice and ethics are often the key to public feelings about responses to harm. Justice may or may not be “done” when people are compensated, depending upon the circumstances. Drawing from psychological research on justice, we argue that the Fund, established following the events of September 11th, is lacking when evaluated against moral criterion,³¹ and this feature of the plan helps us to understand why it has not been more enthusiastically received by its intended beneficiaries.

What we argue, in other words, is that this narrow legal view of “what people want” captures only some, and perhaps not the most important, elements of people’s reactions to harms. We suggest that there are many other factors that matter to people, at least as much as, or even more than, monetary awards and quick solutions, and especially when the harm done is of the nature of the September 11th attack.

C. *Compensation for Harms*

In some circumstances, harms are easily seen as being the consequence of unintended “accidents.”³² In such cases, compensation seems like a natural response to the victims of harm, and people who have been compensated generally feel satisfied with this response to their loss. With the many everyday accidents that occur in work settings, there are procedures for compensation that are based on the extent and nature of the harm—people are compensated for what they have lost in terms of lost income, medical expenses, and the

28. ELAINE WALSTER ET AL., *EQUITY: THEORY AND RESEARCH* 21-83 (1978).

29. Tyler, *supra* note 27, at 199-205.

30. *Id.*

31. TYLER ET AL., *supra* note 25.

32. HENSLER ET AL., *supra* note 22; see also DONALD HARRIS ET AL., *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* (1984).

like.³³ In other instances, however, material compensation is not considered an appropriate response.

People are less likely to find compensation acceptable in situations when the harm involves issues of moral wrong—culpability on the part of wrongdoers.³⁴ In such a situation, the primary focus of victims, their families, and society more generally, is on bringing to account “responsible people.”³⁵ In such settings, people are primarily interested in receiving an apology and restoring social order and respect, not in receiving monetary rewards.³⁶ This is not to suggest that compensation is unimportant. Rather, it fails to address the key issue on people’s minds—moral accountability.³⁷

Studies make clear that when someone has broken the rules of society and caused harm to another person, people want justice restored by dealing with the moral failure of the rule breaker in some way.³⁸ Most of the time simply compensating the victims is not considered enough. For example, a bank robber cannot simply return the money from a robbery and go free; society demands some type of additional response. This response deals with the moral dimensions of the original crime.

This interplay of moral and nonmoral motivations can also be found in people’s desire to punish criminal wrongdoers.³⁹ One reason why people might want to punish those who commit crimes is to deter future criminal conduct, both from the particular person involved as well as from others.⁴⁰ This would reflect a harm-based reaction to the problem—a desire to minimize future negative consequences. From a deterrence perspective, we should punish people in the way that best deters their future criminal conduct and serves as a message that deters the criminal conduct of others.

A second reason to punish wrongdoing is moral; the belief that criminal actions create a moral imbalance that must be resolved.⁴¹

33. HENSLER ET AL., *supra* note 22.

34. TYLER ET AL., *supra* note 25.

35. Robert J. Boeckmann, *An Alternative Conceptual Framework for Offense Evaluation: Implications for a Social Maintenance Model of Retributive Justice* (1996) (unpublished Ph.D dissertation, University of California, Berkeley) (on file with University of Omaha, University Library and University of California, Berkeley, Psychology Department).

36. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experience in the Civil Justice System*, 24 *LAW & SOC’Y REV.* 953 (1990).

37. TYLER ET AL., *supra* note 25.

38. *Id.*

39. Boeckmann, *supra* note 35.

40. Kevin M. Carlsmith et al., *Why Do We Punish?: Deterrence and Just Deserts as Motives for Punishment*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 284 (2002).

41. *Id.*

Experimental studies varying the characteristics of crimes indicate the great importance people attach to the second reason.⁴² The studies show that the primary motivation guiding reactions to wrongdoing is the motivation to restore a moral balance, not issues of deterrence.⁴³ So, for example, people punish someone who has done wrong even when there is no likelihood that the wrongdoer can or will repeat that action in the future.

We, thus, punish people, not primarily to deter them from future crime, but to restore a moral balance among the harm doer, the victim, and society. Of course, in the case of the September 11th attack, the immediate perpetrators were dead, but we believe that the desire to restore a moral balance remained, motivating people to search more broadly for terrorist leaders and others who could be the focus of an effort to seek accountability. Compensation for harm, in other words, was unlikely to meet the psychological need to restore a moral balance in this case. There were no harm doers to be punished, to apologize, or to otherwise acknowledge the wrongness of their actions, but nonetheless compensation was, at best, a poor substitute for the moral accountability that people were actually motivated to seek.

This inability to achieve a moral accounting leads to the inevitable fact that even though victims are almost certainly not going to get those responsible for the terrorist attacks to acknowledge wrongdoing and apologize—not in court or anywhere else—compensation will not feel as if it is a satisfying alternative. This inadequacy of compensation causes frustration, and people start to look elsewhere for a responsible party who can apologize, or at least be held accountable. Some people blame the airlines and others the Central Intelligence Agency or the Federal Bureau of Investigation for not being able to foresee the events that unfolded.⁴⁴ Whether actually responsible or not, these groups have the psychological virtue of being available to be confronted about the tragedy so accountability can be demanded and pursued.

We suggest that one reason some people are reluctant to sign up for the Fund, and are considering whether to sue either the airlines or the Saudi-Arabian government, is that they are still hoping to get their apology or acknowledgement of fault and responsibility from some group or organization. This is much more important than a hope of getting money by going to a trial. Hence, by buying into the Fund, we argue that people feel they are losing their opportunity to eventually

42. *Id.*

43. *Id.*

44. Ripley, *supra* note 3, at 26.

confront those responsible, however unrealistic this future possibility might actually be.

It might initially seem “far fetched” to hold the United States government responsible for the September 11th tragedy. However, the government can be seen as encouraging this connection by setting up the compensation fund. While it may be that the actual motivation for the Fund was to help the airlines, many people do not connect the Fund to the financial health of the airlines. Instead, we propose that there is a natural suggestion in the creation of the Fund that the government must feel some responsibility for the event because it is compensating victims.

We argue that it is plausible that the government feels responsible because it acknowledges having the responsibility to find and stop such attacks or, alternatively, because the government feels that World Trade Center was an attack against society as a whole—a symbolic response to government policies—and, hence, the government is in some broader sense responsible for provoking this response.⁴⁵ In either case, the suggestion that the government is responsible leads to public views that accountability is important.

People are more willing to believe that poor management, or even negligence, has occurred when they lack trust in the character, motives, or intentions of the authorities with whom they are dealing. Corporations, for example, suffer from low public confidence in their leaders, resulting in a greater willingness to mistrust their actions because they are viewed as indifferent or uncaring.⁴⁶ Evidence from public opinion polls points to a decline in trust in government, leaving government authorities more open to similar types of “sinister” attributions.⁴⁷

D. Moral Harm to the Community

While we would generally argue that people do not accept compensation as a complete response to intentional harm done by others, there is a particular aspect of the attacks that works against the acceptance of compensation: The attacks were a symbolic attack against American society, in addition to an attack on individuals.

45. Studies suggest that it is an event of just this type that is most likely to be viewed as calling for a collective response. See Boeckmann, *supra* note 35.

46. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000).

47. *Id.*

According to a framework of wrongdoing developed by Robert J. Boeckmann,⁴⁸ which is shown in Figure 1, compensation is least likely to be viewed as a suitable response to symbolic attacks on society (i.e., attacks like the September 11th attack). Such symbolic attacks require “a moral” response. In fact, people both: (1) react most strongly to a collective, symbolic, attack; and (2) are least likely to see restitution as a suitable response.

	Who is the victim?	
	An individual	Society
What is lost?		
Material resources, Money	Robbing someone of money	Embezzling government Funds
Symbolic resources	Slander, libel	Defiling national symbols; violating collective values

Figure 1. The nature of rule-breaking offenses (Boeckmann, 1996)

The attacks on September 11th caused all kinds of harm in addition to being highly immoral. They hurt both individuals and society as a whole. It was an attack on American values as well as an event that caused a great deal of material and human loss. As a result, there is not one single way to restore justice. Although money might compensate for the loss of steady income, buildings, and businesses, people feel that material compensation is not enough to restore justice and resolve the moral issues involved.⁴⁹ But it does not make up for the losses of loved ones or the insult to American society and its values, which the attacks unquestionably were intended to target. It is the attack on American society, in particular, that calls for some type of moral accounting.⁵⁰

48. Boeckmann, *supra* note 35.

49. *Id.*

50. Interestingly, it is also the symbolic aspect of the attack that lends plausibility to the idea that the government is responsible. There were earlier bombings and other types of attacks on American soldiers and embassies. The government knew, in other words, about the threat to America and could “in theory” be viewed as negligent for failing to do something to respond to this threat. Such a view is certainly more realistic than thinking that the terrorists had something against the particular people or companies in the World Trade Center. The World Trade Center and its twin towers were important as symbols of American commercial power, rather than due to any particular people or companies that were within it.

E. The Need for a Moral Accounting

The immediate perpetrators of the attacks died in the attacks.⁵¹ However, the need for moral accountability remains. This need is expressed in the desire to search for those who funded, trained, or guided the attack. And the government responded to this need by making efforts to find and punish members of the groups behind the attack.⁵² It is hard to fault the government, which has gone to Afghanistan and Iraq to root out terrorists, for lack of effort to find those accountable, even though they remain elusive and have not been brought to account.⁵³

How does blaming the government fit into this framework? The core psychological argument is that people feel the need to find accountable parties, and that this need is stronger when events are more serious in their consequences.⁵⁴ People find it troubling to believe that accidents with widespread and devastating consequences can occur without the negligence of someone. If people believe that some party is responsible, they can then believe that the event could have been controlled. Further, this need to hold someone accountable is not linked only to events that people cause. It can involve judging people negligent or responsible for failing to exercise due care to prevent accidents or other unintended events. As human beings, we feel uncomfortable believing that mass harms can occur by chance, and that we are, therefore, powerless to defend against them. So, we seek a way to view their occurrence, or at least the damage they cause, as due to the failure of some person (or persons) to exercise due care. If we believe this, we can feel that such events can be prevented in the future. However, it is easier to have such a feeling if we are able to point to a person or organization that “failed,” making it clear how to correct the errors that made the problem possible.

When disasters occur—whether the *Challenger* explosion, the sinking of the *Titanic* or the *Indianapolis*, the attacks on Pearl Harbor, or the September 11th attack—there is often an examination of why the event occurred that can, at the extreme, even become an exercise in scapegoating—holding a single person or persons responsible for

51. Meyerson, *supra* note 3, at 15.

52. THOMAS L. FRIEDMAN, *LONGITUDES AND LATITUDES: EXPLORING THE WORLD AFTER SEPTEMBER 11* (2002).

53. *Id.*

54. Elaine Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73 (1966).

events that were beyond their control or foreseeability.⁵⁵ The commander in charge during a military failure, or the head of an agency unprepared for an emergency becomes the focus of the public's need to identify and blame a responsible person. In this same way, we propose that our anger after the September 11th tragedy has focused on one person—Osama Bin Laden—whom we have been unable to bring to account. Hence, people expand their range of potentially responsible people to include government officials and the airlines. Showing that any of these people or agencies could have prevented the event provides the psychologically comforting feeling that such events are not out of our control.

In situations in which there is evidence of negligence or irresponsible conduct, people react in moral terms to harm that results from reckless conduct, or the failure to exercise due care, even when they acknowledge that those in positions of responsibility did not intend to cause harm.⁵⁶ In other words, when harm results from errors within organizations, or the lack of "adequate" safeguards, people are morally angered even though there is no evidence of intentional wrongdoing. For example, no one suggests that the engineers at NASA intended for the *Challenger* shuttle to explode,⁵⁷ but the general feeling is that the engineers exercised too little caution and showed too little concern for the safety of those who died. Similarly, when the oil tanker, the *Exxon Valdez*, ran aground in Alaska, people did not feel that Exxon intended to cause environmental harm by putting a captain with a history of alcoholism in charge of the ship. However, it was felt that too little care was exercised in preventing such a mistake from occurring.

In the case of the September 11th attacks, we suggest that the public felt a need to establish whether the agencies of the government exercised "due care." We argue that this need could best be addressed by an effort to explore the causes of the event—by hearings or by some form of investigation into what the government knew in advance, and what it did to try to prevent the attack. Ironically, in March 2003, an independent commission created by the President began holding hearings about the causes of the attack.⁵⁸ This is over one and one-half

55. Tom R. Tyler & Heather J. Smith, *Social Justice and Social Movements*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 595 (Daniel Gilbert et al. eds., 4th ed. 1997).

56. Boeckmann, *supra* note 35.

57. DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* (1996).

58. The Commission was entitled the National Commission on Terrorist Attacks Upon the United States. For information about the Commission and its hearings, see <http://www.9-11commission.gov> (last visited Nov. 11, 2003).

years after the initial event. Hence, the government did not immediately provide people with any official way to identify and evaluate evidence of government responsibility for the event.

Given that people need to have some type of moral accountability, we argue that this failure to provide any forum for moral reckoning created a psychological problem for the American public, and especially for victims' families. Psychologically, people want a moral accounting, and money is not a substitute. By providing compensation allowing a search for the "truth," the government provided a poor substitute for what people wanted and needed. This situation created the conditions under which people could easily feel that a "cover up" was occurring, and that the money in the Fund was "hush money" to buy silence and hide government irresponsibility and wrongdoing. This is, of course, not to say that such beliefs are true—simply that they are more likely to develop under particular conditions—and we suggest that the Fund met many of those conditions.

F. People Reject Putting a Monetary Value on Moral Harm

We began by suggesting that the key to understanding public reactions to harm doing is to understand the moral and social implications of harm. From this perspective, it is easy to see why the public often views offers to materially compensate for harms to collective resources and symbolic targets as failing to deal with the broader moral dimensions of harm. People have difficulty regarding money as an appropriate compensation for harm if that harm seems to have been intended and, hence, reflects moral wrong. Attempting to compensate for a moral wrong provokes anger and moral outrage. In other words, "there is a strong taboo against using market pricing with regard to entities that people regard as intrinsically belonging to the domain of communal sharing,"⁵⁹ in this case, a common commitment to the group and group rules, values, and institutions.

How do people evaluate the appropriate amount of compensation for a moral harm? Our argument is that people reject such evaluations, seeing such a question as inappropriate. In other words, when you ask to buy my child and I say no, raising the price does not change the situation; instead, it makes me angry. If people view a behavior as morally wrong, they do not consider the costs and benefits associated with that action, but are simply less willing to engage in that behavior.

59. Alan Page Fiske & Phillip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 *POL. PSYCHOL.* 255, 278 (1997).

People do not trade-off moral values against the gains and costs associated with such behavior.

In the case of harm resulting from an act of violence, these findings suggest that people have trouble accepting compensation for immoral actions.⁶⁰ If people regard such harm as developing from bad motives, they are unlikely to see compensation alone as an appropriate response. Similarly, for many workers who develop cancers or other occupational diseases from exposure to chemicals at work, many of whom viewed their companies as negligent in their conduct and indifferent toward employees, compensation is inadequate.⁶¹ Instead, they want their day in court so that they can confront the company and gain a public acknowledgment of the company's moral wrongdoing.⁶² If the company will not apologize, the company can be brought into court and confronted with evidence of moral wrongdoing and condemned publicly by legal authorities, the victims, and members of the public.⁶³

Because of the suggestions by many that some agencies in the government were negligent, or that the airlines were negligent, or both were negligent, we suggest that the offer of compensation seems especially suspect when coupled with the failure to vigorously try to determine why the events occurred and who might be responsible. Ironically, we argue that the government encouraged this line of thinking when it set up the Fund and, thereby, suggested that someone felt the government or the airlines *were* in some way responsible for the September 11th events.

G. *Moral Accountability and Compensation*

Our basic argument is that the September 11th tragedy is one that is not well-suited for a compensatory response. People would be much better served psychologically by an effort to fully and completely air issues of potential negligence and culpability. Absent such an effort, compensation has the tone of trying to "buy people off" and "cover up" the true issue—moral accountability.

We certainly do not want to suggest that the American government is either necessarily responsible for the September 11th attack or that it failed to respond adequately to the event after it occurred. Clearly the government has made major efforts to deal with terrorism, includ-

60. *Id.*

61. Tyler, *supra* note 27, at 199-205.

62. *Id.*

63. *Id.*

ing our military efforts in Afghanistan and Iraq.⁶⁴ However, the government did not respond openly to the desire of the families of victims for a search for responsibility in the aftermath of the event.⁶⁵ We argue that such a search would have helped to mitigate bad feelings in the wake of this tragedy. Further, such a search for answers could have occurred in parallel to the operation of the Fund, which would have minimized suggestions that the Fund was designed to buy the silence of victims or “buy them off.”

IV. DISTRIBUTIVE JUSTICE AND COMPENSATION FOR HARM

Distributive justice is important. When people focus on material compensation, their perspective is likely to be one of distributive justice. People will be as much, if not more, concerned about whether or not they receive a fair amount as they are concerned about how much they receive. The distributive justice focus is desirable because it facilitates the distribution of compensation across victims in ways that will generally be viewed as satisfactory.

Authorities encourage a distributive fairness focus when they articulate a clear message about the fairness norms that are appropriate to the situation. When people have a clear sense of the principles of entitlement that ought to be applied, they are most likely to evaluate their own outcomes in distributive justice terms.

The Fund does not encourage this distributive justice focus. It lacks a clear, moral rationale and, as a result, the appropriate principles of distributive justice are ambiguous. Government needs to establish a clear principle of justice when it creates a program, and it needs to articulate and “sell” that principle to the recipients and the public more generally.

A. *Distributive Justice*

When compensation is a reasonable response to harm, the question that must be addressed is: How much compensation is appropriate? People need to feel that they received “enough” compensation for the harms that occurred. When people receive compensation, they evaluate that compensation, at least to some degree, through their sense of general standards of entitlement or deservedness. People do not simply ask how much they have personally received, but also consider whether things have come out fairly, such that their outcomes correspond to broader standards about what is appropriate under the cir-

64. FRIEDMAN, *supra* note 52.

65. Meyerson, *supra* note 3, at 15.

cumstances.⁶⁶ It is this non-self-interest aspect of distributive justice judgments that is important because it provides a way to effectively distribute scarce or contested resources.

The finding that people react to the fairness of the outcomes they receive is widely replicated within the field of distributive justice research. Literature shows that people are: 1) more satisfied when they get what they deserve rather than when they receive “too much” or “more than they deserve;” and 2) will leave a situation in which they receive too much to go to a situation in which they receive lesser, but “fairer,” outcomes.⁶⁷ This finding is a promising one for those trying to compensate for harm, as well as for those seeking to resolve disputes over the distribution of scarce resources more generally. It suggests that authorities can gain deference for compensation decisions that give people less than they might want, if the resources are allocated in ways that correspond to principles of distributive fairness.⁶⁸

B. *Three Distributive Fairness Norms*

A difficulty in trying to ensure that the recipients of compensation feel that they have received a fair outcome lies in the availability of multiple principles or standards people can potentially employ to judge their deservedness. Three primary principles of distributive fairness are often articulated: *equity*, *equality*, and *need*.⁶⁹ Equity involves the distribution of resources based on merit or productivity; equality provides for equal distribution of resources across people; and need involves giving more to those most in need.⁷⁰

Within the United States, there is a general consensus that equity is the appropriate policy to govern the distribution of rewards within work settings.⁷¹ Employees, therefore, typically accept differences in pay that they think are linked to differences in skills, performance, or market value. In political or community settings, people usually endorse the principle of equality—equal rights under the law, “one person, one vote.”⁷² Just as people resist the idea of equal pay, irrespective of performance, they resist the idea of basing political rights on ability or competence. For example, arguments that only the “knowledgeable” should be allowed to vote are widely opposed. Fi-

66. WALSTER ET AL., *supra* note 28.

67. TYLER ET AL., *supra* note 25, at 45-74.

68. *Id.*

69. MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE* 38 (1985).

70. TYLER ET AL., *supra* note 25, at 45-74.

71. Tom R. Tyler, *Justice in the Political Arena*, in *THE SENSE OF INJUSTICE* (Robert Folger ed., 1984).

72. *Id.*

nally, within families there is general agreement that need is the key principle governing allocation, and parents would not typically feel that they should spend equal time with all children or, especially, that the brightest children should receive more attention or resources.⁷³ Rather, they might think that the child with the most difficulties should receive the most attention. There are differences in the degree to which particular people hold these views, but studies suggest that the three principles outlined generally dominate the areas mentioned, at least within the United States.⁷⁴

The difficulty with the existence of at least three possible standards of distributive fairness is that it invites people to interpret their situation in ways that bring principles more favorable to themselves to bear on the issue of what is fair. So, highly skilled workers can view paying by equity as fair, while the disadvantaged can see it as appropriate to distribute resources via need. Multiple possible appropriate standards invite self-serving views of fairness. Such self-serving thinking is not conscious or intentional, but it does cloud people's assessments of fairness.

One of the important functions of society and of third-party authorities is to make it more difficult for people to engage in self-justifying judgments. Society does so by clearly articulating standards of fairness and, through those standards, (1) labeling the behavior of those who harm others as wrong; and (2) clarifying what will make things right.⁷⁵ Mediators and judges put moral force behind the argument that particular standards represent fairness in a particular situation.

Victims would like for the harm that has been done to them to be repaired but need a framework within which to understand what constitutes a fair response to that harm. What is it reasonable to expect a harm doer, or society, to do in response to the harm that has been done? Victims are most likely to accept compensation when there are principles that tell them how to evaluate the fairness of that compensation, so that they can feel that they have balanced the scales of justice in response to a particular harm.⁷⁶

A third party authority can improve the likelihood that the victim will be satisfied with some settlement involving compensation by framing the problem in terms that make clear, both which principles of distributive justice should apply, and what their implications are for

73. *Id.*

74. *Id.*

75. WALSTER ET AL., *supra* note 28, at 21-83.

76. *Id.*

appropriate compensation.⁷⁷ When authorities clearly state the ethical framework that applies, that clear statement makes it more likely that society and the victim will agree about appropriate compensation.⁷⁸ This leads to a greater willingness to provide this compensation and increases the likelihood that victims will accept it and feel satisfied. People are, in other words, motivated to balance the scales of justice, but it is not always obvious how that can be done. Law and legal authorities articulate the standards that tell people what fairness means in a given situation so that they can feel that justice has been done.

C. *The Problem of Distributive Justice and the Victim Compensation Fund*

The Fund poses a twofold distributive justice problem. First, what are the principles of justice that define who should receive compensation? For example, do the families of victims deserve any compensation at all from the government? Second, what distributive justice principle should be employed to distribute money among those who have been judged to be entitled? Both of these questions are essentially policy questions that have to be answered and clearly explained by authorities. How authorities reach each answer, and whether or not each is explained to recipients of compensation, shapes people's feelings of fairness and, thus, acceptance of the decisions made.

Regarding the first problem, Peter Schunck, from Yale Law School, has been quoted in the *New York Times*, as saying: "It's impossible to justify this money in terms of a defined system of justice."⁷⁹ Because funds have *not* been provided for this purpose in response to prior terrorist attacks, or in response to prior natural disasters, we argue that it is not clear why justice is viewed as involving compensation of this type in this situation.

This raises the question of how to draw the boundary around those entitled to the "justice" of having their losses compensated. In other words, we need to consider whether the range of events for which people are compensated should be expanded beyond the victims of the September 11th attacks to include victims of other foreign terrorist actions on American citizens and military, other domestic terrorist actions such as the Oklahoma City bombing, or even other worthy or noble deaths, such as people who have died while rescuing or trying to

77. *Id.*

78. *Id.*

79. Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine) at 94.

rescue others. Or perhaps criterion need to be narrowed to exclude some or all of those currently in the Fund. Psychologists have talked about this issue in terms of defining the scope of justice—the domain of those entitled to the application of justice norms.⁸⁰

Although defining the domain of those entitled to compensation is not a key issue within the Fund, the establishment of the Fund, and public dissatisfaction with it, are bound up in issues of inclusion and exclusion. Victims of other disasters and terrorist acts have raised questions about why they are excluded from compensation.⁸¹ In the future, clearly defining the boundaries of compensation is likely to be a major issue for government. It seems likely that future disasters or terrorist acts will be followed by efforts to argue based upon principles of distributive fairness that victims and their dependents are as entitled to compensation as were those associated with the September 11th attack.

Within those “entitled,” a class clearly defined by Congress in the case of the September 11th attack, the question is which justice principles should apply: need, equality, equity, or others? In fact, if the Fund was intended by Congress to replace the tort system and protect the airlines from lawsuits, we would argue it should be viewed as an alternative to the tort system. As a replacement for a tort lawsuit, we might expect equity to apply, and to involve taking projected lifetime earnings into account. So, the Fund takes into account “economic losses” for “the loss of earnings or other benefits related to employment, medical expense loss, replacement-service loss, loss due to death, burial costs and loss of business or employment opportunities.”⁸² In other words, the Fund might be viewed as compensating for financial loss, as would occur in tort law.

However, there is a strong governmental aid aspect to the plan, which is after all a government assistance program, suggesting the use of the principle of equality (equal status and rights). When the Fund seeks to compensate for noneconomic losses, such as emotional pain and suffering, it is hard to see why one person’s pain is worth more than another’s. We argue that not using equality seems to suggest that the government views some lives as more valuable than others—a violation of the fundamental principle of communities that everyone is equally entitled to status and rights, irrespective of economic position. It is unclear how the government decides how much one person’s life is worth, and why one citizen is worth more than another citizen. (Or,

80. DEUTSCH, *supra* note 69, at 38.

81. *Id.*

82. *See* September 11th Victim Compensation Fund of 2001, *supra* note 1.

for that matter, is a citizen worth more than a victim who is not a citizen?)

It is this aspect of compensation that is normally minimized by managing tort compensation through the legal system. In tort law, people seek to compensate for financial damages, linking compensation to the number and amount of damages.⁸³ From that perspective, the death of those who would have earned more is a more damaging event—the loss is greater. Hence, from a tort perspective, not all lives are worth the same, while from a political perspective, everyone is equally entitled to government help.⁸⁴

The disaster relief aspect of the plan also links it to another principle of distributive justice—need. In other words, the Fund is also a social welfare fund. When agencies, such as the Red Cross, dispense services following a disaster, for example, they typically provide food, clothing, and shelter to those who are in need. There are a number of social welfare funds, such as “welfare,” supported by the government to provide funds to various groups in our society who meet principles of “need.”⁸⁵ Like equity, this use of the need principle legitimizes the unequal provision of resources across those impacted by the tragedy.⁸⁶ However, in this case, the principle justifying unequal treatment is a person’s immediate need. A person whose house was destroyed in a hurricane, for example, would receive shelter and food, while someone whose house was not destroyed would only receive food. We suggest that viewing the Fund as “need-based relief” makes sense of the provision that the donations people receive from private organizations should be subtracted from their Fund settlements. Because part of their needs have been met by charities, in other words, people should receive lower levels of compensation from government.

Again, the potential applicability of different principles of distributive justice highlights the central point. Different approaches to those victimized by disaster are linked to different principles of fairness. By failing to articulate a clear principle of fairness by which it would operate, the Fund invited people to interpret its goals in self-serving ways. All that the law says about the purpose of the Fund is as follows: “It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of

83. Tyler, *supra* note 27, at 199-205.

84. *Id.*

85. FAYE L. COOK, WHO SHOULD BE HELPED? (1979).

86. *Id.*

September 11, 2001.”⁸⁷ This wording does not communicate what justice principle is the main motive behind the Fund and, thus, creates the risk that people will interpret justice in a self-serving manner.

We argue that discontent with Mr. Feinberg, based on his management of the Fund, could perhaps have been prevented had it been clear from the start what the main distributive justice principle was motivating the creation of the Fund.⁸⁸ Further, this would have led victims to be more satisfied with their own settlements, whether they sued or not. The government, in other words, needed to establish and publicly articulate the ethical framework out of which the Fund was to operate. Unfortunately, we argue that it did not do so.

V. PROCEDURAL APPROACHES TO COMPENSATING FOR HARM

A. *The Allocation Procedure (i.e., Procedural Justice) is Important*

Receiving fair or even favorable compensation, and having some type of moral accounting, are not the only issues that people care about. People are also strongly affected by the fairness of the procedure used to make allocation and culpability decisions.

Fair procedures are especially important when it is difficult to determine is an appropriate compensation for a loss, or when moral responsibility is unclear. In such a situation the only way people have to estimate whether or not the outcome is appropriate is by judging how that outcome was reached (i.e., the procedure).

The Fund lacks many of the procedural features that have been shown to facilitate the willingness to accept decisions made by third-party authorities:

(1) The manner in which the Fund was initially created lacked these features, because there were no hearings or other forums in which people could articulate their views about what type and level of compensation was appropriate. People did not have the opportunity to have input into creating the Fund and establishing its operating principles. Instead, Congress established the Fund in a short period of time without public hearings, and the initial design of the plan did not call for hearings involving the families of victims to discuss how compensation should be determined.⁸⁹

(2) The manner in which the Fund was to be implemented also lacked features such as participation, transparency, and accountability,

87. See September 11th Victim Compensation Fund of 2001, *supra* note 1.

88. Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, *NEW YORKER*, Nov. 25, 2002, at 42-49.

89. See September 11th Victim Compensation Fund of 2001, *supra* note 1.

that are typically viewed as part of fair procedures.⁹⁰ Victims' families were not entitled to hearings, nor were the rules of allocation clearly stated. Further, there were no appeal mechanisms.⁹¹ Placing most of the authority for implementation in the judgments of one person, no matter how competent or well motivated, does not reflect procedural justice.⁹²

The final psychological perspective on compensation for harm is linked to a person's reactions to the procedures used when deciding how to respond to harm. Here our concern is with efforts to respond to harm by aiding the victims and their families. We want to distinguish this procedural issue from our earlier discussion of procedures for finding the responsible parties for the September 11th tragedy. While this section will focus on determining how to help victims, many of the points we make also apply to the issue of appropriate procedures for determining responsibility for events.

An extensive psychological literature on how legal authorities can gain public acceptance for their decisions exists.⁹³ This research has found that people focus their judgments on the procedures through which compensation decisions are made.⁹⁴ In other words, people judge the appropriateness of the outcome by assessing the fairness of the procedures by which that outcome is produced.⁹⁵ This procedural justice effect is distinct from people's reactions to the appropriateness of the compensation outcome itself.⁹⁶

The procedural justice effect is powerful and widespread.⁹⁷ It has been found in studies of people's willingness to accept settlements in cases of automobile accidents⁹⁸ and other civil suits.⁹⁹ It has also been found in studies of the willingness to accept the policies of regulatory agencies,¹⁰⁰ laws, and the decisions of police officers and judges.¹⁰¹

90. For a discussion of the elements of fair procedures, see E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

91. See September 11th Victim Compensation Fund of 2001, *supra* note 1.

92. See LIND & TYLER, *supra* note 90. For an application to legal decision making, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

93. See LIND & TYLER, *supra* note 90; see also Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000).

94. See LIND & TYLER, *supra* note 90; see also Tyler, *supra* note 93, at 117-25.

95. See LIND & TYLER, *supra* note 90; see also Tyler, *supra* note 93, at 117-25.

96. Tyler, *supra* note 93, at 117-25; see also Tyler & Smith, *supra* note 55, at 595-629.

97. TYLER ET AL., *supra* note 25.

98. ROBERT J. MACCOUN ET AL., *ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM* (1988).

99. E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993).

100. Tom R. Tyler & Peter DeGoey, *Collective Restraint in a Social Dilemma Situation*, 69 J. PERSONALITY & SOC. PSYCHOL. 482 (1995).

Across a variety of settings, the fairness of decision-making procedures shapes reactions to decisions.

B. *Weighting Procedures Over Outcomes*

Evidence supporting the importance of procedural justice is found in the literature examining the circumstances under which people choose to go to court to seek redress for an injury caused by others, or to overturn a decision made by a judicial authority.¹⁰² The traditional argument is that people seek redress when they think they are likely to be successful. This argument explains people's claiming decisions as rational cost benefit calculations.¹⁰³ Interestingly, recent research does not support this instrumental perspective on claiming. E. Allen Lind, J. Greenberg, K.S. Scott, and T.D. Welchans, for example, interviewed employees recently terminated by their companies who filed a formal claim because of the termination.¹⁰⁴ Their analysis showed that estimates of the likelihood of winning had only a small influence on claiming, as did the magnitude of the financial hardship caused by termination.¹⁰⁵ Moral responsibility for the termination—whether it was viewed by the employee as due to his or her own work failures or to unfair actions by management—had no significant influence on claiming.¹⁰⁶ Strikingly, employees were most strongly influenced in their claiming decisions by their judgments of the fairness or unfairness of the termination procedures.¹⁰⁷

Robert J. Bies and Tom R. Tyler conducted a similar, but less extensive, study using a smaller sample of employees.¹⁰⁸ At the time of the study, the employees were working for their company, but had a recent experience with management about which they might want to file a claim.¹⁰⁹ An examination of correlations indicated that employees were slightly more likely to consider claiming when they thought they might win ($r = .09$) and when they felt that the decision against which

101. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002).

102. Tyler, *supra* note 27, at 199-205.

103. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 *LAW & SOC'Y REV.* 631 (1980-1981).

104. E. Allan Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful Termination Claims*, 45 *ADMIN. SCI. Q.* 557 (2000).

105. *Id.*

106. *Id.*

107. *Id.*

108. Robert J. Bies & Tom R. Tyler, *The Litigation Mentality in Organizations: A Test of Alternative Psychological Explanations*, 4 *ORG. SCI.* 352 (1993).

109. *Id.*

they are reacting had been an unfair one ($r = .28$).¹¹⁰ However, there was a stronger connection between whether they considered claiming and whether they thought the decision-making procedures were unfair ($r = .46$), whether they felt that they were not treated with respect during the decision-making procedures ($r = .45$), and whether they did not trust the motives of management ($r = .37$).¹¹¹

These findings suggest the importance of making decisions in ways that people will view as fair.¹¹² In the studies above, people's evaluations of the fairness of the procedures used to make decisions shaped their claiming behavior.¹¹³ If people were fired or laid-off, but the procedure involved was a fair one, their likelihood of suing was low. This was true even if they felt that they would win the suit.

Other studies suggest that procedural fairness also shapes the willingness to accept decisions and to follow rules,¹¹⁴ and influences evaluations of authorities and institutions, commitment to organizations, and a variety of other important social behaviors.¹¹⁵ The repeated demonstration that people are concerned about the fairness of the procedures by which outcomes are determined, not just what those outcomes are, has several implications.¹¹⁶

For example, in cases concerning widespread worker exposure to asbestos, liability for a particular person's injuries is sometimes determined without a hearing, using answers to a questionnaire regarding exposure to asbestos. The courts use this approach to distribute settlements to large groups of victims quickly. However, instead of gratefully receiving their rapid settlements, injured parties have been angered by the denial of their "day in court." In other words, an effort by the judicial system to reform in order to better meet the needs of the public has not been successful due to an inaccurate understanding of what people really want in this situation.¹¹⁷

The importance of procedural fairness may seem surprising. This is the case because current thinking about people's satisfaction is largely shaped by the belief that people are motivated primarily by self-inter-

110. *Id.*

111. *Id.*

112. Tyler, *supra* note 27, at 199-205.

113. See Lind et al., *supra* note 104, at 557-90; see also Bies & Tyler, *supra* note 108, at 352-66.

114. TYLER, *supra* note 92.

115. Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 115 (1992); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *DUKE L.J.* 703 (1994).

116. Tyler, *supra* note 27, at 199-205.

117. *Id.*

est.¹¹⁸ It is believed, as a consequence, that people are unhappy when they fail to receive favorable outcomes. In the case of taking claims to the courts, for example, it has been assumed that people are discontented when they receive unfavorable verdicts or settlements, when court costs are too high, or when delays in litigation are too long. These assumptions are typical of those which develop from what social psychologists have labeled the “myth of self-interest”—the belief that people are basically motivated by personal gains and losses.¹¹⁹ The results of studies of the public suggest that the basis of people’s actual reactions differs substantially from that which would be predicted by this “self-interested” image of the person.¹²⁰

C. *When Do Procedures Matter?*

Sometimes the cost of harm is easy to estimate. For example, people may have hospital bills or know the exact amount of income they have lost. However, the degree of subjective harm is often more ambiguous. For example, how much harm is involved in the “pain and suffering” associated with an illness? Or what is the amount of harm caused by the loss of an arm or of a life? In such situations, estimates of the equitable amount of compensation for an injury are very subjective and, therefore, a social judgment. As is true with evaluations of responsibility for an injury, such judgments are shaped by social values dictating which standards of fairness are applicable and by factors that shape the nature of the subjective comparisons people make.¹²¹ Hence, people are influenced by the manner in which the problem is framed. The fairness of a decision-making procedure is especially relevant when it is difficult to determine what is an appropriate compensation for a loss because the only way people have to estimate whether or not their outcome is fair is by judging how that outcome was reached.

Procedures are also important when there are differences among people regarding the “value” of the harm to the victim. In this situation, people may have a clear sense of how much harm has occurred, but people differ in their estimates of the value of the harm. Such situations are likely to occur when people’s views are influenced by their diverse ideologies and social values. Fair and agreed upon procedures can also help to satisfy different groups of people who have

118. Dale T. Miller & Rebecca K. Ratner, *The Power of the Myth of Self-interest*, in CURRENT SOCIETAL CONCERNS ABOUT JUSTICE (Leo Montada & Melvin J. Lerner eds., 1996).

119. *Id.*

120. *Id.*

121. TYLER ET AL., *supra* note 25, at 14-42.

varying opinions on what kind of ideology the compensation should be based on—need, equity, or equality, as discussed above.

Psychological research further suggests the particular types of procedures that will enhance the acceptance of decisions.¹²² One example is the use of mediation. While legal authorities have criticized informal legal procedures such as mediation, these procedures have been found by psychologists to be very popular among disputants. In fact, civil case mediation has been found to produce a greater willingness to accept decisions than formal trials.¹²³ Why? Because these procedures are judged to be fair by people who see the opportunity to participate in decisions regarding their own welfare.¹²⁴

D. *The Meaning of Procedural Fairness*

The key to understanding how to design effective procedures is to understand what people mean by a “fair” procedure. Studies suggest that four elements of procedures usually influence judgments about fairness.¹²⁵ First, whether procedures allow people an opportunity to state their case; second, whether authorities are viewed as neutral (i.e., unbiased), honest, and principled in their decision-making; third, whether the authorities involved are seen as benevolent and caring (i.e., are “trustworthy”);¹²⁶ and fourth, whether the people involved are treated with dignity and respect.¹²⁷

1. *Voice/Participation*

People seek fair solutions to problems involving harm. In order for decision-makers to determine what is fair, they need to have as much information as possible about the nature of the harm that has been done. Further, they need to know the concerns of the victims. Victims believe that a fair procedure should allow them as much opportunity as possible to present evidence about the nature of the harm they have suffered and their views about what should be done. For victims to have input, they must be given a chance to participate in the process of deciding how to resolve the harm. In the area of criminal justice, for example, it has been found that victims regard criminal procedures as much fairer when they are allowed to participate by

122. LIND & TYLER, *supra* note 90.

123. Rosselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323 (1995).

124. LIND & TYLER, *supra* note 90.

125. Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

126. LIND & TYLER, *supra* note 90.

127. Tyler, *supra* note 125, at 301.

describing their experiences and by making arguments about what should be done with the offender.¹²⁸

2. *Neutrality*

People recognize that social rules are designed to ensure that all members of society receive reasonable levels of outcomes over time. When dealing with social authorities, people seek evidence that they are not disadvantaged relative to others. For authorities to be viewed as fair, they need to demonstrate evenhandedness or impartiality. They can do so by equal treatment of all; by not allowing their personal values or relationships to influence their actions, and by using objective criteria as a basis for their opinions. All of these actions assure the people who deal with authorities that their decisions are reasonable and ought to be accepted.

3. *The Trustworthiness of Authorities*

Studies suggest that people are very concerned about their inferences concerning the motives of the authorities responsible for finding appropriate ways to deal with harm. If victims feel that the authorities care about their needs and concerns, and are trying to find fair ways to deal with the harm that has been done, they are much more willing to accept a wide variety of solutions to that harm.¹²⁹

4. *Treatment with Dignity and Respect*

One consequence of doing harm to others is to diminish their status within their own eyes and to raise questions about their status in society.¹³⁰ A central function of procedures enacted following victimization is to help restore the status of the victim.¹³¹ This is done through treatment with dignity and respect. Research suggests that people value respectful treatment by authorities, which enhances their feelings about themselves and their position within society. Conversely, social authorities may seek to diminish the status of harm doers. The judge may, for example, publicly condemn the behavior of a harm doer. Social authorities may take on the role of labeling behavior as morally wrong and shameful to make up for the unwillingness of harm doers to apologize and act contrite. When harm doers refuse to ac-

128. *Id.*

129. Peter DeGoey & Tom R. Tyler, *Trust in Organizational Authorities: The Influence of Motive Attributions on Williness to Accept Decisions*, in *TRUST IN ORGANIZATIONS* 331 (Roderick M. Kramer & Tom R. Tyler eds., 1996).

130. TYLER ET AL., *supra* note 25, at 181-206.

131. *Id.*

knowledge the wrongness of their own conduct, social authorities can take on the role of condemning their behavior in the name of society.¹³²

E. Implications for the Fund

Procedural justice can be expected to play an especially big role in the case of the Fund. As was noted above, people typically have little basis for objectively determining the correct or appropriate compensation for harms. Hence, they will depend heavily on their evaluations of the procedures used by authorities to make such determinations. This is especially true in the case of an event without prior precedent like the September 11th tragedy. If not unique, the events of September 11th were hardly typical, so there is little basis for people to draw on when seeking to develop feelings of entitlement. And, as we have noted, there are multiple principles of justice upon which people might draw. Finally, it is a situation that is very ideological, so there may be differences about what is appropriate or reasonable.¹³³

In the case of the attacks of September 11th, the issue of compensation is literally without precedent. As a result, neither legislators nor victims were able to look to prior situations to make an initial determination of how much compensation was appropriate. As discussed in the section on distributive justice, Congress did not solve this matter by clarifying on what distributive justice rules compensation should be based. Hence, it is going to be very difficult for beneficiaries of the Fund to look at their compensation offer and determine whether justice has been done. As a result, people will estimate the fairness of the Fund by looking at the procedures used to distribute the money.

As we noted above, research has shown that a key element of establishing perceptions about the fairness of procedure is allowing people to have input into the process.¹³⁴ People want to be able to express their views about what should be done in response to harm, and one way they can do so is by being given the chance to state their preferences for how to resolve the issues posed by the harm. To maximize the value people place on the opportunity to have input, government officials should focus upon several features of the procedure given,

132. *Id.* at 103-32.

133. See Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 *LAW & SOC'Y REV.* 809 (1994); see also Tom R. Tyler, *Multiculturalism and the Willingness of Citizens To Defer To Law And To Legal Authorities*, 25 *LAW & SOC. INQUIRY* 983 (2000).

134. Tyler, *supra* note 125, at 301-55.

which can enhance people's feeling that they have experienced a fair procedure. The key from the perspective of gaining acceptance for decisions is that people need to feel that their views were listened to and considered. How can this be done?

First, by allowing people to provide input in their own words. People prefer to have the opportunity to structure their own arguments when making a presentation.¹³⁵ This goes against the basic form of filling out standardized forms and applications. A traditional way of addressing this issue is authorities holding town-hall meetings and asking for people's opinions regarding major decisions pending in the community.¹³⁶

Second, by providing feedback that indicates people's preferences were considered and taken into account. This does not mean that people need to feel they have made the decisions. But people do need to feel that their views have been actively considered. Authorities can facilitate such feelings by accounting for their decisions in the respondent's own terms. Hence, they can explain what the respondent's arguments are, how they were considered, and why they could or could not be utilized. It is important to emphasize that such explanations are not simply an opportunity for the decision-makers to explain their reasons for their actions. It is also important to show that the respondent's arguments were carefully considered and, if not used, were rejected on reasonable grounds.

People also want to believe that those authorities with whom they are dealing are neutral and factual in their decision-making. For this reason, evidence of bias or favoritism has very negative implications for judgments about the fairness of decision-making procedures.¹³⁷ Authorities typically use transparency—openness about what the rules are and how they are applied—to make clear that neutrality exists.

Further, people want to be treated with dignity and respect and have their rights acknowledged and respected.¹³⁸ This involves both interpersonal respect during personal experiences with authorities, and a broader acknowledgement by authorities that people have rights needing respect.

Finally, they want to believe that those authorities with whom they are dealing are benevolent and caring.¹³⁹ People want to have trust and confidence in authorities, believe that the authorities have benev-

135. LIND & TYLER, *supra* note 90.

136. Tyler, *supra* note 93, at 117.

137. LIND & TYLER, *supra* note 90.

138. *Id.*

139. *Id.*

olent motives, and understand that the authorities are concerned about the needs of those they serve.

As far as we can see, none of the aforementioned ways of creating perceptions of procedural fairness were utilized when the Fund was initially established. The working principle was for the authority involved (a Special Master) to be generous in amounts of compensation and swift in distributing them.¹⁴⁰ Calculations were almost exclusively based on tables incorporating age, salary, and marital status of the victim.¹⁴¹ Beneficiaries of the Fund were never asked for input and did not get the opportunity to express their feelings, or argue for what they felt was an appropriate compensation for their loved ones.¹⁴² As a result, there was minimal public input.

People's need for such "voice" became apparent in news reporting that people were including all sorts of memorabilia about their relatives with their completed standardized application to the Fund, even though this information was not relevant to compensation.¹⁴³ People had no input in deciding how and on what distributive rules the Fund should operate; as a result, the second principle of establishing procedural fairness, providing feedback to people about how their concerns were being addressed, could not be fulfilled.

Further, relatives of single and high-earning victims have also questioned the principle of neutral and factual treatment and have raised concerns about the motivations of the Special Master.¹⁴⁴ Giving such a large amount of discretionary authority to the Special Master, who need not account for or explain how he made decisions, has led to a vagueness concerning the rules that would govern allocations, and raised the suspicion that biases and personal preferences will shape the allocation decisions made. Lacking clear procedures that create transparent decisions, and working in a system in which the Special Master need not explain or account for decisions; mistrust seems inevitable.

It is interesting to compare the creation of the Fund to the decision-making process for rebuilding the World Trade Center site. Even though it might not be entirely fair to compare the sentimental issue of compensating for lives to that of deciding on building plans, the two

140. See September 11th Victim Compensation Fund of 2001, *supra* note 1.

141. *Id.*

142. *Id.*

143. David W. Chen, *Families Personalize 9/11 Aid Forms; Testimonial, Victims Offered Alongside Cold Numbers*, N.Y. TIMES, Oct. 26, 2002, at B1.

144. Jonathan Eig, *Litigation Brief: Affixing the Blame for September 11 Loss: A Widow's Choice*, WALL ST. J., Sept. 11, 2002, at A1.

have many things in common. Both are related to the terrorist attacks, are very emotion laden, and involve large amounts of money—a lot of it coming from public funds.

The process of deciding on the building plans for the World Trade Center site has been very open to the public. It has been taken in several steps and has allowed for input by the public along the way. For example, all interested parties were invited early in the process to come to a large public meeting at which they could communicate their views about the future of the World Trade Center site. This large public meeting produced many new ideas and it was made clear that the planners considered and, in some cases, adopted these ideas. In addition, it did a great deal to calm public concerns. People saw that their concerns were listened to and addressed in the planning process; they felt included and involved. In comparison to the Fund, the building site controversy has faded from public attention, and people seem, generally, much more accepting of government efforts to plan future uses for the site.

There are two points at which the public might have had more input into Fund decisions. First, in the design of the Fund itself—here the public had basically no role in shaping the compensation rules or other aspects of the Fund. Many of the problems that developed as a result of the Fund could have potentially been identified and rectified at this initial stage if a procedure, more like the World Trade Center siting procedure, was initially used.

Second, the public could have had more input in individual compensation decisions. Initially, the Fund lacked transparency, because it had no clear rules about how funding decisions would be made. In this case, Mr. Feinberg has made numerous accommodations to this public desire by the implementation of the vague procedures originally created for the Fund, allowing people to have multiple meetings with hearing officers, and considering material people they viewed as relevant to the compensation decision. In other words, in its implementation, the Fund has evolved to include more attention to issues of process.

Of course, the degree to which public input is important is also linked to our prior discussion of the principles by which the Fund will operate. One advantage of equality as a decision rule is that it does not involve as much need for input.¹⁴⁵ If each person, for example, received one million dollars, the money could be dispensed with attention only to determining who deserved it. However, both equity and

145. David M. Messick, *Equality, Fairness, and Social Conflict*, 8 SOC. JUST. RES. 153 (1995).

need require individualized determinations of compensation, and hence, invite the desire to have input into the decisions being made. It is for just such a reason that it is often argued that equality is the decision rule that can be most easily implemented in these types of settings.¹⁴⁶

F. Conclusions About Satisfaction

Our analysis leads to three suggestions to better manage satisfaction with the compensation funds following events similar to the September 11th attack, if and when they occur in the future. First, it is important to articulate clearly what the operating distributive principles are behind the Fund. This is something Congress or the executive branch has to articulate; it involves explaining why the Fund is being created, and the principles of morality or justice that it is supposed to represent. These lead to principles of justice that will govern both the range of recipients and the principles establishing the amounts of compensation that they receive.

Second, people want to feel that the Fund is making decisions using fair procedures. They need opportunities for input into the design of the compensation scheme and, within that scheme, opportunities to discuss their individual needs and concerns with decision-makers. Studies make very clear that people are not primarily interested in the swift delivery of monetary compensation. They seek and find more satisfying procedures that provide them more opportunity for input at all stages. In recent days, more families of victims have met with the Special Master of the Fund, and there are suggestions that these meetings have helped to mitigate negative feelings.¹⁴⁷

Finally, it is important to recognize the need for people to be involved in some form of moral accounting. Unlike prior major tragedies and disasters, there was no highly public "fact-finding" following the September 11th attack. As a result, people never had an opportunity to work through their feelings about possible government negligence or inadequacy, nor did they have the chance to examine any possible responsibility of the airlines, the Saudi Arabian government, or other actors. In addition, the direct harm doers were dead by their own deed, and their superiors have been frustratingly difficult to find and put on trial. Hence, people have had little chance for a moral

146. *See id.* This point has been most clearly articulated by David Messick.

147. Kenneth Feinberg, Comments at the Clifford Symposium at DePaul College University of Law (Apr. 25, 2003).

reckoning. The strong desire that people feel to have such a reckoning should be incorporated into responses to such events.

G. *Why Should We Care About Public Dissatisfaction?*

When discussing the Fund, much of the focus of attention has been on public dissatisfaction. We think this misses the larger perspective against which the Fund, like any government program or policy, might be viewed. That perspective is how it influences or shapes the relationship that members of the public have with the government. In this case there are two potentially relevant groups: the families of the victims and the public, more generally.

In both cases, the broader “civics” argument is the same. The government depends heavily on voluntary cooperation from citizens.¹⁴⁸ We want citizens to willingly obey the law,¹⁴⁹ help police fight crime and terrorism,¹⁵⁰ be willing to assume duties, such as fighting in wars,¹⁵¹ and paying taxes,¹⁵² and generally be engaged in their communities and in the political process.¹⁵³ All of these behaviors are shaped by public views about the legitimacy of government and of its policies and actions.

Hence, the effectiveness of legal authorities, law, and government depends upon the widespread belief among its citizens that it is legitimate and entitled to be obeyed.¹⁵⁴ Given this important set of public beliefs, we need to understand how public views about legitimacy—public “trust and confidence”—are created and maintained. If we understand the conditions under which supportive public values, such as legitimacy, play an important role in shaping public views, we can understand how to build a law-abiding society in which people take the

148. Tom R. Tyler, *Leadership and Cooperation in Groups*, 45 AM. BEHAV. SCI. 769 (2002).

149. TYLER, *supra* note 92.

150. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003).

151. MARGARET LEVI, *CONSENT, DISSENT, AND PATRIOTISM* (1997).

152. John T. Scholz & Mark Lubell, *Trust and Taxpaying: Testing the Heuristic Approach to Collective Action*, 42 AM. J. POL. SCI. 398 (1998); *see also* John T. Scholz & Neil Pinney, *Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior*, 39 AM. J. POL. SCI. 490 (1995).

153. ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

154. This argument is not confined to legal authorities. Similar findings emerge when we study the behavior of employees in work settings. *See* Tom R. Tyler, *Why People Cooperate with Organizations: An Identity-Based Perspective*, in *RESEARCH IN ORGANIZATIONAL BEHAVIOR* (Barry M. Staw & Robert I. Sutton eds., 1999); TOM R. TYLER & STEVEN L. BLADER, *COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY AND BEHAVIORAL ENGAGEMENT* (2000).

personal responsibility and obligation to be good citizens onto themselves.¹⁵⁵

One factor that influences legitimacy is public reaction to government policies, leading the impact of such policies on public views about government to be a key concern in the long-term effort to create and maintain public support for the law, legal authorities and institutions, and for the government more generally. While we have outlined three potentially important issues—moral accountability, distributive justice, and procedural justice—each of which might influence public views about the legitimacy of the government, studies consistently find that the key antecedent of assessments of the legitimacy of government—whether Congress, the United States Supreme Court, the policy, or the law—is judgments about the fairness of the procedures the government uses to exercise governmental authority.¹⁵⁶

For example, while both distributive and procedural justice are found to shape people's satisfaction with their outcomes when they are dealing with legal authorities,¹⁵⁷ it is the procedural justice of government actions that generalizes to shape views about law and government.¹⁵⁸ Hence, when it makes policies, the government needs to be sensitive not only to the objective quality of those policies, but also to how their creation and implementation is viewed by the public.

The importance of procedural justice among those with personal experiences with legal authorities is illustrated in the study of Tom R. Tyler and Yuen Huo.¹⁵⁹ This study explored the factors shaping people's willingness to accept decisions made by police officers and judges during personal encounters in which those being interviewed had been involved. The study found that both the people's judgments that authorities behaved in procedurally fair ways, and acted out of trustworthy motives, strongly shaped their willingness to accept the decisions made, as well as their evaluations of the authorities involved. Both procedural justice and trust, in turn, were shaped by evaluations of the quality of decision-making and the quality of interpersonal treatment. Of the two, it is the quality of interpersonal treatment that is found to

155. Tom R. Tyler & John Darley, *Building a Law-abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000).

156. Tyler & Mitchell, *supra* note 115, at 703.

157. Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988).

158. Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. OF POL. SCI. 629 (1989).

159. TYLER & HUO, *supra* note 101.

be the most important. These findings are consistent with prior procedural justice results, and support the argument that people's reactions to their personal experiences with legal authorities are primarily a reaction to the procedures by which those authorities exercise their authority.

In the case of the larger public, studies of how the public generally evaluates legal institutions suggest a very similar conclusion.¹⁶⁰ People focus on their views about how the courts and the police exercise their authority—whether they make decisions in fair ways and whether they treat people respectfully. Hence, again, the implications of the Fund for the general public are likely to flow out of the way people view the Fund's exercise of its authority.

The need to be viewed as exercising authority fairly is especially important in situations in which people are suspicious about the government and its leaders. We live in an era of generally low trust in government.¹⁶¹ Further, it is clear from the public comments made about the Fund that people were broadly skeptical about the motives of government authorities, and about their possible negligence in the original attack on the World Trade Center. Hence, there was both general mistrust and mistrust about the particular event at issue. Under these circumstances, as we have already outlined, it is especially crucial that the government address issues of trust and credibility, as well as manage the immediate problem being handled. To do so, the government needs not only to *be* fair, but to *be seen as being* fair. This involves using transparent procedures for creating and implementing the compensation funds.

In this instance, the government lost an opportunity to build public support for the law and the government, in addition to resolving the immediate issue of compensating victims. With the families of the victims, the Special Master has been making efforts to manage these issues by adding procedural elements to his implementation of the Fund, as we have already noted. These efforts will, no doubt, mitigate some of the negative feelings among those who choose to participate.

Those who choose not to participate may be too mistrustful and suspicious to be brought into the Fund at this time. This is the group that might have been brought in had the government used procedures,

160. Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215 (2001).

161. Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 869 (1997); Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847 (1998).

such as those used in the case of World Trade Center siting “community meetings,” to involve them in the initial decisions about how the Fund should be constituted. For this group, the opportunity to strengthen allegiance to law and government may have disappeared.

Finally, for the public more generally, the creation and implementation of the Fund is more abstract. But, like many other public events, it shapes people’s orientation toward government and their civic behavior. How is the Fund likely to shape those views? Primarily through the image of procedural fairness that the Fund communicates. In the case of legal authorities, for example, it is clear that those who observe what they view as unfair procedures on the part of legal authorities, procedures such as harassment or profiling, view law and government as less legitimate, even when those procedures do not impact them personally.¹⁶² For example, the views of white citizens about the extent of racial profiling are strongly linked to judgments about the legitimacy of the law and of legal authorities, as are the views of minority citizens, even though white citizens do not think that they are the targets of profiling.¹⁶³ People view government as less legitimate when they view it as engaging in unfair procedures, even when those procedures are directed at other citizens or groups of citizens and do not involve them or the members of their own ethnic group.¹⁶⁴

Underlying our policy analysis is the view that government depends upon the good will and “buy in” of most of the members of the community most of the time. This means that government authorities must be sensitive to the appearance of fairness, as well as to its reality. It needs to create and implement public policies, whether the September 11th Compensation Fund or police stops, with an awareness of how the public views those policies. Based upon empirical research, it is clear that the public is very ethical in evaluating authorities—judging them against criteria of fairness. In particular, the public is very sensitive to its assessment of whether the authorities are exercising their authority in ways that are fair. Such procedural justice judgments shape the legitimacy of the authorities in the eyes of citizens, and influence whether people cooperate with authorities.

The entire era in which we are living, of course, is a long “emergency,” as we battle terrorism at home and abroad. Is it the case that

162. See Tom R. Tyler & Cheryl Wakslak, *Profiling and the Legitimacy of the Police* 42 CRIMINOLOGY (forthcoming 2004) (unpublished manuscript, on file with the Department of Psychology, New York University).

163. *Id.*

164. *Id.*

these special circumstances change the dynamics of the relationship between citizens and the state? We would argue that, in these troubled times, the government is, more than ever, dependent on the good will and cooperation of its citizens, who are being asked to endure hardships and face risks as we battle to defeat terrorism.

In particular, terrorism depends for its success on finding support and safe havens within communities in the general population. The government needs the active cooperation of the members of these vulnerable, and potentially stigmatized, minority groups to identify and capture terrorists. Hence, it is more important than ever that all citizens, whatever their background and history in America, feel loyal toward American society and its institutions. We would suggest that this is a time when the government must both be and be seen to be exercising authority fairly.

