

# PERCEPTIONS OF PROCEDURAL AND DISTRIBUTIVE JUSTICE IN THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

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## INTRODUCTION

The September 11th Victim Compensation Fund (the Fund) was created in response to the terrorist attacks of September 11, 2001. Much has been written about the Fund, both pro and con, in both popular media<sup>1</sup> and scholarly literature.<sup>2</sup> Perhaps the most widely used term in referring to the Fund is “unprecedented.”<sup>3</sup> The Fund is intriguing for many reasons, particularly for its public policy implications and its impact on the claimants themselves.

The federal government has never before provided compensation to victims of terrorism through a special master who had virtually unlimited discretion in determining awards. Consequently, this formal allocation of money by a representative of the federal government to its citizens has provided an opportunity to test theories of procedural and distributive justice in a novel context. This article tests these theories by analyzing the results of a study of the Fund’s claimants. Part I provides general background, summarizes existing commentary on the Fund, and discusses prior research on social justice that is relevant to the 9/11 claimants’ experiences with the Fund. Part II of this article describes the methodology behind the study, in which seventy-one individuals who filed claims with the Fund completed surveys about their experiences with and perceptions of the Fund. Part III discusses the survey results. We found that participants were reasonably satisfied with the procedural

<sup>1</sup> E.g., Lisa Belkin, *Just Money*, N.Y. TIMES MAGAZINE, Dec. 8, 2002, at 92; Anthony J. Sebok, *The Special Master’s Report on the September 11th Victims Compensation Fund: Is He Right that Victims’ Families’ Awards Should Have Been Equal?*, FINDLAW’S WRIT, Dec. 13, 2004, <http://writ.news.findlaw.com/sebok/20041213.html>.

<sup>2</sup> E.g., Kenneth S. Abraham & Kyle D. Logue, *The Genie and the Bottle: Collateral Sources under the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 591 (2003); R. M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005); Janet C. Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627 (2003); Deborah R. Hensler, *Money Talks: Searching for Justice through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417 (2003); Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315 (2004); Marshall S. Shapo, *Compensation for Terrorism: What We Are Learning*, 53 DEPAUL L. REV. 805 (2003).

<sup>3</sup> See, e.g., Ackerman, *supra* note 2, at 137; Michele L. Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 289 (2003); KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005) [hereinafter *WHAT IS LIFE WORTH*]; Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-made Tragedy*, 53 DEPAUL L. REV. 251, 286 (2003); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 358 (2003).

aspects of the Fund, such as representatives' impartiality and respectful treatment. Participants were less satisfied, however, with the distributive aspects of the Fund, such as the unequal distribution of compensation and the reduction in compensation if claimants received compensation from other sources (e.g., life insurance). Part IV of this article addresses the implications of the study results for public policy and for theories of social justice.

### I. THE CREATION OF THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

On September 22, 2001, Congress passed and the President signed the Air Transportation Safety and System Stabilization Act (ATSSSA).<sup>4</sup> The main purpose of ATSSSA was to stabilize and protect the airlines with federal loan guarantees and compensation for losses after air travel was halted on 9/11, while also capping the airlines' liability and imposing jurisdictional constraints on litigation.<sup>5</sup> ATSSSA also established the September 11th Victim Compensation Fund of 2001 (the Fund) in order to discourage lawsuits against the airlines and to provide victims and their families with an alternative to redress through the court system. Victims injured in the September 11th attacks and the families of those killed could make a claim for compensation from the government in exchange for waiving their right to sue potential domestic defendants, such as the airlines and airplane manufacturers.<sup>6</sup> There was no congressional appropriation for the Fund and no limit on the amount of money that could be paid out. The Fund closed to claimants in December 2003 and completed its distribution of payments in June 2004. In the end, 97% of those eligible to make a claim to the Fund participated and the Fund distributed approximately \$7 billion to the claimants.<sup>7</sup> Of this amount, \$5.99 billion went to the 2,880 death claimants and their families.<sup>8</sup>

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<sup>4</sup> Air Transportation Safety and System Stabilization Act of 2001, 49 U.S.C. § 40101 (2001).

<sup>5</sup> See Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 1-41 (2006); LLOYD DIXON & RACHEL K. STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS 18-19 (RAND Corp. 2004), available at [http://www.rand.org/pubs/monographs/2004/RAND\\_MG264.pdf](http://www.rand.org/pubs/monographs/2004/RAND_MG264.pdf).

<sup>6</sup> Air Transportation Safety and System Stabilization Act § 405(c)(3)(B)(i). See generally Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?* 53 DEPAUL L. REV. 769 (2003).

<sup>7</sup> Ackerman, *supra* note 2, at 180-81; KENNETH R. FEINBERG ET AL., 1 FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 77, 80 (2004), available at [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf) [hereinafter FINAL REPORT].

<sup>8</sup> FINAL REPORT, *supra* note 7, at 52.

## A. BACKGROUND ON THE FUND

Shortly after passage of ATSSSA, Attorney General John Ashcroft appointed Kenneth Feinberg as Special Master to administer the Fund.<sup>9</sup> The statute required that the Special Master set compensation according to “the extent of harm to the claimant, including any economic and non-economic losses.”<sup>10</sup> Economic loss was defined in the statute as it is generally understood in tort law and included loss of earnings, benefits, replacement services, etc.<sup>11</sup> Non-economic loss was defined to include emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, loss of society, etc.<sup>12</sup> For those claiming compensation on behalf of a deceased victim, Feinberg developed a formula for calculating each claimant’s “presumed economic loss” based on a variety of factors including the victim’s age, income, benefits, and remaining years of workforce participation.<sup>13</sup> Claimants were presented with this determination and had the opportunity to appeal to the Special Master for an adjustment based on individual circumstances.

For non-economic damages, such as pain and suffering and hedonic damages, every eligible claimant and dependent of the victim received the same amount of compensation. As Feinberg stated, “I refused to exercise Solomonic judgment in calibrating individual degrees of pain and suffering and emotional distress.”<sup>14</sup> For death claims, Feinberg set non-economic damages at \$250,000 per victim and \$100,000 per spouse and each dependent child.<sup>15</sup> In addition, Feinberg guaranteed that no one would receive less than \$250,000 in total compensation.<sup>16</sup> For high-income earners, such as investment bankers who worked in the World Trade Center, Feinberg deviated from the economic loss model by not considering annual incomes above \$231,000 for the presumed economic loss calculation.<sup>17</sup> Without this limit on presumed awards, there would have been many more claimants who would have recovered well in ex-

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<sup>9</sup> WHAT IS LIFE WORTH, *supra* note 3, at 24–25. Mr. Feinberg has recently been appointed to oversee the distribution of money donated to Virginia Tech University in the wake of the April 16, 2007 shootings. Ian Urbina, *Sept. 11 Compensation Chief to Oversee Virginia Tech Payouts*, N.Y. TIMES, July 6, 2007, at A10.

<sup>10</sup> Air Transportation Safety and System Stabilization Act § 405(b)(1)(B)(i), 49 U.S.C. § 40101 (2001).

<sup>11</sup> *Id.* § 402(5).

<sup>12</sup> *Id.* § 402(7).

<sup>13</sup> DIXON & STERN, *supra* note 5, at 22–23; FINAL REPORT, *supra* note 7, at 30–39.

<sup>14</sup> WHAT IS LIFE WORTH, *supra* note 3, at 35.

<sup>15</sup> DIXON & STERN, *supra* note 5; WHAT IS LIFE WORTH, *supra* note 3, at 39, 77 (indicating the amount for surviving spouses and dependents was initially set at \$50,000 but was later raised to \$100,000).

<sup>16</sup> WHAT IS LIFE WORTH, *supra* note 3, at 51.

<sup>17</sup> *Id.* at 73.

cess of \$5 million based only on the victim's projected income.<sup>18</sup> As Feinberg stated, "I was convinced that I should use my discretion to *narrow the gap* between high-end and low-end awards."<sup>19</sup>

Once the amount of compensation was determined, the statute required that it be reduced by other payments that the claimant received, including proceeds from life insurance and workers compensation.<sup>20</sup> These offsets are typical of other government compensation programs, such as state-run crime victim compensation programs.<sup>21</sup> These programs reduce compensation by collateral payments through insurance and social security and typically do not provide compensation for pain and suffering.<sup>22</sup> Feinberg again exercised his discretion and did not deduct charity received by the families, despite language in the statute that could be interpreted to require such deduction.<sup>23</sup> The statute made the decisions of the Special Master final and not subject to appeal.<sup>24</sup> The compensation awarded by the Fund for death claimants ranged from \$250,000 to \$7.1 million.<sup>25</sup> The average award was \$2.08 million and the median was \$1.7 million.<sup>26</sup> Feinberg claimed that the closeness of the mean and the median indicated that he was successful at reducing disparities and preventing excessively high or low awards.<sup>27</sup>

Thus, the Fund was a complex hybrid of different approaches to compensation.<sup>28</sup> As in a typical wrongful death tort case, economic loss was measured according to the projected future earnings of the victim.<sup>29</sup> Yet, unlike the typical tort case, and more like workers compensation

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<sup>18</sup> DIXON & STERN, *supra* note 5, at 22–23; WHAT IS LIFE WORTH, *supra* note 3, at 73–74.

<sup>19</sup> WHAT IS LIFE WORTH, *supra* note 3, at 47.

<sup>20</sup> Air Transportation Safety and System Stabilization Act § 405(b)(6), 49 U.S.C. 40101(2001); *see, e.g.*, DIXON & STERN, *supra* note 5, at 23. This requirement is usually referred to as the "collateral source offset" rule.

<sup>21</sup> LISA C. NEWMARK ET AL., URBAN INST., THE NATIONAL EVALUATION OF STATE VICTIMS OF CRIME ACT COMPENSATION AND ASSISTANCE PROGRAMS: TRENDS AND STRATEGIES FOR THE FUTURE 105 (2003), available at [http://www.urban.org/uploadedPDF/410924\\_VOCA\\_Full\\_Report.pdf](http://www.urban.org/uploadedPDF/410924_VOCA_Full_Report.pdf).

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *See* Air Transportation Safety and System Stabilization Act § 402(4); WHAT IS LIFE WORTH, *supra* note 3, at 70–71.

<sup>24</sup> Air Transportation Safety and System Stabilization Act § 405(b)(6)(3).

<sup>25</sup> WHAT IS LIFE WORTH, *supra* note 3, at 202.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 156–57.

<sup>28</sup> *See generally* Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719 (2003); Stephan Landsman, *A Chance to Be Heard: Thoughts about Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393 (2003); George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527 (2003); Anthony J. Sebok, *What's Law Got to Do with It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501 (2003).

<sup>29</sup> DIXON & STERN, *supra* note 5, at 21–23.

systems and no-fault auto insurance, the claimant was not required to prove liability on the part of any defendant.<sup>30</sup> Unlike both tort damages (which usually includes non-economic damages based on the extent of psychic harm) and workers compensation (which typically does not permit non-economic damages), non-economic damages for death claimants to the Fund were uniform, regardless of the individual circumstances of the victims or claimants.<sup>31</sup> Finally, in the typical personal injury or wrongful death case, insurance and other collateral sources of compensation are not deducted from the award, as they were under the collateral offset provision of ATSSSA.

#### B. EXISTING COMMENTARY ON THE FUND

There were many controversial aspects of the Fund. For example, some claimants objected to the collateral offset rule that was written into the enabling statute.<sup>32</sup> Others complained that it was unfair to make non-economic damages uniform when some victims suffered more than others before they died, and some family members claimed special emotional needs.<sup>33</sup> Perhaps the most controversial aspect of the Fund was that it awarded compensation to the families of victims on the basis of each victim's earning power before death. Distributing funds in this manner was perceived by many to be unjust.<sup>34</sup> Even Mr. Feinberg, despite his confidence in the Fund's due process and its "stunning success,"<sup>35</sup> stated that future compensation funds should not be based on the economic loss model.<sup>36</sup>

Much has been written, particularly in the legal academic literature, about the procedural and distributive justice aspects of the Fund and its larger implications for tort law.<sup>37</sup> There has also been some empirical research on the claimants,<sup>38</sup> but it is primarily anecdotal and unsystematic. There are also some data available about the mental health issues that victims and their families have faced.<sup>39</sup>

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<sup>30</sup> Air Transportation Safety and System Stabilization Act § 405(b)(2), 49 U.S.C. 40101 (2001). See generally Alexander, *supra* note 2, at 636–39.

<sup>31</sup> James R. Copland, *Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform* 20 (Manhattan Institute, Center for Legal Policy Working Paper, 2005), available at [http://www.manhattan-institute.org/pdf/clpwp\\_01-13-05.pdf](http://www.manhattan-institute.org/pdf/clpwp_01-13-05.pdf); Rabin, *supra* note 6, at 783–87.

<sup>32</sup> DIXON & STERN, *supra* note 5, at 24; Landsman, *supra* note 28, at 413.

<sup>33</sup> Belkin, *supra* note 1, at 97.

<sup>34</sup> *Id.* at 96; Hensler, *supra* note 2, at 436–38.

<sup>35</sup> WHAT IS LIFE WORTH, *supra* note 3, at 163.

<sup>36</sup> *Id.*, at 177–88.

<sup>37</sup> See generally Abraham & Logue, *supra* note 2; Ackerman, *supra* note 2; Alexander, *supra* note 2; Hensler, *supra* note 2; Mullenix, *supra* note 2; Shapo, *supra* note 2.

<sup>38</sup> DIXON & STERN, *supra* note 5; Hensler, *supra* note 2.

<sup>39</sup> SUSAN W. COATES ET AL., SEPTEMBER 11: TRAUMA AND HUMAN BONDS (2003).

## C. THE FUND AND EMPIRICAL RESEARCH ON SOCIAL JUSTICE

It is widely accepted that people are concerned about the fairness of both decision-making processes (i.e., procedural justice) and outcomes (i.e., distributive justice).<sup>40</sup> Tom Tyler has shown that to a large extent, different factors influence perceptions of distributive and procedural fairness.<sup>41</sup> Resource concerns (e.g., “Am I getting as much as I deserve,” “Am I getting a fair amount relative to others”) are most closely related to distributive justice, while relational concerns (e.g., “Are the authorities trustworthy,” “Are the authorities neutral,” “What is my standing in the group”) are most closely related to procedural justice.<sup>42</sup>

1. *Distributive Justice*

In general, people have complex, pluralistic views on distributing resources, relying on several distinct allocation principles, which are often invoked simultaneously.<sup>43</sup> For example, Mitchell and colleagues found that participants employed principles of both equality and efficiency and made tradeoffs between them in evaluating income distributions.<sup>44</sup> Michelbach and colleagues likewise found that most individuals’ distribution preferences are fluid and reflect trade-offs among principles.<sup>45</sup> Thus, the experimental research suggests that individuals’ distributive justice preferences are pluralistic and complex, varying both across individuals and across situations.

Experimental research on distributive justice indicates that a variety of factors can influence perceptions of outcome fairness. Distributive justice varies depending on what good is being distributed and the con-

<sup>40</sup> See generally E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (Springer-Verlag New York, LLC 1988); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERS. & SOC. PSYCH. 850 (1994) [hereinafter *Psychological Models*].

<sup>41</sup> E.g., *Psychological Models*, *supra* note 40, at 855.

<sup>42</sup> *Id.*; see also Melvin J. Lerner, *The Justice Motive: Some Hypotheses on Its Origins and Forms*, 45 J. PERS. 1, 1–2 (1977); Lind & Tyler, *supra* note 40, at 61–127; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL PSYCHOLOGY (Mark Zanna ed., 1992).

<sup>43</sup> See, e.g., Jon Elster, *The Empirical Study of Justice*, in PLURALISM, JUSTICE, AND EQUALITY 81, 85–88 (David Miller & Michael Walzer eds., 1995); NORMAN FROHLICH & JOE A. OPPENHEIMER, *CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY* (1993); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* (Harvard Univ. Press 2d ed. 2001); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (Basic Books 1983); Philip A. Michelbach et al., *Doing Rawls Justice: An Experimental Study of Income Distribution Norms*, 47 AM. J. POL. SCI. 523, 523, 534–35 (2003); Gregory Mitchell et al., *Judgments of Social Justice: Compromises between Equality and Efficiency*, 65 J. PERS. & SOC. PSYCHOL. 629, 633–35 (1993); John T. Scott et al., *Just Deserts: An Experimental Study of Distributive Justice Norms*, 45 AM. J. POL. SCI. 749, 764 (2001).

<sup>44</sup> Mitchell et al., *supra* note 43, at 633–36.

<sup>45</sup> Michelbach et al., *supra* note 43, at 529–35; see also Scott et al., *supra* note 43, at 762–63.

text of the distribution (e.g., the scarcity of resources and the extent to which actors' efforts influence outcomes), as well as the individuals' particular characteristics, such as gender, culture, ideology, and socio-economic status.<sup>46</sup> For example, women tend to be more egalitarian than men,<sup>47</sup> and in comparison to whites, members of minority groups are less sensitive to differences in merit.<sup>48</sup> In addition, people tend to evaluate distributive outcomes in both relative and absolute terms. That is, one's outcome relative to those similarly situated is an important determinant of perceived fairness, as is one's outcome in some absolute sense.<sup>49</sup>

## 2. *Procedural Justice*

A multitude of factors influence perceptions of procedural fairness. Relational concerns, as manifested by polite or respectful treatment at the hands of authorities, significantly predict individuals' satisfaction with encounters with authorities.<sup>50</sup> In addition to the relational concerns identified by Lind and Tyler,<sup>51</sup> procedural fairness is enhanced by giving disputants an opportunity to voice their side of the story.<sup>52</sup> Thus, decision-makers can use a variety of measures to enhance a disputant's sense of procedural justice. Resulting improvements in perceptions of procedural justice have been demonstrated in a variety of contexts, including organizational settings, citizens' encounters with the police and other legal authorities, treatment by the government and health care plans, and

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<sup>46</sup> See, e.g., Michelbach et al., *supra* note 43, at 536–37 (discussing race and gender differences in “distributive justice behavior”); Scott et. al., *supra* note 43, at 763–64 (discussing gender differences in “distributive justice judgments”); Linda J. Skitka & Philip E. Tetlock, *Allocating Scarce Resources: A Contingency Model of Distributive Justice*, 28 J. EXPER. SOC. PSYCHOL. 491, 515, 519 (1992) (discussing differences in distributive justice judgments as a function of political ideology).

<sup>47</sup> Michelbach et al., *supra* note 43, at 536–37; see Scott et al., *supra* note 43, at 763–64.

<sup>48</sup> See Michelbach et al., *supra* note 43, at 529–30.

<sup>49</sup> MILLER, *supra* note 43; Jason Sunshine & Larry Heuer, *Deservingness and Perceptions of Procedural Justice in Citizen Encounters with the Police*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 397 (Michael Ross & Dale T. Miller eds., Cambridge Univ. Press 2002).

<sup>50</sup> See, e.g., E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC'Y. REV. 951, 964–73 (1990); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERS. & SOC. PSYCHOL. 830, 831 (1989); Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, in *APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS* 77 (John S. Carroll ed., Lawrence Erlbaum Assoc. Inc. 1990).

<sup>51</sup> Lind & Tyler, *supra* note 40, 61–127; see also Tyler & Lind, *supra* note 42.

<sup>52</sup> See, e.g., Robert J. Bies & Debra L. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 ACAD. MGMT. J. 676 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (John Wiley & Sons Inc. 1976); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERS. & SOC. PSYCHOL. 72 (1985).



involvement in the court system.<sup>53</sup> Feinberg believed that claimants would only be satisfied with the Fund if it provided extensive due process, particularly the opportunity to be heard. He stated that he “was determined to make due process a cardinal virtue of the program.”<sup>54</sup> Feinberg adopted a number of procedures designed to increase the transparency of the process and provide claimants with a voice in the proceedings, such as meeting with individual families, posting information on the Fund’s website, and simplifying claim forms.<sup>55</sup> Individuals’ perceptions of authorities’ legitimacy and their expectations or sense of entitlement about how they should be treated are also key matters.<sup>56</sup> Presumably, all Fund claimants would feel entitled to respectful treatment, yet there was doubtless variability amongst individuals as to what constituted respectful treatment.<sup>57</sup>

As with distributive justice, there are important racial/ethnic differences in attitudes toward procedural justice, especially when the authorities involved are the police or other governmental agents. Compared to whites, minority citizens are more likely to feel that they are treated less

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<sup>53</sup> Bies & Shapiro, *supra* note 52, 682–84; *Psychological Models*, *supra* note 40, at 855–57; Tyler & Bies, *supra* note 50, at 83–88, 89–91 (focusing on organizational settings); Sunshine & Heuer, *supra* note 49, at 409–12; Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & Soc’y REV. 513, 522–34 (2003); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 329–40 (2003) [hereinafter *Procedural Justice*]; Tom R. Tyler, *Racial Profiling, Attributions of Motive, and the Acceptance of Social Authority*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING, 61, 65–69 (Richard L. Wiener et al. eds., 2007) (police encounters); *Psychological Models*, *supra* note 40, at 854–55 (encounters with other legal authorities); Larry Heuer et al., *The Role of Resource and Relational Concerns for Procedural Justice*, 28 PERS. & SOC. PSYCHOL. BULL. 1468, 1471–77 (2002) (treatment by the government); Virginia Murphy-Berman et al., *Fairness and Health Care Decision Making: Testing the Group Value Model of Procedural Justice*, 12 SOC. JUST. RES. 117, 123–25 (1999) (treatment by healthcare plans); Lind et al., *supra* note 50, 967–73, 981; *Psychological Models*, *supra* note 40, at 854–55; Tristin Wayte et al., *Psychological Issues in Civil Law*, in TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 323, 330–36 (James R.P. Ogloff ed., 2002) (involvement in the court system).

<sup>54</sup> WHAT IS LIFE WORTH, *supra* note 3, at 44.

<sup>55</sup> *Id.* at 49.

<sup>56</sup> Sunshine & Tyler, *supra* note 53, at 534–36 (showing perceptions of legitimacy impact the willingness of individuals to cooperate with police); Larry Heuer et al., *A Deservingness Approach to Respect as a Relationally Based Fairness Judgment*, 25 PERS. & SOC. PSYCHOL. BULL. 1279, 1282–89 (1999) (citing study results showing an individual’s sense of deservingness and self-esteem impact his or her perception of fair treatment); Melvin J. Lerner, *Integrating Societal and Psychological Rules of Entitlement: The Basic Task of Each Social Actor and Fundamental Problem for the Social Sciences*, 1 SOC. JUST. RES. 107, 115–17, 120–22 (1987) (impact of individual’s sense of entitlement on his or her behavior); Sunshine & Heuer, *supra* note 49, at 397, 403–08 (showing inverse relationship between entitlement and perceived fairness of treatment, but positive correlation between favorable treatment and perceived fairness).

<sup>57</sup> WHAT IS LIFE WORTH, *supra* note 3, at 51–61 (describing the variety of reactions among families of victims).

fairly by the police and the courts.<sup>58</sup> Despite this difference in perceived fairness across racial groups, the same factors (e.g., legitimacy, voice, etc.) appear to influence the perception of procedural justice in white and minority samples.<sup>59</sup>

### 3. *Interaction Between Distributive and Procedural Justice*

Although distributive and procedural justice are often construed independently, they are interrelated.<sup>60</sup> Different factors do tend to influence perceptions of distributive and procedural fairness, but there is not a perfectly clean separation between them.<sup>61</sup> For example, relational variables, such as trust, neutrality, and standing, affect judgments about resource distribution as well as procedural justice.<sup>62</sup> Consequently, there is a correlation between measures of procedural and distributive justice, as well as between measures of justice and outcome.<sup>63</sup> In the context of the Fund, the existence of factors common to procedural and distributive justice creates an expectation of correlations between outcome (i.e., the amount of compensation), distributive justice, and procedural justice for Fund beneficiaries.

#### D. THE NEED TO STUDY FUND CLAIMANTS

Theories of social justice are more robust when consistent findings emerge in diverse contexts, especially in extreme, novel instances, such as the September 11th Victim Compensation Fund. The circumstances surrounding the Fund differ in several respects from the legal and organizational contexts of many distributive and procedural justice studies. Claimants to the Fund became eligible because of a completely unexpected and unique event, in contrast to studies involving events about which participants may have formed preconceived notions, such as dispute-resolution proceedings and employment.<sup>64</sup> The Fund differs in the nature of the authority figure, the amount of discretion exercised, the

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<sup>58</sup> See, e.g., Richard R.W. Brooks & Haekyung Jeon-Slaughter, *Race, Income and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & L. 250, 251–53 (2001); W.S. Wilson Huang & Michael S. Vaughn, *Support and Confidence: Public Attitudes toward the Police*, in AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 31, 32–33 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996).

<sup>59</sup> Sunshine & Tyler, *supra* note 53, at 16–17.

<sup>60</sup> See, e.g., Joel Brockner et al., *High Procedural Fairness Heightens the Effect of Outcome Favorability on Self-Evaluations: An Attributional Analysis*, 91 ORG. BEHAV. & HUM. DECISIONAL PROCESSES 51, 53–55, 63–66 (2003); Tom R. Tyler & Maura A. Belliveau, *Tradeoffs in Justice Principles: Definitions of Fairness*, in CONFLICT, COOPERATION, AND JUSTICE 291, 300 (Barbara B. Bunker & Jeffrey Z. Rubin eds., 1995).

<sup>61</sup> Heuer et al., *supra* note 53, at 1469, 1474; *Psychological Models*, *supra* note 40, at 855, 857.

<sup>62</sup> Heuer et al., *supra* note 53, at 1471–74; *Psychological Models*, *supra* note 40, at 857.

<sup>63</sup> E.g., Brockner et al., *supra* note 60, at 51–52.

<sup>64</sup> See generally Wayte et al., *supra* 53; Brockner et al., *supra* note 60.

manner in which participants became eligible for the process, the method of calculating compensation, and the limitless nature of the resource distributed. As described above, the Fund differs considerably from alternative compensation schemes, such as the tort system, workers' compensation, and crime victims' compensation funds, in terms of both procedure and outcome.

Significantly, this compensation fund was created in response to a terrorist act for which the compensation authority (the U.S. government) was perceived by some as culpable.<sup>65</sup> The special master had an unusually high degree of discretion, and he both made final decisions (which were unappealable, except to himself) and crafted the Fund's regulatory procedures.<sup>66</sup> In these respects, he was not an authority figure in the same sense as other dispensers of justice, such as a police officer, legal fact-finder (e.g., a judge), government official, or work supervisor. The special master's unique constellation of powers has led some commentators to question the Fund's legitimacy.<sup>67</sup> Finally, unlike most studies of distributive justice, the resource being distributed (i.e., money from the U.S. Treasury) was not scarce or otherwise limited.<sup>68</sup>

Additionally, the results of this study provide important preliminary information for evaluating the success of the Fund and creating future victim compensation schemes if policy makers are faced with other terrorist incidents that warrant them. To date, many scholars and writers have made claims about the purported successes and failures of the Fund. Feinberg himself, as well as many others, believe that the Fund was administered equitably and that the claimants who wanted to be heard had a chance to participate and make their views known.<sup>69</sup> Feinberg did in fact go to extreme lengths to be available to the claimants and their families, and he has been widely praised for this.<sup>70</sup> Feinberg believed that this approach was not only appropriate but also accounted for the high rate of participation by the families.<sup>71</sup> He also believed that families were more likely to accept the statutorily mandated differences in economic loss awards if given the opportunity to be heard.<sup>72</sup>

Critics of the Fund have pointed out that participation is not the only measure of procedural justice, however. For example, according to Tyler

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<sup>65</sup> NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>; e.g., Tyler & Thorisdottir, *supra* note 3, at 359.

<sup>66</sup> See generally FINAL REPORT, *supra* note 7.

<sup>67</sup> E.g., Berkowitz, *supra* note 5.

<sup>68</sup> MILLER, *supra* note 43; Skitka & Tetlock, *supra* note 46, at 498–16.

<sup>69</sup> Ackerman, *supra* note 2, at 209–11, 227; WHAT IS LIFE WORTH, *supra* note 3, at 163–75.

<sup>70</sup> See, e.g., Ackerman, *supra* note 2, at 218–20.

<sup>71</sup> WHAT IS LIFE WORTH, *supra* note 3, at 163–68.

<sup>72</sup> *Id.* at 93–117.

and Thorisdottir, acceptance of legal decisions is more likely when people have not only voiced their concerns, but also when they believe that their input was considered in the final decision.<sup>73</sup> The absence of any requirement that award decisions be justified, in writing or otherwise, violated this aspect of procedural justice.<sup>74</sup> Feinberg believed that he had in fact provided transparency and consistency by publishing presumed awards on the website and explaining the basis of those calculations,<sup>75</sup> even though families did not have any assurances, beyond Feinberg's word, that other families in similar circumstances would receive similar awards. Although it is impossible to determine objectively what would constitute a "successful" compensation fund because perceptions of justice are related to the public's acceptance of legal authority,<sup>76</sup> it is important to consider the perceptions of the beneficiaries of the Fund in evaluating the Fund and thinking ahead to the future.

#### E. HYPOTHESES

Given the unprecedented nature of the Fund, the research is largely exploratory. However, previous research on procedural and distributive justice and the extensive public discourse about the Fund allow us to make three specific hypotheses:

*Hypothesis 1* (distributive justice): Based on the inequality of the distribution of compensation and the collateral offset requirement, claimants will not be satisfied with the amount of compensation they received.

*Hypothesis 2* (procedural justice): Because of the due process protections instituted by the Special Master, claimants will be moderately satisfied with the procedures of the Fund.

*Hypothesis 3* (correlations): Claimants who received more compensation from the Fund will express a greater sense of procedural and distributive justice and claimants who more strongly believed the process was fair will express a greater sense of distributive justice.

## II. METHOD

### A. PARTICIPANTS AND PROCEDURE

We obtained the names and addresses of the 2,880 death claimants through a Freedom of Information Act (FOIA) request.<sup>77</sup> Three hundred

<sup>73</sup> Tyler & Thorisdottir, *supra* note 3, at 375–82; *see also* Diller, *supra* note 28, at 758–65 (criticism of the Fund's procedures).

<sup>74</sup> *See e.g.*, Ackerman, *supra* note 2, at 211–12.

<sup>75</sup> WHAT IS LIFE WORTH, *supra* note 3, at 48–49.

<sup>76</sup> *See supra* Part I.C.2.

<sup>77</sup> The participants are limited to those who made a claim to the Fund as the personal representative (usually next of kin) of a deceased victim of the 9/11 terrorist attacks. We did not send the survey to claimants who were injured on September 11th but survived. There

names were initially selected at random, after which any claimants with foreign addresses were removed, leaving 292 surveys that were mailed in June and July 2005.<sup>78</sup> Out of the 292 that were mailed, 14 came back as undeliverable, and 13 came back with forwarding addresses and they were forwarded. Thus, 278 surveys were presumably received by claimants. Each participant who returned the survey received fifty dollars, though several declined payment. We sent a second request and replacement survey in September 2005. We ultimately received responses from seventy-one participants, a 25.5% response rate.

Most of the participants were female (70%) and most (84.1%) were white. Most claimants were the victim's spouse (46.5%) or parent (33.8%), although other relationships (e.g., child, sibling) were represented as well. Most (82.9%) of the claimants had filed on behalf of victims who died in the World Trade Center. Table 1 displays characteristics of the sample and also shows that the sample was fairly representative of the claimant population as a whole. For example, the percentage of victims who died at the World Trade Center (82.9%) was exactly the same for all of the claimants to the Fund as it was for the present sample; victims' mean age in the sample was 40.7, compared to 31–40 for the population.<sup>79</sup>

## B. MATERIALS

Most of the survey questions use a Likert-type scale to ask the participant to choose one response from five possibilities ranging from "Strongly Agree" to "Strongly Disagree." The content of the questions was developed after reviewing the empirical accounts of the Fund,<sup>80</sup> as well as the literature on procedural and distributive justice.<sup>81</sup> The questions were aimed at learning about the participants' perceptions of the procedural and distributive justice of the Fund and its administration, as

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were 2,680 injury claims to the Fund, but they received only \$1.05 billion, 15% of the total Fund distribution. *WHAT IS LIFE WORTH*, *supra* note 3, at 193. These claimants do not share common issues to the same degree as the death claimants do. For example, future income was not an issue for those with less severe injuries, but was for the relatively small number of injury victims with grave injuries. In addition, Feinberg did not set a uniform amount for non-economic damages for injury victims, so these awards varied; *see FINAL REPORT*, *supra* note 7, at 43.

<sup>78</sup> Financial constraints prevented us from surveying the entire population of claimants to the Fund.

<sup>79</sup> *FINAL REPORT*, *supra* note 7 (reporting age data in ranges).

<sup>80</sup> *DIXON & STERN*, *supra* note 5; *FINAL REPORT*, *supra* note 7; *WHAT IS LIFE WORTH*, *supra* note 3.

<sup>81</sup> Brockner et al., *supra* note 60; Heuer et al., *supra* note 53; *Psychological Models*, *supra* note 40; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 *INT'L J. PSYCHOL.* 117 (2000).

Table 1  
*Sample Characteristics*

	Claimant	Victim
Mean Age	51.8	40.7 (31-40)
Women	71.1	14.1 (24.0)
U.S. Citizens	100	93.8 (91.4)
Race/Ethnicity		
White	84.1	85.3
Black	10.1	11.8
Hispanic	2.9	1.5
Asian	2.9	1.5
Relationship		
Spouse	46.5	
Parent	33.8	
Child	5.6	
Partner	4.2	
Sibling	2.8	
Niece/Nephew	1.4	
Friend	2.8	
Other	2.8	
Had Dependent Children		
No		50.0 (51.8)
Yes		42.9 (48.2)
Conceived/Unborn		7.1
Location During Attack		
World Trade Center		82.9 (82.9)
Airplane		10.0 (5.9)
Pentagon		4.3 (3.9)
Street in NY		1.4 (7.2)
Other		1.4
Received Estimate of Award	77.8	
Accepted Estimate w/out Meeting	31.8 (31.4)	
Had Help from Lawyer	90.1	
Paid Lawyer	35.9	

*Note.* Except for age, figures are percentages.  $N = 71$ . Figures in parentheses are characteristics for the full, death-claimant population (FINAL REPORT, *supra* note 7, at 96-108).

well as details of their experience in seeking and receiving compensation through the Fund.

The survey instrument contained 39 questions, a few with subparts. The first set of questions requested basic demographic information about the claimant and victim, where the victim was when s/he was mortally wounded, how much compensation (in ranges) the claimant received from the Fund, and whether s/he received compensation from other sources. The survey also asked a few questions about the claimant's ap-

proach to the Fund, including whether s/he used a lawyer and whether s/he met with representatives of the Fund.

Part two of the survey asked claimants to rate their agreement/disagreement (strongly agree, agree, neutral, disagree, strongly disagree) with a number of statements assessing their perception of various components of procedural (11 items) and distributive justice (6 items). For example:

*I had the opportunity to present everything I wanted to present to those in charge of determining compensation from the Fund. The representatives of the Fund treated me with respect and dignity. I participated to the extent that I desired in the process that determined the compensation. My degree of participation in the process affected the compensation that was provided by the Fund. The procedures by which the compensation was determined were fair. From my perspective today, the people in charge of the Fund were trustworthy. My claim was resolved within a reasonable amount of time. I understand the reasons why the Fund awarded the amount of compensation that it did. I understand how the amount of compensation was determined. I was satisfied with the compensation provided by the Fund. The compensation from the Fund for my claim was fair compared to what other families received. [See Table 4 for additional items.]*

At the end of the survey, there were three open-ended questions where the participants were invited to write about their views of the Fund, including "Do you think that if events similar to the events of September 11, 2001 occur again there should be another fund like the Victim Compensation Fund? Why/why not?".

### III. RESULTS

Some participants did not answer an occasional question; analyses for each question are based on the number who answered that question.

#### A. COMPENSATION

Participants were asked to indicate compensation by checking one of several possible ranges (see Table 2). Fourteen participants did not respond to this question. Of those who did respond, there was a broad range of compensation (see Table 2), with a median of \$1.25–1.75 million; 26.3% received more than \$2 million. These figures suggest that the sample participants were reasonably representative of the entire pool

of claimants, where the median compensation was \$1.7 million. Most participants received compensation from one or more sources besides the Fund, mainly from insurance (83.1%), charity (77.5%), and workers compensation (73.2%). Over three-quarters (77.5%) of participants reported that they received less from the Fund because of the collateral offset doctrine and an additional 16.9% reported that they didn't know whether their award had been offset or not.

Table 2

<i>Fund Compensation</i>	
Range	% of Claimants
\$250-500,000	8.8
\$500-750,000	8.8
\$750,000-1 million	10.5
\$1-1.25 million	21.1
\$1.25-1.75 million	15.8
\$1.75-2 million	8.8
\$2-4 million	22.8
> \$4 million	3.5

*Note.*  $N = 57$ .

## B. PERCEPTIONS OF THE FUND

In this section we present selected findings of participants' perceptions of the Fund and the processes of filing a claim and receiving an award to test our hypotheses regarding overall perceptions of procedural and distributive justice.<sup>82</sup> To convey the degree of variability in responses, we present the percentage of respondents who agreed (combining "strongly agree" and "agree"), disagreed (combining "strongly disagree" and "disagree"), or were neutral on each statement.

### 1. *Distributive Justice*

Table 3 shows the results for selected items related to perceptions of distributive justice. Overall, these figures indicate considerable dissatisfaction with the amount of compensation. Although 63.5% of participants expected fair compensation *before* filing, only 31.9% agreed that they received fair compensation *after* filing, and only 15.6% felt that they received fair compensation compared to other families. Consistent with this latter figure, nearly two-thirds of participants (64.3%) agreed that the Fund administrators placed different values on people's lives. Therefore, there was some amount of perceived injustice in terms of both

<sup>82</sup> For purposes of correlational analysis, we also created indices of procedural and distributive justice, as described in Part III.B.3, *infra*.



absolute and relative compensation, although participants were more satisfied with their absolute compensation (31.9% agreed that it was fair) than with their relative compensation (15.6% agreed that it was fair). The collateral offset rule was one of the most controversial elements of the Fund in public discourse about the Fund. Not surprisingly, 78.5% of participants viewed this rule as unfair.

Table 3

*Perceptions of Distributive Justice*

Item	Agree (%)	Neutral (%)	Disagree (%)
Before filing, I expected the Fund would provide fair compensation.	63.5	19.0	17.4
The compensation provided by the Fund was fair.	31.9	23.2	44.9
My compensation was fair compared to what other families received.	15.6	40.6	43.8
The rule that certain money be deducted from the amount of compensation was fair.	11.5	10.0	78.5
The fact that I received a different amount from other claimants shows they place different values on lives.	64.3	14.3	21.5

*Note.* Numbers may not equal 100% exactly due to rounding. "Agree" percentages combine "strongly agree" and "agree" responses, and "disagree" percentages combine "strongly disagree" and "disagree" responses.

## 2. *Procedural Justice*

Table 4 shows the results for selected items related to perceptions of procedural justice. Compared to their perception of the claim's outcome, participants were more satisfied with the process, especially in terms of their degree of participation (76.8% agreed that they participated to the extent desired and 59.1% understood how the amount of compensation was determined) and their interactions with Fund representatives (85.5% felt they were treated respectfully). Nonetheless, there is clear evidence of dissatisfaction with the procedures. Although 62% expected the process to be fair *before* filing, only 23.2% found the procedures to be fair *after* filing. On the latter question, nearly half of the participants (49.2%) disagreed that the procedures had been fair, and only 43.3% found the Fund representatives impartial. These data indicate that the Special Master was in a sense successful in his efforts to make the process open, especially on an interpersonal level, but nevertheless leaving

many claimants dissatisfied and with an incomplete understanding of how their compensation had been determined.

Table 4

*Perceptions of Procedural Justice*

Item	Agree (%)	Neutral (%)	Disagree (%)
Before filing, I expected the process to be fair.	62.0	19.7	18.3
Fund representatives treated me with respect and dignity.	85.5	11.6	2.8
I participated to the extent that I desired.	76.8	11.6	11.5
The procedures by which compensation was determined were fair.	23.2	27.5	49.2
People who determined compensation were impartial.	43.3	28.4	28.4
I understand how the amount of compensation was determined.	59.1	14.1	26.7

*Note.* Numbers may not equal 100% exactly due to rounding. "Agree" percentages combine "strongly agree" and "agree" responses, and "disagree" percentages combine "strongly disagree" and "disagree" responses.

3. *Relationships Among Procedural Justice, Distributive Justice, and Compensation*

Responses to the survey were used to assess correlations among perceptions of procedural justice, distributive justice, and compensation. Agree/disagree responses were scored on a five-point scale, and the eleven procedural justice items and the six distributive justice items were averaged to create scales.<sup>83</sup> Table 5 contains the items comprising each scale. Participants who did not respond to some of the items were not included in these analyses.

<sup>83</sup> Responses were scored so that 1 = strongly agree, 3 = neutral, and 5 = strongly disagree. The procedural justice and distributive justice scales were both highly reliable, with  $\alpha = .88$  and  $.82$ , respectively.

Table 5

*Items Comprising Procedural and Distributive Justice Scales*

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*Procedural Justice* (11 items;  $\alpha = .88$ )

I had the opportunity to present everything I wanted to present.  
 Representatives of the Fund treated me with respect and dignity.  
 I participated to the extent that I desired in the process.  
 The procedures by which the compensation was determined were fair.  
 The people who determined the compensation were impartial.  
 The people in charge of the Fund were trustworthy.  
 My claim was resolved within a reasonable amount of time.  
 I understand why the Fund awarded the amount of compensation that it did.  
 I understand how the amount of compensation was determined.  
 The information that I needed to submit to request compensation was easy to obtain.  
 The forms that I needed to fill out were easy to understand.

*Distributive Justice* (6 items;  $\alpha = .82$ )

The compensation provided by the Fund was fair.  
 I was satisfied with the compensation provided by the Fund.  
 The compensation for my claim was fair compared to what other families received.  
 The rule that certain money, such as life insurance, be deducted or offset was fair.  
 The fact that I received a different amount than others shows they placed different values on lives.\*  
 I felt that I was competing with other families/claimants for a large compensation award.\*

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\*These items were negatively correlated with the other distributive justice items and were reverse-scored for purposes of analysis.

The responses correlated as predicted, and the correlation between perceptions of procedural and distributive justice was especially high.<sup>84</sup> The more compensation participants received, the more satisfied they were with both the procedural and distributive aspects of the Fund, although the former correlation was only marginally significant.<sup>85</sup>

To explore whether participants' perceptions and compensation differed depending on their demographic characteristics, we performed a series of analyses on these same three measures, grouped by participant gender, race (white vs. non-white), and relationship to the decedent (spouse/partner vs. parent vs. other). Participant gender was not associated with significant differences on perceived procedural justice, distrib-

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<sup>84</sup>  $r = .72, p < .001$ .

<sup>85</sup>  $r = -.26, p < .08$ , and  $r = .43, p < .01$ , respectively.

utive justice, or compensation.<sup>86</sup> Race was also not associated with participants' perception of procedural or distributive justice,<sup>87</sup> but white participants received marginally greater compensation.<sup>88</sup>

We categorized participants' relationship to the victim as "spouse/partner," "parent," or "other," which combined several low-frequency categories (e.g., child, sibling, friend). Participants' relationship to the decedent influenced their perception of both procedural and distributive justice.<sup>89</sup> Spouse/partners perceived significantly less procedural fairness than others,<sup>90</sup> as well as less distributive fairness.<sup>91</sup> Parents were intermediate on both measures and did not significantly differ from either of the other two groups. The relationship groups did not differ in terms of their compensation.<sup>92</sup>

#### 4. Responses to Open-Ended Questions

Participants' opinions about the existence of the Fund itself were generally, though not unanimously, supportive. Two-thirds (66.2%) of participants believed that if similar events occurred again in the future, there should be another Fund like the Victim Compensation Fund, but 26.2% responded that such a Fund should *not* be employed.<sup>93</sup> Nearly three-quarters, or 72.9%, of participants wrote something in response to at least one of the open-ended questions. Consistent with the results presented above, many participants complained about the collateral offset rule. For example, one participant stated, "I don't think it was fair to take personal life insurance money away from award [sic]. That had nothing to do with the government's money" (Participant #6). With respect to money distribution, several participants complained that inequality was inherently unfair. Sentiments such as "All life is important—one amount for all is fair—no one should determine another person's value!" (Participant #22) and "I don't think one life is worth more than another" (Participant #6) were common. Participants' comments also reflected their relatively high level of satisfaction with the Fund's personnel and procedures, stating, for example, "The people in charge of the fund were very sensitive to our difficult situation. A special thank you to Mr.

<sup>86</sup> Respectively,  $t(55) = .28$ ,  $t(59) = 1.26$ , and  $t(54) = .19$ ;  $ps > .2$ .

<sup>87</sup>  $t(56) = .58$  and  $t(60) = 1.09$ , respectively;  $ps > .2$ .

<sup>88</sup>  $t(55) = 1.79$ ,  $p = .08$ .

<sup>89</sup> Respectively,  $F(2,55) = 3.12$ ,  $p = .05$ , and  $F(2,59) = 3.32$ ,  $p < .05$ .

<sup>90</sup> Means were 2.78 for spouse/partners and 2.17 for others,  $p < .05$ ; higher values indicate *less* agreement with statements about fair treatment.

<sup>91</sup> Means = 3.66 vs. 2.94,  $p < .05$ ; higher values indicate *less* agreement with statements about fair treatment.

<sup>92</sup>  $F(2,54) = 1.34$ ,  $p > .2$ .

<sup>93</sup> An additional 7.7% wrote in that they were "unsure."

Feinbaum [sic] and his staff" (Participant #25) and "I met with Mr. Feinberg and felt he was honorable and did a great job" (Participant #2).

### C. LIMITATIONS

The principal limitation of the present study is that it sampled only 71 participants from a population of 2880 individuals. These 71 individuals might be representative of neither the 279 persons contacted, nor of the larger population. Future research should attempt to procure a larger sample to address these concerns. However, the size of the present sample should not cause great concern, for two reasons. First, the main risk of non-response error is that individuals who respond will differ systematically from non-respondents.<sup>94</sup> For example, this would be the case if only those who were dissatisfied with the Fund responded, or conversely, if mostly satisfied claimants responded. Although we cannot rule out this possibility, the range of responses suggests that we were not sampling from just one end of the distribution.

Second, the present sample compares favorably to the available descriptive data on the entire class of participants.<sup>95</sup> For example, the median award made by the Fund was \$1.7 million; the median award in the present sample was in the \$1.25-\$1.75 million category, which is approximately the same. The sample was also reasonably representative of the entire population in terms of age, sex, dependent children, location at time of death, etc. (see Table 1). A larger sample would permit confirmation of the present findings, while allowing for finer-grained analyses of claimants' experiences with the Fund as a function of their race/ethnicity, citizenship, and so forth. We hope that the present study provides a useful starting point for future empirical study of the Fund.

## IV. DISCUSSION

### A. SUMMARY OF MAJOR FINDINGS

Overall, these findings offer support for our research hypotheses. Participants were more satisfied with procedural than distributive aspects of the Fund and perceptions of justice were correlated with the amount of compensation participants received from the Fund. With respect to procedural justice, Mr. Feinberg appears to have been relatively—though not completely—successful in his attempts to provide claimants with elements of due process such as voice and neutrality. With respect to distributive justice, participants were less satisfied, especially with the

<sup>94</sup> DON A. DILLMAN, *MAIL AND INTERNET SURVEYS: THE TAILORED DESIGN METHOD* 11 (John Wiley & Sons, Inc. 2000).

<sup>95</sup> See generally FINAL REPORT, *supra* note 7, at 52–55; WHAT IS LIFE WORTH, *supra* note 3, at 192–204.

collateral offset rule, and notions of relative fairness were paramount in claimants' minds. Only 15.6% of participants felt that their compensation was fair compared to what other families received and nearly two-thirds of participants (64.3%) believed that the Fund administrators placed different values on people's lives. These figures support Mr. Feinberg's own conclusion, after the Fund closed, that all eligible claimants in future cases should receive the same amount of compensation.<sup>96</sup>

There were relatively few differences across various demographic groups, which may be a function of the sample size, especially in terms of different racial/ethnic groups. Nonetheless, some differences did emerge. Whites and non-whites did not differ in terms of perceived justice, but non-whites received marginally less compensation. Whether this merely reflects differential earning capacity among the victims (who were, in nearly all instances, the same race as the claimants) or a more insidious bias, the present data cannot address. The most consistent difference occurred when claimants were classified by their relationship to the victim, with spouses perceiving significantly less procedural and distributive justice than "others" (e.g., child, sibling). Parent claimants did not differ significantly from either group, but were more akin to spouses. This pattern of findings likely reflects the more pronounced feeling of incommensurability when one loses a spouse or child, compared to the loss of other family members.

As predicted, perceptions of procedural and distributive justice and the amount of compensation were correlated. These findings support previous research showing that although individuals distinguish between process and outcome, there is overlap between these elements of justice.<sup>97</sup> Similarly, actual outcomes are related to their perceived fairness, in both an absolute and a relative sense.<sup>98</sup>

## B. THEORETICAL IMPLICATIONS

The circumstances of the Fund were different from the contexts in which distributive and procedural justice have typically been studied.<sup>99</sup> For example, Congress created the Fund in response to a terrorist act for which some perceived the compensation authority, the United States government, to be culpable;<sup>100</sup> the Special Master had an unusually high

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<sup>96</sup> See generally WHAT IS LIFE WORTH, *supra* note 3, at 177–88.

<sup>97</sup> See *supra* Part I.C.3.

<sup>98</sup> See, e.g., MILLER, *supra* note 43; Sunshine & Heuer, *supra* note 49; *Psychological Models*, *supra* note 40.

<sup>99</sup> See Tyler & Thorisdottir, *supra* note 3, at 372–75, 382–86.

<sup>100</sup> See generally NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 65 (discussing missed opportunities in developing effective counterterrorism procedures prior to the attacks, and changes that should be made in governmental organization to deal with a new age of terrorism).

degree of discretion over final distribution of the funds;<sup>101</sup> and the pool of money for distribution was not limited, at least not in any meaningful way.<sup>102</sup> The Special Master also differed from other authority figures who dispense justice, such as a police officer, a judge, or a work supervisor, in that his decisions did not directly affect claimants' future liberty, employment status, or opportunities. Despite these differences, the demonstration that the same sorts of relational and resource concerns are important in the context of the September 11th Victim Compensation Fund as in other situations where social justice has been studied lends convergent validity to theories of justice.

### C. POLICY IMPLICATIONS

The most direct implication of this research is to contribute to the national conversation about the government's responsibility to victims of terrorism. As government officials have stated repeatedly, it is not a question of "if" the United States will experience another terrorist attack but a question of "when" and "how."<sup>103</sup> It is noteworthy that although two-thirds (66.2%) of Fund participants supported a similar compensation scheme for similar future events, more than a quarter of participants (26.2%) felt that such a Fund should *not* be employed again. The Special Master himself favored changes, such as awarding all claimants a flat amount.<sup>104</sup> However, debate about the merits of the Fund goes beyond the government's response to terrorism. For example, some activists and commentators invoked the Fund's procedural and distributive issues in assessing the government's response in 2005 to the natural disasters of Hurricanes Katrina and Rita.<sup>105</sup> This research is applicable in the private context as well, as in the distribution of donated funds to compensate victims of the 2007 Virginia Tech shootings.<sup>106</sup> Thus, when the culpable party—whether a foreign terrorist, Mother Nature, or a criminal—cannot be compelled to compensate its victims, it appears that governmental and non-governmental plans to do so are here to stay. Empirical data on the results of such plans and informed debate about the features they should take are critical to structuring future compensation mechanisms and gaining the public's acceptance.

<sup>101</sup> Air Transportation Safety and System Stabilization Act, § 404, 49 U.S.C. § 40101 (2001) (giving broad administration powers to the Special Master); Tyler & Thorisdottir, *supra* note 3, at 384.

<sup>102</sup> *Id.* at 382 ("[N]either legislators nor victims were able to look to prior situations to make an initial determination of how much compensation was appropriate.").

<sup>103</sup> NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 65, at 361–65.

<sup>104</sup> WHAT IS LIFE WORTH, *supra* note 3, at 177–88.

<sup>105</sup> See, e.g., Kenneth R. Feinberg, *Response to Robert L. Rabin, September 11 Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 483 (2006); Holly Yeager, *Victims' Groups Seek a Voice in Reconstruction*, FIN. TIMES (London), Sept. 20, 2005, at 17.

<sup>106</sup> Urbina, *supra* note 9.

Lawyers and legal academics have begun to consider the relevance of the Fund to the tort reform movement,<sup>107</sup> particularly as it relates to the debate about caps on non-economic damages and the collateral source rule, which ordinarily prevents juries from adjusting awards based on other compensatory payments, such as life and health insurance, received by the victim.<sup>108</sup> In addition, exploration of the willingness of claimants to eschew the traditional tort remedy for an alternative, no-fault payment scheme may provide important insights into reform of the civil justice system, a system primarily based on fault.<sup>109</sup> The data show that claimants to the Fund were willing to forego the possibility of higher damages for guaranteed payments with minimal transaction costs. Moreover, insights into social justice gleaned from the Fund could have important ramifications for distributive programs in general, including crime-victim compensation, social welfare, unemployment insurance, and reparations.<sup>110</sup>

Finally, the present results could also lead to further research on administrative discretion. The Special Master, who had tremendous discretion and whose decisions were final,<sup>111</sup> put in place many procedural safeguards but left out others, such as a provision requiring justification of his final decisions.<sup>112</sup> The data provide us with important information about the degree to which people are willing to accept the exercise of discretion as legitimate, as long as it is coupled with particular procedural safeguards.

## CONCLUSION

In considering the government's role in compensating people for losses due to terrorism, there is much to learn from the September 11th Victim Compensation Fund. These data about the role that perceptions of procedural and distributive justice played in claimants' satisfaction with the Fund support the findings of previous studies that link these justice issues to overall satisfaction with other encounters with govern-

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<sup>107</sup> See, e.g., Christopher P. DePhillips & Brian P. Sharkey, *Will Tort Reform Be the Legacy of the September 11th Victim Compensation Fund?* 173 N.J. L. J. 876, 880 (2003); Mullenix, *supra* note 2, at 1337–45.

<sup>108</sup> Mullenix, *supra* note 2, at 1337–45.

<sup>109</sup> *Id.* at 1341–45.

<sup>110</sup> See, e.g., Diller, *supra* note 28 (discussing the links between the Fund and several principles of social welfare); James L. Gibson, *Addressing Historical Injustice*, 17 Soc. JUST. RES. 421 (2004) (discussing the need for more empirical data on justice claims to add to the dialogue on social justice, generally and with regard to reparations).

<sup>111</sup> Air Transportation Safety and System Stabilization Act, § 405(b)(3), 49 U.S.C. § 40101 (2001).

<sup>112</sup> See FINAL REPORT, *supra* note 7, at 15–18, 64–65 (discussing the process for evaluating claims and the need for transparency in the process, but lacking a provision for the justification of individual compensation determinations).



mental and nongovernmental authorities.<sup>113</sup> Although claimants' satisfaction is not the sole measure of a compensation scheme's success, it is nonetheless important because it affects the willingness of participants to accept what they might consider suboptimal decisions. By this measure, the Fund did fairly well in some respects (especially the Fund's procedures), but not as well in other respects (especially the ultimate distribution and the rules related to determining that amount, such as the collateral offset rule). Finally, this study contributes important empirical data to the national conversation about the propriety and attributes of future funds, should the government contemplate creating a compensatory mechanism in the event of another terrorist attack or national disaster.

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<sup>113</sup> See *supra* Part I.C.

