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Volume 53
Issue 2 *Winter 2003: Symposium - After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*

Article 16

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Recommended Citation

Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DePaul L. Rev. 719 (2013)
Available at: https://via.library.depaul.edu/law-review/vol53/iss2/16

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TORT AND SOCIAL WELFARE PRINCIPLES IN THE VICTIM COMPENSATION FUND

*Matthew Diller**

INTRODUCTION

Perhaps everything related to the attack on September 11th and the response to it is so unprecedented that it makes no sense to use pre-existing frameworks to examine either the attack itself or its aftermath. Nonetheless, we can only come to terms with September 11th using the tools that we have, many of which involve drawing on past experience as a basis for prediction and comparison. Moreover, the social, legal, and political response to September 11th is rooted in perceptions, belief systems, and institutions formed long before the events of that day. Thus, principles and categories developed before September 11th have shaped the response to the attack even as they have been changed by it. With the passage of time, it is easier to see that the reservoir of human experience has a depth and breadth that renders few phenomena truly without parallel. For all of these reasons, the urge to look at even the unique aspects of September 11th in light of pre-September 11th categories and principles is extremely powerful.

Just ten days after September 11, 2001, Congress established the September 11th Victim Compensation Fund of 2001 (the Fund), which permits the families of victims to receive full financial compensation for their losses through application to a fund established and administered by the federal government.[1] One can look at the Fund as an example of how things relating to September 11th depart from previously accepted norms.[2] The Fund relies on distributive principles that

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1. *See* Air Transportation Safety and System Stabilization Act, tit. IV, Pub. L. No. 107-42, 115 Stat. 230 (codified as 49 U.S.C.A. § 40101 note (West 2003))[hereinafter Transportation Safety Act] The legislation, however, requires that certain collateral sources be deducted from the final award. *Id.*

2. *See* Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92 (stating that "nothing in the history of the country is comparable to the system of compensation set in place" for victims of September 11th); September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (referring to the Fund as a "unique federal program").

are unlike any other government benefit program. While other government programs provide death benefits or pensions to survivors, none attempt the goal of "compensation" in the sense of making survivors financially whole for the resulting loss.[3] Instead, most government-awarded death benefits have focused on supporting surviving dependents or providing compensation in only fixed limited amounts. The Fund's reliance on the principle of full compensation results in the payment of awards that are far in excess of other government programs which provide payments to survivors.[4]

Although the Fund appears anomalous as a government benefit program, the basic principles for the provision of awards fit comfortably within the framework of tort law in which compensation for loss of life is an everyday matter. The connection to tort law is evident in the legislation. The governing statute provides that award amounts shall be based on "the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."[5] It makes clear that both economic loss and noneconomic harm, such as pain and suffering, are compensable.[6] Thus, the legislation, like tort law, establishes a broad principle of compensation and leaves to a fact-finder the difficult value judgements that are necessarily implicated.

The link to tort law is evident in other ways as well. Individuals filing claims with the Fund waive their rights to pursue most of the possible tort remedies that would otherwise have been available to

3. For example, the Social Security system provides a lump sum death benefit of only $255. Federal Old Age, Survivors, and Disability Insurance, 20 C.F.R. § 404.390 (2003). A monthly pension is available only to surviving spouses when they are caring for minor dependents, or are themselves above sixty years old or disabled. *See* 42 U.S.C. § 402(b) (defining eligibility for spousal benefits); § 402(g) (eligibility for mother's benefits).

Worker's compensation plans are plainly based on a concept of "compensation," however, the amounts provided are strictly limited, and are not based on an individualized computation of the victims' pecuniary and nonpecuniary losses. *See* ROBERT KEETON ET AL., TORT AND ACCIDENT LAW: CASES AND MATERIALS 867 (3d ed. 1998) ("In general, worker's compensation aims to provide full recovery of medical and rehabilitation expense, but only limited recovery of wage loss, and no recovery for pain and suffering as such.").

Payments to survivors of public officials killed on the job are generally very limited. Federal law provides that family members of public safety officers killed in the line of duty receive a lump sum of $250,000. *See* 42 U.S.C. § 3796(a) (2000); 38 U.S.C. § 1967 (2000). Relatives of soldiers killed in action receive a death benefit of $6,000 and a widows' pension of at least $10,000 a year. *See* 10 U.S.C. §§ 1475-77 (2000).

4. The administrators of the Fund estimate that awards will average $1.8 million for each victim before collateral offsets. *See* CBS News, *Terror Attack Compensation Raised*, (Mar. 7, 2002), *available at* http://www.cbsnews.com/stories/2002/03/07/national/main503242.shtml (last visited Dec. 24, 2003).

5. Transportation Safety Act, *supra note* 1, § 405(b)(1)(B)(ii).

6. The Act defines economic loss in terms of applicable state law, thus incorporating an explicit reference to allowable categories of harm in tort law. *Id.* § 402(5).

them.[7] The waiver provision makes clear that the Fund serves as a substitute for the tort system. The legislation also caps the potential liability of the airline industry, in effect limiting the tort remedies available to victims.[8] The Fund mitigates the negative impact of this cap by providing victims with an assured means of recovery.[9]

The statutory language also suggests that Congress viewed the Fund from the vantage point of tort law, even where it differs from the tort system. Thus, the legislation states that awards are not contingent upon a showing of "negligence or any other theory of liability," an inclusion that suggests Congress used tort law as its frame of reference in crafting the statute. The statute provides administration of the program by a "special master," an office that generally serves as an adjunct to the court in a judicial proceeding.[10] For these reasons, it is tempting to conceive of the Fund, not as a government benefit program analogous to Social Security, but rather as a settlement fund—a pot of money to be distributed to the victims of a mass tort in satisfaction of their tort claims. The fact that the Fund is limited to the provision of awards relating to a single series of incidents also invites the comparison to a discrete tort settlement fund, rather than an ongoing governmental program.

Viewed this way, the Fund appears less anomalous. By now, there is a wealth of experience in dealing with large tort compensation schemes, in the context of class action settlements.[11] For a number of reasons, however, the conception of the Fund as simply another mass tort claims system is not fully satisfying. There are aspects of the Fund that appear to differ fundamentally from recovery schemes in products liability litigation or suits such as the Agent Orange litigation involving the exposure of large numbers of individuals to toxic substances.

First, it is far from clear that the payments reflect the actual or likely tort liability of entities who are protected from suit, such as the airlines or the Port Authority of New York and New Jersey, because

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7. *Id.* § 405(c)(3)(B).

8. *Id.* § 201.

9. Democrats in Congress pushed for the creation of the Fund as a means of providing redress to those who would otherwise lose out due to the liability cap. *See* Belkin, *supra* note 2, at 92. According to the *New York Times*, Democrats insisted that "because the plan was a replacement for the tort system, it should operate like the tort system." *Id.* at 94.

10. *See* FED. R. CIV. P. 53 (defining powers of special masters in federal litigation).

11. *See* Deborah R. Hensler & Mark Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993) (identifying and discussing distinctive features of mass tort litigation); Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 LAW & CONTEMP. PROBS. 1 (1990) (collecting articles on settlements in mass tort cases).

for many of the victims of the attack on September 11th, the possibility of recovery under tort law seems remote.[12] The fact that the victims of the 1993 terrorist attack on the World Trade Center and the victims of the Oklahoma City bombing have not successfully recovered in tort are reminders that terrorism victims have not routinely won judgments against anyone other than the terrorists themselves. In sum, the liability assumed by the Fund appears disproportionate to the likely results of litigation.[13] For this reason, it is difficult to justify the awards simply based on the potential tort liability of the entities shielded from suit.

It is, of course, possible to form a different view of the likelihood of recovery through litigation. Therefore, it is important that the Fund differs from an ordinary tort compensation scheme in another more fundamental way—the awards are paid out directly by the United States Treasury. The expenditure of government funds needs a justification beyond the potential tort liability of the airlines and other entities. The use of direct government funds to compensate victims raises a set of issues that go beyond the usual principles that underpin tort awards. Because the government is not the tortfeasor, the question of why the public should foot the bill for direct transfers of income to individuals moves to the foreground.[14] Moreover, once the govern-

12. *See* Lee Kreindler, *Pros and Cons of Victims' Fund: Compensation Provisions May Bring Salvation or Frustration*, N.Y. L.J., Nov. 27, 2001, at 5. Domestic passengers on the four hijacked flights would have to establish negligence in the airlines security systems, a showing that could be difficult given that the weapons used by the terrorists were not, at the time, proscribed items. *Id.* Victims on the ground would bear the burden of showing negligence and would also face additional difficulties in establishing that any of the potential defendants should have reasonably foreseen the risk of harm. *Id.* Only the international passengers on the four planes have a clear ground of recovery under the Warsaw Convention, but the Convention has a $75,000 limit on damages that could be awarded to each victim. *See* Convention for Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, art. 22, 49 Stat. 3000, T.S. 876. *See also* Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. Rev. 1265, 1269-71 (2002) (discussing "tenuous" nature of the tort liability of the airlines and World Trade Center security personnel).

Despite these difficulties, Judge Alvin Hellerstein recently denied defendants' motion to dismiss claims by seventy victims against the airlines, airport security companies and airline manufacturers, finding that they did indeed owe a duty to individuals on the ground who could be injured in an airplane crash resulting from a hijacking. *See In Re* September 11 Litig., 21-MC-97 (2003 U.S. Dist. LEXIS 15522) (S.D.N.Y. Sept. 9, 2003). Judge Hellerstein also denied the motion to dismiss by the owners of the World Trade Center. *Id.*

13. By way of comparison, none of the litigation filed by victims of the 1993 attack on the World Trade Center or the bombing of the federal building in Oklahoma City have received payments through the lawsuits. *See* Belkin, *supra* note 2, at 92; Paul H.B. Shin, *10 Years After Blast WTC Kin Feel Shaken*, N.Y. DAILY NEWS, Feb. 26, 1993.

14. Over time, information has emerged that lends credence to claims that the government bears at least some responsibility for its failure to forestall the attack. Thus, in retrospect, it may be possible to view the Fund as a recognition of this responsibility. *See* GERALD POSNER, WHY

ment is providing substantial assistance to individuals, the issues of equity among recipients and between recipients and others who do not receive awards become much more pressing. This reliance on government funding has a significant impact on the questions of how much individual victims should receive and how they should be treated in relation to each other.

On one level, the explanation for public funding of compensation for the victims of the September 11th attacks appears easy to identify—the Fund is part of the government bailout of the airline industry following the disaster. The objective of protecting the airlines is apparent in the legislative history, which is replete with expressions of congressional concern about the possible collapse of the air transportation system in the United States.[15] In essence, the Fund is a means of shielding the airlines and other potential tort defendants from the avalanche of litigation that would otherwise have followed. The Fund accomplishes this purpose in two ways. First (and most directly), the legislation bars claimants to the Fund from bringing suit. Second, the Air Transportation Safety and System Stabilization Act (Transportation Safety Act) caps the liability of the airlines at the amount of their insurance coverage. The Fund makes palatable this measure which undercuts the ability of potential tort plaintiffs to recover through litigation.

The goal of protecting the airlines from tort liability provides a connection between the Fund and the tort system that is very direct. Because the Fund replaces potential tort liability, it makes sense for it to borrow the compensation principles from tort law. Moreover, because victims have the choice between litigation and the Fund, the Fund is, in essence, competing with the tort system.

At the same time, however, an understanding of the Fund that reduces the victims of the terrorist attacks to the status of mere potential creditors of the airlines is unsatisfying. The establishment of the Fund was part of the tremendous outpouring of sympathy and compassion for the victims of the terrorist attacks.[16] It was a governmental expression of the same impulses that led Americans to donate

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AMERICA SLEPT (2003). This view, however, does not reflect the impetus that led to the creation of the Fund less than two weeks after the attack.

15. *See* 147 CONG. REC. H5894-915, S9589-601 (daily ed. Sept. 21, 2001). With only a few exceptions, participants in the debate mentioned the compensation provisions of the bill only in passing.

16. *See* 67 Fed. Reg. 11,233 (Mar. 13, 2002) (noting that scores of commentators on the proposed regulations implementing the Fund described it as "a testament to Congressional and taxpayer generosity").

billions in funds and services.[17] Many dissertations could be written on the question of why September 11th evoked such an outpouring of generosity that far exceeded the response to previous terrorist attacks and other disasters, whether man-made or natural.[18] For our purposes, it is sufficient to note that the Fund was a component of this overwhelming response.[19]

Going beyond an expression of sympathy for those who have suffered a tremendous loss, the Fund can also be seen as a statement about the unity of the United States. It serves as a declaration that our society will pull together and rally around the victims of terror, thereby demonstrating that the terrorists have failed in their goal of weakening the fiber of our nation through chaos and fear. By protecting the victims of September 11th, the government is also implicitly reassuring Americans that if they were to fall victim to a terrorist attack, their families would be well cared for. This reassurance was particularly important in the aftermath of September 11th, as it was (and is) apparent that the attack was not an isolated random event, but a component of an organized, well-funded, and sustained campaign against American interests.

This discussion highlights the fact that the Fund serves a variety of purposes, some of which, such as protection of the airlines, are directly linked to the tort system. Other purposes, however, bear no particular connection with tort law. Rather, they connect more closely with larger social welfare notions relating to governmental assistance for those who are in need and are viewed as worthy of support. The Fund is, therefore, an amalgam of two different systems for making payments to victims—the private law regime of tort rooted in public law, which is based on the principle that wrongdoers should compensate those injured by their wrongs, and social welfare programs which are based on the principle that government should provide assistance to those in need. Special Master Kenneth Feinberg has himself framed the dilemmas that he has faced as rooted in the underlying ambiguity in the Fund—"Is it tort or is it social welfare?"[20]

17. *See* Amanda Ripley, *WTC Victims: What's a Life Worth*, TIME, Feb. 6, 2002, at 23 (estimating charitable contributions to September 11th victims to total nearly $2 billion).

18. *Id.* (contrasting aid received by September 11th victims to other victims of terrorism, crime and disaster).

19. *See* Robert Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1835-36 (2002) ("The fund was conceived as a grant of largess to the survivors of those who had unwittingly served as surrogates for the rest of the American people."); Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 HOFSTRA L. REV. 1245, 1252 (2002) (noting that the Transportation Safety Act is a "symbol of displaced vengeance and a marker of social compassion").

20. *See* Belkin, *supra* note 2, at 97.

This Article explores some of the consequences of this blending of frameworks that underpins the Fund. Part II points out that key features of these respective systems are in tension with one another as the social welfare system focuses on meeting needs, and emphasizes the values of parity between claimants and administrative efficiency, while the tort system seeks to replace losses and stresses individualized consideration of each claim. The dichotomies between tort and social welfare are far from absolute. Part II also describes a number of programs that bridge the two models by importing private law concepts into public law programs. It also notes that in the context of mass tort litigation, the tort system increasingly draws on social welfare principles.

Part III situates the Fund as an example of a public benefit program that draws on private law principles. Unlike other programs of this type, the payment of benefits based on a private law model is not connected with a corresponding financing scheme based on private law. The Fund makes expenditures directly from the federal treasury based on principles largely drawn from tort law. This structure heightens the tensions around the Fund as claimants are led to expect amounts that are comparable to what they would receive in the tort system—amounts that would be difficult to justify from a public benefits perspective. Part III then explores how Special Master Kenneth Feinberg has sought to come to terms with these conflicts, concluding that he has taken elements from each model in constructing his adjudicative framework, but that his basic approach relies on a tort model tempered with elements taken from a social welfare model. The ultimate resolution of these conflicts, however, is impossible to discern as the Special Master has retained large amounts of discretion to be exercised on a case-by-case basis.

The Article then turns from substantive to procedural considerations, noting in Part IV that the role of the Special Master is ambiguous. Under a private law tort model, he appears as a mediator seeking to bring claimants into what amounts to a settlement in a mass tort case and then as an arbitrator who resolves their individual claims. Under the public law rubric, he is an administrator dispensing benefits in accordance with legal standards. The Article explains how Special Master Feinberg appears to rely on a mediation and arbitration model, rather than the administrative conception. Part IV goes on to argue that while Special Master Feinberg's approach has a number of benefits, he has not created a scheme in which the inherent fairness of the procedure can be seen as validating the results. Thus, the scheme falls short in one of the main goals of a procedural system—convinc-

ing participants that they should accept the outcome because their claims have been determined through the dispassionate application of general principles to their particular circumstances. In both the substantive standards and the procedural model, the spotlight remains focused on the personal choices and values of Special Master Feinberg himself. Regardless of how capable and well-intentioned the Special Master, the Fund vests too much discretion in a single individual with little means of accountability and oversight.

II. COMPARING SOCIAL WELFARE AND TORT REGIMES

The tort and social welfare systems both serve to protect people from harm through the provision of financial payments after a harm has occurred. Although both systems are creations of government, tort law operates as a private law system in which rights and obligations run between private parties. In contrast, social welfare programs operate in the arena of public law, in which the governmental role is paramount: Government makes the decisions about the distribution and extent of assistance and provides the resources that make the assistance possible. The conception of tort as an aspect of private law and social welfare as an aspect of public law have consequences for how these systems are structured, how they operate, and the expectations that we place upon them. A full comparison of these two frameworks for payments to victims is beyond the scope of this Article.[21] Any generalizations about them are inevitably crude, as both systems recalcitrantly resist reduction to a few core or essential principles. Indeed, some maintain that distinctions between tort and social welfare are artificial and that the two systems are best viewed together.[22] Finally, both systems are continually in flux as they are con-

21. A full comparison would reveal that in addition to the contrasts discussed here, the two systems have a number of similarities. For example, both systems could be viewed as dealing principally with the promotion of socially desirable conduct, rather than support for those who receive payment. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS 26 (1970) (stating that the first goal of accident law is "reduction in the number and severity of accidents"); FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR (2d ed. 1993) (arguing that public welfare systems are principally a device for regulating conduct in the labor market). Moreover, both systems are arguably underinclusive. The social welfare system only protects individuals who fall into specified categories of the needy. *See* Joel Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 467-86 (1987-1988). The tort system only provides compensation to victims of recognized torts, leaving others with no means of recovery. *See* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989).

22. Professor Stephen D. Sugarman, for example, argues that tort is, in essence, a form of social welfare law. He writes:

tinually contested.[23] Nonetheless, a number of characteristics commonly associated with social welfare programs contrast sharply with aspects of the tort system. This discussion will focus on these contrasting elements. In particular, government benefit programs tend to emphasize three intertwined values: equal treatment, administrative efficiency, and, most significantly, payment based on need. The tort system, in contrast, assigns a high value to the principles of individualized treatment and compensation based on loss rather than need. Traditionally, the tort system pays little attention to the large transaction costs that attend its operation. Despite these contrasts, there is ample precedent for programs that appear to straddle the line between these public law and private law systems. Like the Fund, a number of these programs, such as workers' compensation, reflect decisions to supplant the regime of tort law with a social welfare regime.[24] This section will consider the ways in which public benefit programs incorporate and adapt features of private law systems. It will also discuss mass tort settlements, a tort-based regime that draws on elements of social welfare law.

Government benefit programs which incorporate elements of private law models typically rely both on distributional principles that

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> Personal injury law . . . is a form of collective intervention into social and economic affairs. We judge other forms of government action . . . by comparing their costs and benefits. So too, should we judge personal injury law.

SUGARMAN, *supra* note 21, at xvi. This paper does not stake out a position in the long running debate about the "essential nature" of tort law. For our purposes, it is sufficient that the public views tort law as a distinct and separate system from social welfare programs that are directly administered by the government.

23. Many aspects of traditional tort principles are increasingly being called into question as "tort reform" remains high on the political agenda in many state legislatures and in Congress. *See* Thomas Edsell, *Battle over Court Awards Takes More Partisan Turn*, WASH. POST, Aug. 10, 2003, at A1 (noting that twenty-one states have passed some form of revisions to their tort law in the past year and that several proposals on the issue are pending in Congress). Application of traditional tort principles in the context of mass disasters has also been controversial. *See* PETER SCHUCK, AGENT ORANGE ON TRIAL (1986); JACK WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System*, 97 HARV. L.REV. 849 (1984).

The social welfare system has undergone a thorough upheaval over the past decade with the passage of welfare reform legislation. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. The characteristics of the new system that is emerging are far from clear. *See* Matthew Diller, *The Revolution in Welfare Administration: Rules Discretion and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000).

24. In fact, some scholars have proposed replacing all or much of the tort system with administrative compensation models based on social welfare principles. *See* SUGARMAN *supra* note 21 (calling for a comprehensive social insurance scheme to replace tort law); Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993) (discussing prospects for creation of a compensation system for victims of mass torts based on models such as the Price-Anderson Act).

draw from private law analogs and financing structures that are similarly tied to private law systems. This connection between private law payment principles and financing schemes serves to justify the use of distributional principles that would appear questionable if the program were perceived as simply a system of government transfer payments. Private law financing mechanisms therefore deflect questions of distributional fairness that might come to the fore if the public underpinning of the program were more apparent.

A. The Social Welfare Framework

As noted above, government benefit programs generally place a high value on equal treatment, administrative efficiency, and the principle of payment based on need. The value of equality can be seen most clearly and in its crudest form in a number of governmental death benefit programs that simply award a fixed amount to all who are eligible. Federal programs awarding fixed sums to survivors of military personnel killed in action reflect this model.[25]

Programs of ongoing support frequently rely on schedules of benefits that provide uniform amounts subject to a discrete number of variables designed to take into account some variations in need.[26] Thus, public assistance benefit levels and food stamp allotments typically vary by household size.[27] In some places, a few other variables, such as housing costs, are factored in.[28] The Supplemental Security Income (SSI) program, the federal program for the elderly and disabled poor, provides a fixed monthly amount that the states may supplement.[29]

As this discussion suggests, the goal of parity is complex. Recipients may not be similarly situated, so that identical treatment may not be tantamount to equal treatment. Almost all government benefit programs address the tension between uniformity and individualization by greatly limiting the number of variables taken into account, thereby putting great weight on the value of uniform treatment. Thus, household size is frequently considered and the existence of other in-

25. *See* 10 U.S.C. §§ 1475-77.

26. The State Documentation Project, a joint venture by the Center for Law and Social Policy and the Center for Budget and Policy Priorities, maintains a website with detailed state by state information on public benefit programs. *See* http://www.spdp.org/index.htm (last visited Dec. 24, 2003).

27. *Id. See also* HELEN HERSHKOFF & STEPHEN LOFFREDO, RIGHTS OF THE POOR 148 (1997) (discussing food stamp allotments).

28. *See* Jiggetts v. Grinker, 75 N.Y.2d 411 (1990) (New York state provides a separate shelter allowance, equal to the recipient's actual rent, up to a maximum.).

29. *See* HERSHKOFF & LOFFREDO, *supra* note 27, at 73. In addition, payments may be reduced if the recipient is classified as "living in the household of another." *See id.* at 77-79.

come and financial assets may be taken into account, but individual variation in the degree of need for items such as transportation, clothing, food, and other necessities are commonly disregarded.[30]

The goal of uniformity in government benefit programs serves an important social end—it supports the notion that in a democracy, government should value all individuals equally and should not play a direct role in maintaining social castes. This anticaste principle can be seen clearly in the federal disability benefit programs. Individuals who are unable to perform their past work because of medical impairments will be expected to switch jobs if there are positions for which they are qualified.[31] Thus, the disabled stockbroker would be denied benefits if he or she could work another job, regardless of whether the pay or social status is commensurate with his or her past work.[32]

At times, the priority given to uniform treatment can be harsh, and ride roughshod over individual circumstances. Thus, variations in living conditions and in many needs are not taken into consideration—a family with car payments and a high rent will generally receive no more than a family with few transportation costs and a low housing expense. Regardless of the reality, variations in most expenses are deemed matters of personal choice that do not justify greater levels of governmental support.

In part, the emphasis on uniformity flows from a concern about administrative efficiency. By shutting out a large number of variables that affect the actual needs of recipients, government benefit programs avoid the need for countless individualized determinations. Instead, administrators can rely on predetermined fixed amounts as a means of saving costs. Moreover, the use of benefit schedules facilitates the predictability of the program, enabling recipients and policymakers to plan more effectively. It also cuts down on the number of disputes that must be resolved.[33]

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30. The standardization of public assistance budgeting took hold in the 1960s. Before then, benefit levels were calculated on an individualized basis in an attempt to tailor the assistance to the particular circumstances of each household. The potential inequities in such a system, as well as the administrative costs, led states to abandon individual consideration of items of need. *See* Rosado v. Wyman, 397 U.S. 397 (1970).

31. *See* Heckler v. Campbell, 461 U.S. 458 (1983).

32. *See* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 390 n.92 (1996). However, the requirements for coverage by the Social Security system tend to reinforce class distinctions as those without work records, or familial ties to a worker, are excluded from the Social Security system. *Id.* at 376-78.

33. This discussion is not intended to oversimplify the administrative aspects of public benefit programs. *See generally* Diller, *supra* note 23 (discussing trends in welfare administration following the enactment of welfare reform legislation). Significant aspects of most government benefit programs do involve consideration of individual circumstances. For example, the recipient's in-

One way or another, most government benefit programs take need into account, as they are predicated on the goal of alleviating harm by meeting needs. Most directly, many programs hinge eligibility upon a showing of indigence.[34] Once eligibility is established, the availability of income and resources may reduce the level of payments. Indeed, the mechanism for establishing indigence and taking stock of any income is a central focal point of the administrative apparatus in many programs, including public assistance, food stamps, housing assistance, and SSI.

Need standards arise most clearly from a desire to target assistance to those who need it the most. In this sense, they assure that programs are efficient in alleviating hardships that would otherwise occur.[35] Implicit within the idea of the need standard is the notion that governmental support should provide some threshold living standard to recipients—a floor, rather than simply some incremental amount of assistance to a broad swath of people. This principle means that governmental assistance programs generally redistribute income downward—from taxpayers who have some means, to those with little or no means.[36]

The idea of meeting needs could, in theory, generate a robust debate about what needs are appropriate for government to meet. Should assistance recipients be supported at levels that permit some "inessential" items? What should count as an essential? Although this issue surfaces occasionally, the reality is that benefit levels are so low in most needs-based programs that even the most basic needs are

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come and assets are generally considered in determining financial eligibility. Similarly, disability programs require individualized proof of disability. *See, e.g.*, 42 U.S.C. § 423(d) (2000). The question of whether recipients have satisfied conditions of eligibility, such as work requirements, is also dealt with individually. The question of how much income people are expected to live on, however, is almost always dealt with in some aggregated manner, subject to variation based on only a limited number of factors.

34. *See* Martha B. Coven, *The Freedom To Spend: The Case for Cash Public Assistance*, 86 MINN. L. REV. 847, 852-863 (2002) (surveying means-tested programs).

35. *See* William Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1505-10 (1986). Needs testing is frequently associated with social stigma, as the process of needs testing gives the government agency license to inquire into and supervise innumerable aspects of applicants' lives. *See* Diller, *supra* note 32. Professor Simon, however, contends that such stigma is not a necessary concomitant of needs testing.

36. This statement is not an assertion that governmental subsidies generally redistribute resources downwards. Indeed, the Internal Revenue Code is replete with subsidies that have precisely the opposite effect. Rather, the claim is that programs that are explicitly cast as a form of governmental assistance are generally intended to meet needs. In contrast, subsidies enjoyed by the middle class and the wealthy are generally disguised. *See infra* notes 47-55. It is a premise of this Article that the packaging of governmental programs plays a critical role in how they are perceived both by recipients of assistance and by the public. *See* Diller, *supra* note 32, at 454-63; Simon, *supra* note 35.

not fully met. Most programs make no attempt to calculate the package of goods and services that constitutes a floor, and any attempt to do so would expose the woeful inadequacy of benefit levels.[37]

B. The Tort Framework

In contrast to most public benefit programs, the tort system sets award amounts based on the principle of individualized calculation of loss.[38] The parties are charged with the task of presenting evidence of the individual's economic and noneconomic losses, such as a pain and suffering. Because each case is conceptualized as unique, cases are not directly comparable and equality does not emerge as a central concern. Because the task of calculating damages is generally assigned to the jury, and because elements of loss, such as pain and suffering are not quantifiable, there is little oversight of whether losses are treated the same across cases, or even whether the jury handles them in a coherent manner.[39] The potential for punitive damages further exacerbates inequities that may exist between the way victims are treated.

The focus on individual calculation of economic loss means that higher-earning victims receive greater awards than lower earners. The tortfeasor who injures a CEO will be required to pay much more than the tortfeasor who injures an indigent person. The system has the effect of enabling survivors of the deceased CEO to maintain the lifestyle they enjoyed before their loss.[40] By the same token, the survivors of an indigent deceased are offered no leg up on the economic ladder—their award will reflect the limited earning capacity of the deceased. In this way, the tort system protects individuals from loss of

37. For example, a family of three in Illinois may receive up to $377 a month in cash assistance and an additional $318 in Food Stamps. *See* State & Policy Documentation Project, TANF Cash Assistance: Categorical and Financial Eligibility Rules, *available at* http://www.spdp.org/tanf/catfin.htm (last visited Dec. 24, 2003) (listing maximum benefit levels by state). *See generally* KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW WAGE WORK (1997) (studying how mothers on welfare survive given the extreme inadequacy of cash assistance).

38. *See* Kenneth Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 173 (1992) (describing "the right to custom-tailored compensation for the actual loss suffered by the claimant" as a notion that lies at "the core of our traditional conception of a tort claim").

39. *Id.* at 177-78 (pointing out that evidence of awards made to others with similar injuries "not only is not binding—it is not even admissible").

40. Of course, the reality is frequently somewhat different, as large transaction costs eat away at tort awards. *See* SUGARMAN, *supra* note 21, at 40-41.

their economic and social standing in a way that government benefit programs generally do not.[41]

The individualized approach of the tort system imposes large administrative costs as each case is processed individually through the court system. Although the prevalence of settlement serves to reduce these costs, even settlement involves the time and expense of attorneys for both parties, as well as some amount of case investigation, discovery and preliminary litigation.

Tort law may also be seen as incorporating a principle of need—the idea that an injury or death can result in significant financial loss to victims and their dependents. In this sense, injury can be seen as a proxy for need. But more realistically, tort law focuses on loss, rather than need. Recovery can be had even when there is no loss of earnings or other pecuniary loss. In addition, tort law makes no attempt to set an economic floor or ceiling for victims.[42] The individual who loses millions in future earnings due to the fault of a tortfeasor stands to recover millions. Tort law thus serves to preserve the economic status of victims and their survivors without reference to the degree of need.[43] Indeed, to the extent that tort law provides monetary compensation for nonmonetary losses and punitive damages, it can easily have the effect of leaving victims in a position that is financially superior to their state before the injury.

The difference between replacing losses and meeting needs constitutes a fundamental difference between the tort regime and social welfare programs.[44] The distinction creates a very different set of expectations among those who deal with the respective systems, as the tort system holds out the potential for far greater awards. This differ-

41. *See* Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 799-803 (1990) (concluding that "tort law intensifies social inequality").

42. John Goldberg has pointed out a significant strand in the literature on torts that advocates replacing the goal of full compensation with the goal of meeting needs. *See* John Goldberg, *Misconduct, Misfortune and Just Compensation: Weinstein on Torts,* 97 COLUM. L. REV. 2034 (1997) (describing Judge Jack Weinstein's approach to torts as based on the goal of meeting needs, rather than replacing losses). Professor Goldberg points out that Fleming James has most fully developed this approach. *Id.* at 2044-51 (citing 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.1, at 1301; Fleming James, Jr., *Some Reflections on the Bases of Strict Liability,* 18 LA. L. REV. 293, 297 (1958)).

43. *See* JULES COLEMAN, RISKS AND WRONGS 304-05 (1992) (arguing that tort law reflects a theory of corrective justice in which it appears as just to demand that an impecunious person compensate a wealthy one).

44. *See* IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW 113 (1993) ("The fundamental difference between individual liability and social insurance lies in their general objectives: the former aims at restoring the victim, by means of compensation, to his prior situation; the latter proposes by means of welfare benefits to achieve a more equal distribution of wealth in society.").

ence in objectives can be linked to the source of the payments and purposes of the systems. Tort awards are paid by the tortfeasors—actors directly responsible for the losses.[45] Accordingly, tort law can be seen as a means for requiring the tortfeasor to simply bear the cost of its actions.[46] Any diminution in the measure of damages may undermine the deterrent effect of the award, as the tortfeasor will receive the benefit of its conduct while avoiding the full cost. Moreover, the limiting principle of fault can be seen as adding a moral dimension to this responsibility. In a dispute between victim and tortfeasor, the claim that the victim does not really need the money has traditionally not evoked much sympathy.

In contrast, in the social welfare regime, the payments stem from the government, which is not generally viewed as the actor responsible for the recipient's predicament. Thus, payment based on loss cannot be justified by the misconduct of the payer. Social welfare payments are generally conceived of as a means of alleviating hardship, a goal which calls for only a threshold level of support. Moreover, as discussed above, full compensation of losses may effectively require taxpayers to support those who are wealthier than they are, and thus are not likely to be perceived as having needs that justify governmental support.

C. *Blending the Tort and Public Benefits Framework*

1. *Insurance Based Public Programs*

A number of public benefit programs bridge the divide between social welfare's public law approach to aiding victims and the private law model upon which the tort system is built.[47] Most commonly, these hybrid programs provide government mandated payments to victims while drawing on the principles and imagery of insurance, a private

45. Tortfeasors may, in turn, be able to spread their losses in a variety of ways, including insurance, bankruptcy, and by passing on costs to consumers. *See* CALABRESI, *supra* note 21, at 39-67 (discussing loss spreading).

46. *See generally* COLEMAN, *supra* note 43 (arguing that tort law centers on the relationship between the injurer and the victim). Coleman writes:

> The victim brings an action against his injurer because his (the victim's) claim to compensation as a matter of justice is based on his claims about what the injurer *did* to him. . . . To the extent tort law is a forum for vindicating claims to repair, the victim's connection to his injurer is fundamental and analytic, not tenuous or contingent.

Id. at 381-82. *But cf.* SUGARMAN, *supra* note 21, at 55 ("The idea that tort law actually serves to compensate the deserving by those who deserve to pay is a mirage.").

47. *See* Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121 (2002) (discussing the Fund in light of other compensation funds); Rabin, *supra* note 19, at 1853-67 (comparing the Fund to other no-fault compensation schemes).

law regime that is linked to the tort system. Programs organized along these lines are known as social insurance.[48] Under the social insurance rubric, government mandates that individuals or employers pay into a fund. The fund, in turn, pays out benefits when prescribed conditions are met.

Social insurance programs provide payments in a manner that straddles the distinction between payment based on loss and payment based on need. Because social insurance coverage must be earned through employee or employer contributions, it does not protect against need without a loss. For example, unemployment insurance benefits are only payable when an individual loses a job. An individual who was never able to find a job in the first place is never covered by the system. The idea of loss in social insurance programs is important to creating the analogy to insurance, a system that seeks to restore a status quo ante for those who suffer a covered loss. Social insurance programs also differ from traditional public benefit programs in that they generally do not engage in explicit means testing. Millionaires can and do collect Social Security. In these respects, social insurance appears to depart from the general principle that social welfare programs deal with need, while the tort system deals with loss.

Social insurance programs, however, also draw on concepts of payment based on need. Benefits are payable upon the occurrence of particular events that are presumed to signify a high level of need. Events such as the retirement, death, or disability of a wage earner serve as proxies for financial need.[49] In practice, a high proportion of social insurance payments go to households that would be in poverty, but for the government benefit.[50] Thus, while some millionaires collect Social Security payments, the vast majority of recipients are individuals with extremely limited means.[51] Moreover, the payments under social insurance programs are limited, so that they do not effec-

48. *See* Simon, *supra* note 35 (discussing social insurance as a means of presenting public benefits as private entitlements). *See also* MARTHA DERTHICK, POLICYMAKING FOR SOCIAL SECURITY (1979) (discussing political aspects of the social insurance model).

49. The treatment of spousal benefits in the Social Security program illustrates the program's concern with need. The surviving spouse of a deceased wage earner is only entitled to benefits if she is herself disabled, over age sixty, or caring for minor children. *See* 42 U.S.C. § 402(b), (g) (2000). A surviving spouse who does not meet these criteria receives no monthly benefits despite the loss of the wage earner's income.

50. *See* JERRY MASHAW ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE 100-02 (1992).

51. *See* Sheldon H. Danziger & Daniel H. Weinberg, *The Historical Record: Trends in Family Income, Inequality and Poverty, in* CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 18, 43-44 (Sheldon H. Danziger et al. eds., 1994) (observing that, while only a little over one third of Social Security payments go to the poor, Social Security has the effect of lifting 83% of the pretransfer elderly poor out of poverty).

tively insure the living standard of upper income individuals. In these ways, social insurance programs such as Social Security balance the objectives of replacing losses with the goal of meeting needs.

These dual objectives create tensions that policymakers must struggle to address.[52] The goal of creating an income floor calls for a different set of distributional principles than the goal of replacing losses. To the extent that social insurance programs rely on payment principles that stray from the insurance-based model, they cast doubt on and potentially jeopardize the image of the program as simply providing a return on individual contributions. If the programs hew closely to the insurance framework, however, they are less efficient as a means of preventing poverty and protecting against destitution. This dilemma has informed Social Security policymaking since its inception.

The financing system of social insurance programs thus creates a dynamic that forms a critical component of the public's expectations about the payment principles of these programs. Because they are financed by contributions, the payments made by these programs are not conceived of as direct government support for the wealthy, but rather, are viewed as a return on amounts contributed.[53] Even though these contributions are essentially taxes, and the distributional decisions are made entirely by the government, Social Security benefits appear simply as a return on an investment.[54] This appearance has created a cognitive separation between social insurance programs and those programs which are explicitly a form of governmental support. The financing structure both justifies and necessitates payment principles that draw heavily on loss, rather than need.[55]

A number of other programs that bridge the divide between public law and private law models are directly linked to the tort system.

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52. Martha Derthick has described the tension in the Social Security program between the goal of meeting needs and the goal of paying benefits based on insurance principles. *See* DERTHICK, *supra* note 48, at 213-227. Derthick describes how the principles of benefit payment used by Social Security are a hybrid of these objectives, and that the balance between them has shifted over time toward the goal of creating an income floor, rather than the objective of replicating a traditional insurance scheme. *Id.* at 222-27.

53. *See* JOEL HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY 98-100 (1991) (describing how the contributory structure of Social Security creates the appearance that no redistribution of income is involved).

54. *See* Fleming v. Nestor, 363 U.S. 603 (1960) (holding that social security "contributions" confer no vested rights); JAMES PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY 1900-1994 73-76 (1994) (discussing how "contributions" are, in reality, simply taxes); Milton Friedman, *Payroll Taxes, No; General Revenues, Yes, in* THE CRISIS IN SOCIAL SECURITY 25-31 (M. Boskin ed., 1977) (describing insurance language connected with Social Security as "imaginative packaging").

55. *See* Diller, *supra* note 32, at 383.

Workers' compensation and no-fault auto insurance are explicitly designed to temper inequities in the distributional consequences of the tort system. These programs trade the promise of full individualized compensation for a scheme of smaller yet more certain awards.[56] Other examples of public programs intended to supplant the regime of tort law include the Price-Anderson Act,[57] establishing a fund for victims of disasters at nuclear power plants, and the National Childhood Vaccine Injury Act,[58] which creates a no-fault system for compensating individuals injured by childhood vaccines.

Like Social Security and unemployment insurance, these programs also rely on a structure that serves to obfuscate the role of the government and the distributive choices that it has made. Both the Price-Anderson Act and the Childhood Vaccine Injury Act require industry to make payments into a fund, which is available to pay claims.[59] This arrangement makes the programs appear as simply insurance schemes mandated by the government, but paid for by industry. Similarly, workers' compensation and no-fault auto insurance are designed as insurance requirements, rather than direct governmental outlays.[60] Of course, the distinction between a mandatory premium that goes into a fund that the payer has no control over and a program based on taxation and governmental spending may be difficult to discern from an economic perspective.[61]

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56. *See* KEETON, *supra* note 3, at 867-71 (discussing workers' compensation); 883-912 (discussing no-fault auto insurance).

57. *See* 42 U.S.C. § 2210 (2000). *See also* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (upholding constitutionality of the Price Anderson Act).

The Price-Anderson Act relies on a judicial model for the operation of compensation. Thus, it is more closely linked to the tort system than programs which rely on administrative models. The Act establishes a regime of strict liability for injuries resulting from "extraordinary" nuclear occurrences and provides for the consolidation of all claims in a single federal district court. *See* Rabin, *supra* note 24 at 955-56. Claimants may recover the full amount of their economic and noneconomic losses unless it appears that the total liability of all claimants exceeds the amount of the fund. *Id.*

58. Pub. L. No. 99-660 (codified at 42 U.S.C. § 300aa-310 (2000)).

59. The Price-Anderson Act is funded through a combination of private insurance and mandatory industry contributions into a fund. *See* Rabin, *supra* note 24, at 955. The Childhood Vaccination Injury Act establishes a compensation fund financed by excise taxes on the sale of vaccines. *Id.* at 958.

60. *See* KEETON, *supra* note 3, at 868 ("Workers' compensation is a 'plan' for accident reparation because the insurance mechanism for financing awards is made an integral part of the whole approach."), 883-84.

61. Programs that limit or supplant tort claims, such as the Price-Anderson Act typically have the distributional consequence of subsidizing a particular industry or class of market participants. *See Duke Power Co.*, 438 U.S. at 64-66 (noting that the Price-Anderson Act passed at the behest of the nuclear energy industry); HANDLER & HASENFELD, *supra* note 53, at 77-78 (arguing that the enactment of workers' compensation schemes constituted a victory by employers over workers).

These financing structures mean that payments to claimants do not appear as direct transfer payments of taxpayer dollars to individuals. The arrangement distances the government from the distributive choices that are made. The recipients of an award under the Price Anderson Act or the Childhood Vaccine Injury Act may not perceive themselves, and may not be perceived by the public, as the recipients of a governmental benefit program. In addition, the financing structure protects these programs from competition with other collective needs of society as they appear to be self-funded. Thus, payments under these programs are not directly weighed against other demands for public support or the myriad other potential uses of public money because the program raises the money that it spends.

2. *Mass Tort Litigation as Public Law*

While social insurance programs can be viewed as elements of the social welfare system that incorporate features of private law, mass tort litigation can be viewed as a feature of the tort system that incorporates aspects of public law. Indeed, it is possible to view mass tort litigation principally as a form of social welfare policy that operates through a private law regime.[62] Settlements in mass tort cases are frequently concerned with the values of parity between victims and with ease of administration. Typically, settlements in such cases yield a fixed pool of funds that must be distributed among claimants. Distribution plans inevitably seek to allocate benefits equitably and through a process that does not itself consume a large share of the funds' resources.[63] Because the fund is generally the product of a compromise, the goal of full compensation is generally not possible and claimants frequently receive fixed amounts determined by a schedule.[64] Ac-

62. The vision of mass tort litigation as "public law" views such cases principally as a means of satisfying the public responsibility to distribute compensation to victims of inevitable disasters. *See* Goldberg, *supra* note 42, at 2057 (describing view of tort damages as a form of public disaster relief); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies,* 97 COLUM. L. REV. 2010, 2019-22 (1997) (viewing mass tort settlement funds as temporary administrative agencies); Rosenberg, *supra* note 23, at 905-08 (arguing that substantive duties enforced by tort law "are extrinsically imposed on the parties and are therefore inherently public"). *See generally* Weinstein, *supra* note 23 at 46-52 (describing broader community interests at stake in mass tort cases and arguing that these interests should be explicitly addressed in such cases). *But see* Linda Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced,* 88 Nw. U.L. REV. 579 (1994) (describing "public law" paradigm as "unhelpful").

63. *See* WEINSTEIN, *supra* note 23, at 155-62.

64. *Id.*; SCHUCK, *supra* note 23; Hensler & Peterson, *supra* note 11.

cordingly, mass tort settlement funds often have a number of features that also characterize social welfare programs.[65]

However similar they may be to social welfare schemes, mass tort settlements have a number of characteristics that are distinct from traditional government benefit programs. Payments are rarely predicated on need, because substantive tort law provides the organizing principles of distribution.[66] Second, even though the defendant may pass on the costs to the public through insurance and other means, the Fund is not a government expenditure, but rather, is the product of a private law system. Thus, the larger public interest in who receives benefits and who bears the costs of the settlement lurks only in the background of the arrangement rather than at the forefront.

III. THE MARRIAGE OF TORT AND SOCIAL WELFARE PRINCIPLES IN THE VICTIM COMPENSATION FUND

As this discussion has shown, in a number of respects, the private law regime of the tort system operates based on different principles than the public law framework of the social welfare system. As a public benefits program that relies on tort principles to determine award amounts, the Fund grafts a system of private law remedies onto a program rooted in public law. This blending of tort and social welfare regimes makes the Fund part of the family of programs that hybridize the two models. The Fund, however, differs from its siblings in two respects that serve to sharpen the tensions that are present in all these schemes.

First, the Fund is a post hoc remedy, rather than a prospective alteration of rights and responsibilities. Because the Fund only applies to injuries relating to September 11th, it makes no attempt to fashion an ongoing scheme for the compensation of terror victims. The Fund and its implementing regulations have, therefore, been devised with full knowledge of who the claimants are likely to be and the circumstances leading to the claims. This retrospective aspect of the Fund sharpens

65. The legitimacy of these departures from traditional tort principles is still very much a matter of debate. The United States Supreme Court's decisions on class action procedure reflect great skepticism about the "mass justice" or "public law" aspects of mass tort settlements, stressing that the conduct of the litigation must be measured against traditional standards of procedural and substantive fairness. *See* Amchem Products v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard 527 U.S. 815 (1999). The Court is particularly troubled by settlements that allocate benefits to class members in ways which cannot be justified in traditional tort norms. *Amchem Products,* 521 U.S. 591; *Ortiz*, 527 U.S. 815.

66. Judge Weinstein has noted, however, that the settlement in the Agent Orange litigation was structured "with an eye to compensating the neediest class members quickly." *See* WEINSTEIN, *supra* note 23, at 158.

the conflicts within it because there is no Rawlsian veil of ignorance that can be drawn over the entire matter. Every decision yields an identifiable set of winners and losers.[67]

Second, apart from its title, which falsely suggests the existence of a specific pot of money devoted to compensation, the Fund lacks a financing system based on a private law model that serves to justify the use of private law principles for the payment of public money. Unlike social insurance, workers' compensation, the Price-Anderson Act, or the Childhood Vaccine Injury Act, payments by the Fund come directly from general tax revenue, making the governmental role in determining who gets paid and how much they receive apparent for all to see. All payments from the Fund must be justifiable as governmental conduct. As a result, the tensions between the core values that underpin the tort system and those that inform government benefit programs come into conflict in a direct and unmediated way. If the Fund completely ignores the principles that have tended to inform government benefit programs, it may strike many as unfair—ignoring basic questions of equity and lavishing government resources on many who are already wealthy. However, to the extent that it builds in a recognition of social welfare principles, the Fund will stray from the tort paradigm and inevitably disappoint many victims who are seeking full compensation for their losses.

These tensions have played themselves out in the implementation of the Fund both through the Justice Department regulations and in the policies announced by Special Master Kenneth Feinberg.[68] While the Fund could be seen as a creative and positive union of tort and social welfare principles, it has often come under fire. Some victims have expressed fury at the extent to which the regulations and Feinberg's policies depart from traditional tort principles.[69] On the other

67. The retrospective nature of the Fund may have nudged Congress in favor of generosity, as it may be viewed as more unfair to limit the recovery on tort claims that have already accrued than to limit recovery on torts that have not yet happened. Indeed, if the Fund were perceived as taking something away from September 11th victims, rather than conferring a benefit on them, the Transportation Safety Act might have generated significant opposition.

68. The regulations implementing the Fund were issued by the Department of Justice, "in consultation with the Special Master." September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002). Special Master Feinberg, however, has claimed the regulations as his own. *See* Online NewsHour, *Compensating Victims* (Feb. 6, 2002) (stating that "these are my regulations, not the administration"), *at* http://pbs.org/newshour/bb/terrorism.jan-june02/victime_2-6.html (last visited Oct. 31, 2003) [hereinafter Online NewsHour, Feb. 6, 2002].

69. *See* Lee Kreindler, *WTC Victims' Compensation Fund: A Sad Disappointment*, N.Y. L.J., Jan. 4, 2002, at 3 (stating that the Fund "will be devastating and unfair to the lives of most claimants"); Ripley, *supra* note 17, at 22; David W. Chen, *Worst Hit Firm Faults Fairness of Sept. 11 Aid*, N.Y. TIMES, Sept. 17, 2002, at A1.

hand, some victims and many members of the public have raised equity concerns about the Fund, arguing that disparities in awards are inappropriate and unfair[70] and that the category of recipients is underinclusive.[71]

Feinberg has attempted to walk a fine line between these two perspectives. He has frequently espoused values drawn from the social welfare system and cautions that comparisons between the Fund and the tort system are inappropriate. Despite his desire to avoid comparison with the tort system, however, it is evident that the core organizing principles used by the Fund for determining awards are drawn from tort law rather than social welfare law. The exact resolutions of the tensions between the two are difficult to discern because they are shrouded in an ambiguous cloud of discretion that Feinberg exercises on a case-by-case basis.

The crux of the compensation scheme devised by Feinberg is reliance on a table of presumptive awards. The presumptive awards are based on the victim's age, marital status, number of dependents, and income.[72] They include fixed amounts for nonmonetary losses such as pain and suffering, loss of society and companionship, and loss of consortium. The tables represent an attempt to standardize the treatment of claimants by providing a single methodology for calculating losses. They serve the familiar purposes of creating parity between claimants, predictability, and administrative ease, which are all important goals of most public benefit programs. They bear much in common with benefit schedules that are a feature of many public benefit programs.

Yet, at the same time, by including variables such as income and age, the tables yield a tremendous range in the size of awards. For example, the survivors of a forty-five-year-old unmarried victim with no dependents and an annual income of $10,000 prior to the attack, stand to collect $300,000 under the tables.[73] In contrast, the survivors of a thirty-year-old married individual with two children who had an income of $150,000 stand to receive an award of over $4 million.[74] Even when some of these variables are held constant, the range con-

70. *See* Elizabeth Kolbert, *The Calculator,* NEW YORKER, Nov. 25, 2002, at 42 ("The more needs a family is likely to have, the less well it fares.").

71. *See* David W. Chen, *Traces of Terror: Compensation, House Gives Embassy Victims Same Status as Those of Sept. 11*, N.Y. TIMES, May 22, 2002, at A23; Belkin, *supra* note 2, at 95-96 (quoting victims of other acts of terrorism); Kolbert, *supra* note 70.

72. The tables are available on the internet. *See* http://www.usdoj.gov:80/victimcompensation/loss_calc.html last visited Oct. 31, 2003).

73. This amount would be reduced by any collateral offset. *See id.* (The tables are titled "Presumed Economic Loss Calculation Tables Before Any Collateral Offsets.").

74. *Id.*

tinues to be very wide. If the thirty-year-old victim described above had earned only $20,000, the award would be cut from $4 million to a little over $1 million.[75] Any claim that the tables establish uniformity and parity between victims can be met with the objection that they do precisely the opposite, principally because the amounts for noneconomic loss vary with the number of dependents, and the economic component is based on income levels, a figure that of necessity varies widely.

The component of presumptive awards reflecting noneconomic losses is based on a series of flat amounts of $250,000 for each decedent plus $100,000 for each dependent. Although these amounts seem to be largely pulled out of thin air,[76] their uniformity reflects Feinberg's decision to avoid the enterprise of individually valuing the degree of physical and emotional pain and loss suffered by the victims and their families.[77] He does not intend to make value judgments that one victim suffered more than another or that the companionship of one child's parent is worth more than another, or that the loss of one spouse hurts more than the loss of another.[78]

The unwillingness to make such determinations is heightened by the fact that awards from the Fund constitute explicit governmental determinations. Thus, any valuation of the quality of human relationships and the pain of human suffering by the Fund carries with it the imprimatur of the government and raises the question of whether government should be in the business of making such valuations. Such judgments cast the government in the role of valuing lives unequally, a dubious proposition in a democratic society. As Frank Keating, Governor of Oklahoma, explained in distinguishing awards made by the Fund from jury awards in tort litigation: "[T]axpayer dollars should not distinguish between those with and those without. The government authors official inequity when it compensates a dishwasher at the World Trade Center differently from the way it compensates the person whose dishes were washed."[79]

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75. The range for thirty-year-old married victims with two children stretches from $879,000 to $4.7 million. *Id.*

76. The notice in the Federal Register states that the $250,000 amount is based on the compensation payable for military personnel killed in action and public safety officers killed on duty. *See* September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,239 (Mar. 13, 2002).

77. *See* Belkin, *supra* note 2, at 97.

78. In defending the presumed noneconomic loss awards, the Department of Justice explained that "the Special Master believes it is important to have some measure of consistency among awards, so that he does not have to "play Solomon" by attempting to place a value on human lives on an ad hoc basis." 67 Fed. Reg. at 11,239.

79. Frank Keating, *Dishwasher or Stockbroker: A Life's a Life,* WASH. POST, Jan. 20, 2002, at B7. Keating argues that the Fund is built on the "unAmerican notion" that "the lives of the rich

More practically, the uniformity of the amounts for noneconomic loss also relieves claimants of the painful task of proving such damages individually. The prospect of forcing claimants to put on evidence about where each victim was in relation to the plane crashes and what they must have each suffered would have been difficult for many claimants to endure.

The uniformity of these amounts, however, is a departure from the traditional regime of tort law, which would call for an individualized determination of all of these matters.[80] Drawing on a tort model, the Transportation Safety Act requires payment of awards based on the harm to the claimant, including noneconomic losses, and states that determinations are to be based on "the individual circumstances of the claimant."[81] Thus, Feinberg's use of a series of fixed amounts appears difficult to justify under the explicit terms of the Act.[82]

From a tort perspective, the use of a fixed schedule of awards can be seen as riding roughshod over the facts of each case—an attempt to achieve wholesale justice that fails to recognize the unique human qualities of each of the victims of September 11th.[83] The tables drain the harms of their visceral impact, reducing them to figures on a chart and making irrelevant the most searing aspects of the tragedy. By fixing liquidated amounts for noneconomic harm, the tables make irrelevant issues on which many claimants will want to focus in proceedings before the Special Master—the magnitude of the emotional losses they have suffered.[84] Finally, consideration of individual circumstances may inevitably lead to higher amounts, given the magnitude of the suffering and loss. The reliance on a fixed schedule for

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are more valuable than those of the indigent." *Id.* Keating's criticism is targeted principally at disparities caused by variations in the levels of economic losses, since Feinberg has greatly reduced such disparities with respect to the noneconomic aspects of compensation.

80. *See* Abraham, *supra* note 38, at 186-89 (discussing how statutory caps on pain and suffering awards conflict with traditional tort principles).

81. Transportation Safety Act, *supra* note 1, § 405(b)(1)(B)(ii).

82. Indeed, in the one major legal challenge to the Special Master's scheme, the Court of Appeals for the Second Circuit concluded that any cap "would be a direct violation of the statute." Schneider v. Feinberg, 345 F.3d 135 (2d Cir. 2003).

83. *See* Abraham, *supra* note 38, at 187-88 (noting that when caps are placed on pain and suffering awards "the unique circumstances of those seriously injured victims whose pain and suffering would [exceed the cap] therefore are ignored").

84. As one claimant put it: "I wanted [Feinberg] to hear what kind of father and what kind of husband Frank was." *See Sept. 11 Fund Offers More Than Expected, Lawyers Say*, WASH. POST, Oct. 1, 2002, at 49. At public meetings with Feinberg, the families of many victims focus on conveying the trauma and loss that they have suffered as well as anger. *See* Ripley, *supra* note 16 (describing meeting between Feinberg and families). Of course, Feinberg has not prohibited families from introducing such evidence, but it is not clear how it can affect the amount of the award.

noneconomic harm is easily cast as a statement that victims are getting "less" than they would under a tort regime.[85]

Feinberg has resolved the dilemma between the individual treatment promised by the tort regime and the need for governmental assistance programs to treat people equally by providing that the schedule is "presumptive" only and can be overcome by individual factual circumstances.[86] In discussing this decision, Feinberg has indicated that departures from the schedule amounts for noneconomic losses will be rare, thereby tilting the scheme toward uniformity rather than individual treatment.[87] The formulation has two advantages. First, as suggested above, fixed caps would violate the terms of the Transportation Safety Act, which calls upon the Special Master to adopt an individualized approach. Some flexibility is mandated by law. Second, the presumptive schedule approach allows Feinberg to publicly espouse the values of equal treatment reflected in the schedule, while at the same time holding out the possibility of individualized judgments that would placate those who seek it. In essence, Feinberg is seeking to have it both ways—to communicate the values of equal treatment and equal worth, while at the same time recognizing the individuality of each victim.

This solution may satisfy everyone, or it may satisfy no one. Proponents of individualization may conclude that the emphasis on the table of fixed amounts puts them in the position of arguing for a departure from a "norm" which should not exist. Proponents of uniformity may decide that the table is little more than a sham because the Special Master retains complete discretion to depart from it in unspecified circumstances. The upshot, at any rate, is a degree of ambiguity as to how decisions are actually made by the Special Master.

The use of presumptive tables to determine economic losses raises many of the same considerations, but there are a few significant differ-

85. *See* Richard Campbell, *The September 11th Attack on America: Ground Zero in Tort and Insurance Law*, 9 CONN. INS. L. J. 51, 76-77 (2002) (arguing that presumptive amounts for noneconomic losses fail to compensate victims fully for their losses).

86. September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.31(b)(2) (2001) (establishing procedure in which award is determined after individualized hearing at which the Special Master or his designee will utilize the presumptive award methodology "but may modify or vary the award if the claimant presents extraordinary circumstances not adequately addressed by the presumptive award methodology").

87. *See* Special Master Kenneth Feinberg, News Conference Announcing Regulations Concerning 9/11 Victim Compensation Fund at DOJ Conference Center (Dec. 20, 2001), *available at* http://www.usdoj.gov/ag/1220kenfeinbergnewsconference.htm) (last visited Oct. 31, 2003) [hereinafter News Conference of Dec. 20, 2001] ("You can come in, ask to be heard—the noneconomic loss is part of this, is presumptive—we'll hear what you have to say, but I am dubious that we will make those distinctions.").

ences. The use of schedules to address this component of awards ensures that all claims are based on a common set of assumptions about how conditions in the labor market will change, including interest and tax rates. But accurate calculation of economic losses necessarily requires consideration of many factors which vary significantly among claimants, including the likelihood of future unemployment, the extent to which future income can be projected from past income, and the rate of growth of future income.[88] For example, a thirty-five-year-old stockbroker with an income of $70,000 in 2001 may have had very different prospects than a thirty-five-year-old teacher who earned the same amount in that year.[89] The use of fixed schedules may yield apparent uniformity, predictability, and equality of treatment, but it is also more likely to be demonstrably inaccurate because it ignores or averages many variables.[90]

Individualized consideration of economic loss does carry with it some of the concerns about government sanctioned inequality that came to the fore in the context of considering the noneconomic components of awards,[91] but if it is accepted that lost earnings are an appropriate component of compensation, it is not clear that the concern about unequal valuations of lives is altered by the use of a matrix as opposed to individualized consideration, as either method yields substantial disparities in awards. In addition, the task of calculating lost earnings is nowhere near as value laden and subjective as individualized valuation of noneconomic losses. Calculation of economic losses that looks to data concerning each victim would yield results that are in fact more defensible as accurate measures of loss than the matrix.

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88. The schedules attempt to measure net economic loss. The total sum of projected earnings is reduced to a present value and deductions are made for expenses that have been obviated, such as taxes on the income and living expenses of the deceased. *See* U.S. DEP'T OF JUSTICE EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, *available at* http://www.usdoj.gov/victimcompensation/loss_calc_deceased.html (last visited Dec. 24, 2003).

89. Cantor Fitzgerald, the firm which lost 658 employees on September 11th, has issued its own study which attempts to show that, due to "the unique nature of Cantor Fitzgerald's business, [and] its record of continuing growth and success," the presumptive tables significantly understate the potential earnings of the Cantor employees who lost their lives. *See* Cantor, Tradespark, eSpeed Family Center Information, *available at* http://www.cantorusa.com (last visited Oct. 29, 2003).

If the Special Master agrees with the report and discards the tables for Cantor employees who represent over 20% of all victims, then it will be clear that the presumptive force of the tables is quite weak.

90. *See* Abraham, *supra* note 38, at 190 (noting that individuals whose "claims might lie outside the high end of any particular schedule [of damages] bear the risk that they will be less than 'fully' compensated because their special characteristics are not taken into account").

91. *See* Keating, *supra* note 79.

For all of these reasons, the use of schedules for economic losses appears considerably more problematic than the use of fixed amounts for noneconomic losses. Not surprisingly, the presumed loss schedule has come under the greatest attack for its handling of economic losses. Feinberg has defended the tables in several different ways. First, as with the noneconomic component of awards, the regulations provide that the schedules are presumptive only and do not preclude consideration of individual evidence.[92] But, in discussing the economic loss component of awards, Feinberg has sent mixed signals about the strength of the presumption that the schedules create. The regulations provide for deviation from the presumptive amounts "if the claimant presents extraordinary circumstances," implying that the room for flexibility is limited—in the "ordinary" situation they will be binding.[93] In discussing the Fund, however, Feinberg describes the presumptions in ways that sound much more tentative—presenting them more as a frame of reference for the consideration of individual circumstances. In announcing the regulations, Feinberg stated that, "Any individual dissatisfied with the presumptive award, may submit . . . documentation to change it, and may request a hearing to demonstrate why the award is inappropriate or inaccurate."[94] On one television news show, Feinberg said that he "invite[s] any family that feels that the presumptive award is not fair in their individual case to file an application requesting an appeal . . . and we [sic] will review any individual application and try as best I can to make sure that the families are fairly compensated."[95] These statements omit any mention of an obligation to present "extraordinary" circumstances.[96]

Second, Special Master Feinberg sought to blunt criticism of the presumptive tables by arguing that although awards under the tables are more limited than recovery in tort would permit, claimants to the Fund are spared the risks and delay of the tort system.[97] In effect, he

92. September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.31(b)(2) (2002).

93. *Id. See* September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,278 (Dec. 21, 2001) (codified at 28 C.F.R. § 104 (2003)) (statement accompanying the proposed regulations, asserting that the tables will be applied except when there is a "demonstration of extraordinary circumstances").

94. News Conference of Dec. 20, 2001, *supra* note 87.

95. Online NewsHour, Feb. 6, 2002, *supra* note 68.

96. *See* September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,243-44 (Mar. 13, 2002) (codified at 28 C.F.R. § 104) ("The term 'extraordinary circumstances' is not intended to signal that there is an unsustainable burden to justify departure from the presumed award.").

97. Most recently, Feinberg stated that the awards he has made "compare very favorably to the net recovery that a claimant might expect, if successful, under the conventional tort claim alternative, given very real litigation risks on liability, damages and collectability, substantial litigation expenses and large attorneys fees, as well as years of delay in actual receipt of any cash

argues that the Fund embodies a bargain that represents a fair trade off for claimants. This justification draws on an analogy to settlement funds in mass tort cases where plaintiffs generally sacrifice the possibility of large individual awards for smaller amounts paid out of a common fund. Indeed, mass tort settlements commonly contain schedules of awards similar to those devised by Feinberg for the Fund.[98] Moreover, the fact that victims can opt out of the Fund makes the schedules appear almost as an offer of settlement rather than a bargain struck by Congress on their behalf. A victim who opts in can be seen as making a choice analogous to the decision to settle.

The difficulty with conceiving of the Fund as simply another mass tort settlement is that, apart from sacrificing punitive damages and the offset of collateral sources, Congress has not mandated that claimants "compromise" their compensation levels by filing under the Fund. To the contrary, the Transportation Safety Act defines economic loss as "any pecuniary loss resulting from [the] harm . . . to the extent recovery for such loss is allowed under applicable State law."[99] Congress provided that payments must be based on the "harm to the claimant, the facts of the claim and the individual circumstances . . ."[100] Given the terms of the legislation, it is difficult to conclude that Congress has struck a bargain that gives the Special Master great power to limit awards as part of some "compromise."[101]

The analogy to mass tort settlements suffers from an additional problem. In one way or another, dealing with inadequacy of funds is a

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recovery." Press Release, U.S. Dep't of Justice, Statement of Special Master Kenneth Feinberg Regarding the Lawsuit Against the September 11th Victim Compensation Fund (Jan. 27, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/January/03_civ_043.htm (last visited Oct. 29, 2003). *See* September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,237 ("Civil litigation often takes years, with awards varying greatly from one claimant to another, particularly where the incomes of the victims vary. Indeed under the tort system, while many claimants receive extremely large awards, many others walk away empty-handed due to the requirement that plaintiffs prove fault."). Feinberg has also stated, "[I]t is not fair to compare this program to what might happen in the roll-of-the-dice casino, in the lottery system that is the courtroom." *See* Online NewsHour, Feb. 6, 2002, *supra* note 68.

98. As Special Master for the Agent Orange Litigation, Feinberg devised a distribution plan that was also based on a schedule of awards. In devising the plan he rejected the idea of creating a compensation system that would seek to replicate the results of the tort system. *See* SCHUCK, *supra* note 23, at 211-15.

99. Transportation Safety Act, *supra* note 1, § 402(5). Noneconomic losses are defined in similar unlimited terms. *Id.* § 402(7).

100. *Id.* § 405(b)(1)(B)(ii).

101. Feinberg has alluded to the phrase "individual circumstances" as support for the notion that he has broad discretion to take into account factors other than harm to the claimant. *See infra* notes 113-114 and accompanying text. Whatever the scope of this discretion, it is difficult to justify reliance on fixed schedules based on congressional language calling for individualization. *See infra* notes 115 and accompanying text.

central problem in creating compensation schemes in mass tort cases. Whether due to settlement or the actual or threatened bankruptcy of defendants, administrators of mass tort settlement funds are placed in the position of allocating a fixed amount among a large number of claimants. The Fund does not present this problem, as it has no cap. Ironically, the open-ended nature of the Fund makes its administration more difficult because the Special Master cannot parry discontent about awards with claims that he would have liked to have awarded more but that the Fund is simply inadequate. Absent such a limit, he cannot play claimants off against each other, but must be prepared to justify each award as an appropriate amount of compensation on its own terms.

Finally, the "settlement" conception of the Fund would seem to justify any principle of compensation Feinberg selects on the ground that claimants are free to opt out and proceed individually. As an expression of public support and compassion for the victims, Congress has mandated that their losses be compensated. It has not simply authorized Feinberg to, in effect, negotiate with the claimants.

If the schedule of awards cannot be justified from within the tort model, it can be readily supported by notions drawn from the social welfare context. First, the tables represent an attempt to promote parity among claimants by assuring that similarly situated claimants are treated the same. Second, the tables reflect the view that the level of payment should bear some relation to need. The aspect of the tables that most clearly reflects these objectives is the fact that the tables only extend to an income of $231,000, identified as commensurate with the ninety-eighth percentile of individual income in the United States. Although Feinberg has continually denied that the absence of a table for higher incomes amounts to a cap, he has stated that "there is a presumption that that will be the upper level of the award."[102]

Feinberg has been explicit in arguing that his tables represent an attempt to compress the range of awards made by the Fund.[103] As he has explained, "[w]e are not trying to promote vast disparity. We're trying to interpret [the statute] in a way that will minimize the high

102. News Conference of Dec. 20, 2001, *supra* note 87.

103. At one point, Feinberg stated: "I don't want a system that gives $6 million to the stock broker on the 38th floor and $38,000 to the waiter at Windows on the World." *See* Bob Van Voris, *Fund Boss Spurns Huge Payout Gaps*, NAT'L LAW J., Dec. 10, 2001, at A1. *But see* Roger Williams, *A Conversation with Ken Feinberg: In Solomon's Footsteps*, FOUND. NEWS & COMMENT., Sept.-Oct. 2002, *available at* http://www.foundationnews.org/CME/article.cfm?ID=2214 (last visited Dec. 26, 2003). Feinberg stated that "the rich getting richer doesn't bother me at all. You'd be hard pressed to think of a federal entitlement that's not based on economic variables. Social Security and Medicare come immediately to mind." *Id.*

from the low."[104] The tables accomplish this objective by limiting the awards at the upper end, averaging out variables used to calculate economic loss, and providing a floor in the form of liquidated amounts for noneconomic losses.

Implicit in this desire to limit the spread of awards is an assumption that the purpose of the Fund is to provide a kind of income floor that will meet the financial needs of victims. Feinberg has made this assumption explicit, stating that "Congress wanted to make sure that there is a safety net below which nobody would go and find themselves destitute."[105] Further, the regulations provide that, in determining awards, the Special Master will take into account "the financial needs or financial resources of the claimant, or the victim's dependents and beneficiaries."[106] This view supports Feinberg's goal of raising the bottom and reducing the top. Thus, while declining to publish a guaranteed floor for awards, Feinberg has stated that he will take need into account to boost awards to individuals at the low end.[107] At the opposite end of the spectrum, he has explained that "multi-million dollar awards out of public coffers are not necessary to provide [the wealthiest high income victims] with a strong economic foundation from which to rebuild their lives."[108]

Not surprisingly, the inclusion of need as a consideration, instead of simply looking to loss, has infuriated many claimants. As one family member told Feinberg: "The idea is to compensate me so my life style doesn't change, and my life style is different from a guy washing dishes."[109] On the other hand, some members of the public have

104. News Conference of Dec. 20, 2001, *supra* note 87. *See id.* ("[W]e've done a pretty good job of trying to prevent disparate treatment with wildly inflated, high awards and depressingly low small awards.").

105. Online NewsHour Feb. 6, 2002, *supra* note 68.

106. September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.41 (2002).

107. The regulations do provide a floor of $500,000 for victims with spouses or dependents and $300,000 for those without, but these amounts are subject to collateral offsets. *See id. See also* Ripley, *supra* note 17, at 24 (quoting Feinberg as promising that he will make sure "no one gets zero").

108. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,278 (Dec. 21, 2001) (codified at 28 C.F.R. § 104); *see id.* ("Any methodology that does nothing more than attempt to replicate a theoretically possible future income stream would lead top awards that would be insufficient relative to the needs of some victims' families and excessive relative to the needs of others."); 67 Fed. Reg. 11,233, 11,237 (Mar. 13, 2002) ("[P]roviding compensation [above the level of the tables] would rarely be necessary to ensure that the financial needs of [the] claimant are met.").

Although it found that issues relating to the application of the Special Master's regulations are not subject to judicial review, the Second Circuit noted that his statements of intent to reduce awards due to lack of need "are hard to square with the text of the Act" since they suggest a form of de facto cap on awards. Schneider v. Feinberg, 345 F.3d 135, 145 (2nd Cir. 2003).

109. *See* Kolbert, *supra* note 70, at 47.

voiced complaints about a public policy that makes millionaires out of World Trade Center widows but leaves victims of other disasters without any comparable redress.[110]

To the extent that the Fund has embraced need and uniformity as objectives, Feinberg has cast them loose from their moorings in tort law and embraced a social welfare vision of compensation. The overall justification for this approach that the Special Master articulates is that it is inappropriate to ask the public to foot the bill for awards that would result from application of a pure tort model.[111] In essence, Feinberg sees the Fund as an expression of Congress's desire to meet the needs of victims, rather than simply as a means of compensating their losses.[112]

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110. *See* Charles Laurence, *Envy over Cash for World Trade Center Victims*, SUNDAY TELEGRAPH, Sept. 8, 2002, at A1 (reporting that founder of victims group has received hundreds of telephone calls and emails accusing families of greed).

111. *See* September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,278 (Dec. 21, 2001) (codified at 28 C.F.R. § 104 2003).

112. Applying *Chevron* deference, the Second Circuit upheld the Special Master's contention that the language in the statute that permits consideration of "the harm to the claimant, the facts of the claim and *the individual circumstances of the claimant*," Transportation Safety Act, *supra* note 1, § 405(b)(1)(B)(ii) (emphasis added), authorizes him to take need into account *See Schneider*, 345 F.3d at 147.

The court, however, was clearly troubled by the Special Master's invocation of need as a means of simply reducing awards that would otherwise appear "unseemly." *Id.* It stated:

> [T]o the extent the Special Master is employing a need based analysis to compute awards, he has introduced some limit on what would otherwise be proper compensation under the Act. Such a notion, in our view, would seem contrary to what Congress aimed to accomplish in the statute. The overriding purpose of the statute is, of course, fair compensation for economic and non-economic loss. Therefore, even though the Special Master has authority to conduct a thorough analysis, he should take into full account a claimant's economic loss, as specifically required by the statute, before evaluating need-based circumstances. This slight shift in approach has the virtue of more closely reflecting Congress's aim as well as appearing to be more fair to claimants.

Id.

There is, however, no indication that Congress viewed the reference to "individual circumstances" as permitting inquiry into need. To the contrary, all specific references to the basis for awards refer to the calculation of losses. For example, in describing the information to be provided in the application form, Congress did not mention information on the extent of the claimant's need, or lack thereof. *See* Transportation Safety Act, *supra* note 1, § 405(a).

A few statements from the congressional debate support the proposition that the Fund is intended to meet needs, but for the most part, these statements refer to the collateral offset requirement. *See* 147 CONG. REC. S9599 (statement of Sen. Patrick Leahy) ("This program is targeted to help the neediest victims and their families. When making the determination, the Special Master will take into account any life insurance, death benefit, or other government payment received by the victims and their families."). Senator John McCain offered a more general statement that "the intent of the Fund is to ensure that the victims of [the] unprecedented, unforeseeable, horrific event, and their families, do not suffer financial hardship in addition to the terrible hardships they have already been forced to endure." *See* 147 CONG. REV. S9594 (statement of Sen. McCain). Of course, the goal of alleviating hardship could be accomplished by boosting awards in particular cases, without reducing awards in other cases.

The aim of meeting needs implicitly calls for judgments about what counts as a "need" as opposed to a mere desire. The line that Feinberg has drawn—replacement of lost income based on no more than $231,000 a year—is remarkably high in comparison to almost any other measure of economic "need" in our society. At the same time, the awards are insufficient to enable some victims to maintain the lives that they had prior to September 11th, when housing costs, private school tuition, and the like are taken into account.[113]

In this regard, Feinberg's promise to consider individual circumstances is significant.[114] It is clear that the $231,000 a year income threshold is not a ceiling, but rather a marker beyond which determinations will be made on a case-by-case basis. The Special Master, however, has not articulated any theory of need that would provide coherence to his handling of the issue. He has set forth no statement of principles upon which awards above the tables will be made. It is not clear whether he will look to the magnitude of the lost income, the size of the monthly bills that a family faces, or some combination of the two. One can only speculate about what kind of "needs" will move him to find "extraordinary circumstances." Will the need to make payments on a summer home as well as a primary residence qualify as a "need?" Will college tuition costs justify awards in excess of the schedule? Alternatively, will departures from the schedule focus on solely producing a more accurate measure of an individual's lost earnings? The use of elaborate matrices with detailed explanations to calculate economic loss contrasts sharply with Feinberg's gut instinct approach to need, which may amount to little more than a means of alleviating sticker shock over the magnitude of lost income in high earner cases.

As Feinberg has structured it, it is difficult to conceive of the Fund as a safety net in the sense that the term is generally used—as a means of preventing destitution. At the same time that the Special Master has advanced a social welfare vision of the Fund, he continues to rely on the fundamental tort concept that lost income should form a principle basis for the award. As a result, the Fund is predicted to generate awards that average in the seven figures. It is an odd kind of "safety

113. For example, one widow offered the following objection to the tables:

> This is not to make me rich at all. It would be so I would not have to sell my house, so that I could keep my kids at the same school where they're going and I could live where I am and maintain the same standard of living as if my husband were still providing for us.

See Online NewsHour, Feb. 6, 2002, *supra* note 68 (statement of Laurie Laychak).

114. *See* September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.33(b) (2002) (providing that claimants may present evidence concerning financial need at hearings on claims).

net" that results in upward income redistribution. In reality, Feinberg's approach incorporates need as a principle around the margins, rather than as a fundamental organizing principle for determining awards. If both loss and need are, as Feinberg maintains, factors that are cognizable under the statute, he could have organized the presumptive tables around need, with adjustments at the margins for loss, rather than the other way around. Given the fact that tort measures of compensation are explicitly referenced in the governing statute, and that considerations of need can only be read into the language with difficulty, the hierarchy that Feinberg has assigned to these different goals is not surprising.[115]

The tensions between the tort and social welfare aspects of the Fund also inform some of the disputes that have arisen concerning the collateral offset of award amounts.[116] The traditional tort rule does not permit the reduction of awards based on payments the victim has received from collateral sources.[117] The requirement, therefore, can be viewed as an instance in which Congress departed from traditional tort principles to target awards toward the goal of meeting the otherwise unmet needs of victims.[118]

The offset raises concerns that arise in all government benefit programs that take into account the income and resources of recipients in determining assistance levels. The principles of payment based on need and equal treatment of all individuals with the same level of need suggest that all income and resources should be taken into account. Applied rigorously, however, such a system creates significant perverse incentives that discourage self support. In public benefit programs, the problem is that strict needs testing penalizes recipients for working, potentially reducing their assistance by an amount that is

115. In cautioning the Special Master to calculate losses before looking to need, the Second Circuit took a similar view that need should play a subordinate role in the calculus. See *Schneider*, 345 F.3d at 147.

116. *See* Tim O'Brien, *Cracks in Plaintiff Bar's Solidarity: Sept. 11 Survivors Caught Between Competing Brands of Legal Advice*, N.J. L.J. Jan. 28, 2002 at 1 (referring to the collateral offset as "the most controversial aspect" of the Special Master's interim regulations).

117. *See* Abraham, *supra* note 38, at 190-91.

118. *See* Rabin *supra* note 18, at 1854-55 (referring to deduction of collateral source payments as reflecting a commitment to meeting needs that is incongruent with the tort based aspects of the Fund).

Alternatively, the deduction of collateral source awards could be justified without regard to need—as simply a means of preventing the overcompensation that would result from multiple payments for the same loss. In the tort system, deduction of collateral sources has the effect of letting the tortfeasor off the hook, arguably resulting in underdeterrence. That concern is not present in the Victim's Compensation Fund, because tortfeasors are not paying.

equal to the amount earned.[119] Similarly, the accumulation of savings can render a recipient completely ineligible for aid. Most benefit programs address this dilemma by splitting the difference—for example, by "disregarding" some portion of earnings and savings.[120]

In the context of the Fund, the concern about perverse incentives takes the form of an objection to the deduction of collateral sources on the ground that victims who planned ahead and purchased large amounts of life insurance should not be "penalized" for being careful by a reduction in their awards.[121] Moreover, the possibility of including charitable contributions in the offset raised the possibility of both "penalizing" families for accepting charity and nullifying the effect of the charity so that the generous contributions would serve only to save the government money, rather than helping victims. These concerns are particularly acute with respect to families of emergency service workers, whom many might view as most deserving of large awards, but who stand to collect relatively low amounts because they are protected by pension benefit plans.[122]

But more fundamentally, the negative reaction by claimants to the collateral offset focuses more on the way the Fund has been presented to the public. Although the media has reported extensively about the generous awards claimants may receive, including the announcement that awards will average almost $2 million, the reality is that the collateral offset requirement will substantially reduce the actual recoveries that families receive and greatly increase the disparity between awards and potential tort recoveries.

Thus, the collateral offset creates a gap between the perception and the reality of the Fund that has fueled a backlash against the families of victims who are unhappy with the Fund. It is possible to build a case that the Transportation Safety Act undermines the ability of families to seek damages from potentially responsible tortfeasors, turns large segments of the previously sympathetic public against them, and

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119. *See* Marie Cohen, *Earned Income Disregards*, Welfare Information Network (Apr. 1997), *available at* http://www.financeprojectinfo.org/Publications/income.htm (last visited Oct. 29, 2003) ("[R]educing benefits by one dollar for each dollar of earned income may discourage work unless a recipient can make more, after paying work expenses, than the benefits she can receive without working").

120. *See id.* (discussing state policies on treatment of earned income in the Temporary Assistance to Needy Families program).

121. *See* Nicholas Varchaver, *What's a Life Worth*, FORTUNE, Sept. 2, 2002, at 126 ("Many saw [the collateral source reduction] as penalizing those who had been responsible enough to plan for the future of their loved ones.").

122. *See* O'Brien, *supra* note 116.

in many cases, provides only a modest net award. It is not surprising that some families feel manipulated and bitter about the process.[123]

In sum, Feinberg has dealt with the tensions between the tort and social welfare aspects of the Fund by placing a primary emphasis on the tort model but tempering it with features drawn from the social welfare model. He has enshrouded this basic choice with a cloud of ambiguity, reserving the discretion to restrike this balance in individual cases as he sees fit. Feinberg's approach may constitute a reasonable compromise between the competing models, but, like many compromises, it lacks any underlying principle. If, as Feinberg argues, the statute does permit him to take need into account in determining an "appropriate award," then why do the compensation tables provide large discrepancies in awards based on past earnings rather than need? If, as Feinberg has also maintained, he is required to base awards on a measure of economic and noneconomic loss, how can he ignore the extent of economic loss for the wealthiest victims who have suffered the largest losses? Finally, it remains unclear whether Congress has authorized Feinberg to strike such a balance, or whether the Transportation Safety Act calls for the unmitigated application of tort law principles, despite the questions such principles raise.

IV. PROCEDURAL FAIRNESS AND THE FUND

The tension between the tort and social welfare paradigms underpinning the Fund has consequences for the procedural regime that it employs. The conception of the Fund as analogous to a mass tort settlement carries with it a different set of procedural expectations than does the view of the Fund as a government benefit program. The Special Master could be thought of as a mediator seeking to give structure to a settlement fund in a manner that dissuades victims from opting out, or as an adjudicator who determines legal entitlements under governing principles of law. The two roles carry with them very different images about the kinds of conduct appropriate to the office of Special Master. Given the tensions inherent in the substantive policies that the Fund implements, the choice of procedural model is likely to have a large impact on the overall perception of its fairness.

As this section explains, Congress and Feinberg have established a procedural system that in some ways serves to exacerbate, rather than dampen, the tensions concerning the Fund. At the same time that

123. *See* Ripley *supra* note 17, at 27 (quoting one widow as referring to the Fund as a "cheap bribe"); Laurence, *supra* note 110 (quoting another surviving spouse as stating "we are very angry because the government is using 9/11 families as pawns").

Feinberg espouses a social welfare perspective in discussing the substance of the Fund, when it comes to procedure, his approach is drawn from the mass tort context. This conception of the Fund permits the fact that the measure of awards is based on a tort model to obscure the fact that claimants have legal entitlements that call for treatment of their claims in accord with principles of public law governing the provision of government benefits.

In creating a program with broad and vague substantive standards that call for individualized determinations, Congress placed great authority in the hands of those charged with implementing the Fund. These aspects of the statute, however, do not necessarily give the Special Master greater authority than, for example, that accorded to other agencies administering government benefit programs.[124] Two aspects of the statute, however, do confer administrative discretion beyond the "normal" template. First, the Transportation Safety Act precludes all judicial review of awards, and second, it does not provide claimants with a right to a "hearing on the record," thus leaving the Special Master free of judicial oversight and unfettered by the procedural requirements of the Administrative Procedures Act (APA) that govern formal adjudication.[125]

Given this enormous discretion, the statute casts a spotlight on the office of the Special Master. Because of the absence of legal constraints, the perception of fairness in the implementation of the Fund is heavily dependent on the conduct of the Special Master and on his decisions about how to structure the adjudicative process. Seen in this light, the promulgation of presumptive tables contains important elements of procedural fairness, regardless of their substantive advantages and disadvantages. By publicly disclosing his starting point for the calculation of awards, Feinberg has provided an important means

124. *See, e.g.*, Shweiker v. Gray Panthers, 453 U.S. 34 (1981) (noting the "exceptionally broad authority" of the Secretary of Health and Human Services in administering the Social Security Act).

125. The Act provides that the Special Master will develop a claim form and will issue written determinations within 120 days of the filing of claims. *See* Transportation Safety Act, *supra* note 1, § 405(a)(2) (form); § 405(b(3) (120 day requirement). Claimants have the right to appear through an attorney and to present evidence, including witnesses and any other "due process rights determined appropriate by the [S]pecial [M]aster." *See id.*, § 405(b)(3)-(4). The omission of a right to a decision after a hearing "on the record" signifies that the formal procedures of the APA are not applicable. *See* 5 U.S.C. § 554(a) (2000) (Formal procedures apply when statute requires that a determination be made "on the record after opportunity for an agency hearing.").

The prohibition on judicial review of awards raises constitutional questions that are beyond the scope of this paper. It should be noted, however, that although award amount may not be challenged, Congress has not immunized the Special Master's procedures from judicial review. *See* Schneider v. Feinberg, 345 F.3d 135 (2d Cir. 2003).

of enabling claimants to determine whether to file with the Fund. In the absence of such tables claimants would be forced to choose between litigation and the Fund without any means of predicting how they would fare under the Fund.[126] Second, the tables and the accompanying documentation showing how they were calculated provides claimants with a framework for assembling their cases. The tables enable claimants to determine whether they have a strong case for challenging the application of the presumptions to their claims and to gauge the impact of altering one or more assumptions that are built into the tables.[127]

The fact that claimants can seek departures from the tables, however, begs the question of when and how Feinberg will use his discretion. This becomes the key question for claimants as they proceed with the process. The issue of procedural fairness centers on whether Feinberg has structured an adjudicatory system that bolsters rather than undermines confidence in the fairness of the results it produces. One way or another, the question returns to Feinberg himself because the procedures are all focused on his decision-making process. On this score, Feinberg has handled himself in a manner that is not likely to promote a perception of the Fund as a fair administrative mechanism. Feinberg has adopted a high profile approach with the media and the public. His tendencies to philosophize, argue, console, and offer predictions and advice about the Fund all emphasize his own personal role in making decisions. As a result, awards appear as the product of Feinberg's personal choices and preferences rather than as the product of dispassionate principled application of legal standards to facts.

It is easy to admire Feinberg's candor and accessibility. He has spent hundreds of hours meeting with victims and others discussing

126. *See* September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,278 (Dec. 21, 2001) (articulating goal that "claimants [should] be able to enter the program—or choose not to enter the program—with an understanding of how their claims will be treated").

127. If Feinberg insists that all the calculations that went into deriving the amounts in the tables must be viewed as a package, claimants may not be able to rely on some aspects of the calculations while maintaining that other aspects are inappropriate as applied to them.

In addition, Feinberg has publicized descriptions of selected awards as a means of disseminating information about the program. *See* Martin Kasindorf & Zubin Jelveh, *Sept. 11 Lawyers Counter Critics of Federal Compensation Fund,* USA TODAY, Oct. 1, 2002, at A5 (reporting on fourteen awards). However, the publicized information is too general to be of great value to claimants preparing claims. This information, together with aggregate statistical data about awards are available on the internet. *See* http://www.usdoj.gov/victimcompensation/payments.html (last visited Oct. 29, 2003).

the Fund and answering questions,[128] and he offers to meet with families prior to their filing claims to give them an idea about the magnitude of the award they would receive.[129] He freely admits the difficult choices with which he has been faced and even his own ambivalence about the statute that he implements.[130] Feinberg has taken great efforts to convince the families of the fairness of the Fund and to urge them to file claims. Feinberg frequently asks families to place their trust in him to "do the right thing"[131] and promises that for any families in need who would not otherwise be eligible for an award, "I will exercise my discretion and make sure that anybody like that gets a substantial paycheck."[132] He is unabashed in touting the Fund as superior to the alternative of litigation.[133] He presents himself as the personification of the Fund, referring to it in the first person possessive—as "my program" and "my regulations."[134]

Feinberg offers a highly personal form of justice. In this day of large bureaucratic institutions, when public officials routinely distance themselves from the choices they make, there is a refreshing quality to the personal stamp that Feinberg has placed on the Fund. For claimants, the process is, therefore, presented as a human interaction, a moment at which the Special Master, possessing essentially absolute authority, will take stock of the family's tragedy and loss. A *New*

128. *See* Online NewsHour, *Victim Compensation* (Mar. 7, 2002), *at* http://www.pbs.org/newshour/bb/terrorism/jan-june02/victims_3-7.html (last visited Oct. 29, 2003) [hereinafter Online NewsHour, Mar. 7, 2002] ("I have spent almost daily . . . over the last ten weeks traveling all around the country meeting with the families."); Kolbert, *supra* note 70 (noting "several dozen" sessions with families).

129. *See* Online NewsHour, Mar. 7, 2002, *supra* note 128.

130. *See, e.g.*, Julie Kay, *Doubts from the Hot Seat,* BROWARD DAILY BUS. REV., Nov. 15, 2002, at A3 (noting Feinberg's quip that the statute establishing the Fund "was carefully crafted—it took two hours in the middle of the night" and his concern that the Fund creates "an unfortunate precedent"); Kolbert, *supra* note 70 (reporting Feinberg's doubts about whether the Fund is a good idea).

131. *See* Dirk Olin, *Crossfire,* AM. LAW., Sept. 4, 2002, at 2 (reporting Feinberg's statement that the statute gives him the ability to "do the right thing"); Ripley, *supra* note 16, at 22 (reporting Special Master Feinberg's appeal that families "leave it to me" to make sure they are treated fairly).

132. Online NewsHour, Feb. 6, 2002, *supra* note 68.

133. *See* Kay, *supra* note 130 (quoting Feinberg as asserting that families who pursue litigation rather than filing claims with the Fund are making a "big mistake"); Williams, *supra* note 106 (characterizing litigation as "a loser's game" for families); Online NewsHour, Feb. 6, 2002, *supra* note 68 ("I'm hoping, and the Attorney General is hoping, that when these regulations are promulgated . . . they will agree that it is better for them to stay in this program, forget the lawsuit, come in and within 120 days . . . they will get a check").

134. Online NewsHour, Mar. 7, 2002, *supra* note 128 (calling the Fund "my program"); Online NewsHour, *supra* note 68 (calling the Fund "my regulations"); *Olin*, *supra* note 131, at 2 (quoting statement by Feinberg that "only ten suits have been brought at this point—and a couple of those filers are now trying to get back into my program").

York Times reporter who was permitted to sit in on one hearing, found Feinberg's attitude to be "professional" and "his demeanor empathetic."[135] One claimant reported that Feinberg "just sat there with me for forty-five minutes and talked to me about everything . . . When I walked out of the office, I felt very reassured. I felt that I might actually have a hope and a chance. . . . I also felt that I could go and see him anytime I wanted."[136] Feinberg presents an appeal that claimants and the public should trust the Fund because they should trust Mr. Feinberg. The implicit pitch is that he is worthy of trust because of his empathy with the victims as evidenced by his tremendous accessibility to them.

Feinberg's conception of his role draws on the model of the Fund as a mass tort settlement mechanism. In this tort-based conception of the Fund, Feinberg appears in the role of the mediator, struggling to get all parties to agree on an imperfect resolution.[137] Like all mediators, he emphasizes the risks of litigation and the benefits of nonadversarial settlement. Under this view of his office, Congress has charged him, not only with the task of administering the Fund, but of convincing victims to opt in, rather than go to court.[138] Feinberg is both the salesman and the product itself. These dual roles echo Feinberg's involvement in the Agent Orange Litigation, in which he mediated the settlement and then administered the distribution of the Fund.[139] If the Fund is seen as a large alternative dispute resolution mechanism, Feinberg's arguments, promises, and cajoling break no new ground, even if they reflect an approach that is not free of controversy.

With respect to the decisionmaking process itself, Feinberg has adopted a model that owes much to arbitration practices.[140] Under

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135. *See* David W. Chen, *A Slow, Deliberate Process of Weighing 9/11 Awards*, N.Y. TIMES, Feb. 18, 2003, at B1.

136. Varchaver, *supra* note 121. Feinberg has described his view of the office of special master: "You're only 10 percent lawyer. You're 40 percent Rabbi and 50 percent shrink." *See* Josh Tyrangiel, *Holding the Checkbook,* TIME, Sept. 11, 2002, at 62.

137. In discussing his conception of mediation, Feinberg has described himself as "an assertive mediator" whose job is to be "the voice of brutal honesty" that shakes parties from their fixed positions. *See* Varcharver, *supra* note 121.

138. Feinberg has been explicit that he measures the success of the Fund in terms of how many families file claims, as opposed to commencing litigation. *See* Olin, *supra* note 131, at 2 (quoting statement by Feinberg that "if you really want to gauge the success of this thing, it resides in the fact that only ten suits have been brought to this point, and a couple of filers are trying to get back into my program").

139. *See* SCHUCK, *supra* note 23.

140. *See* EDWARD BRUNET & CHARLES CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE, CASES AND MATERIALS 315-18 (2001) (describing characteristics of arbitration).

the regulations, hearings are private and informal.[141] No record need be maintained. Because most of the regulatory standards governing the Fund are presumptive, there are few legal rules to apply. The determination takes the form of an award amount with no written explanation or decision.[142] Awards do not create binding precedent and are completely unreviewable.[143] If Fund claimants are viewed as having opted out of the tort system and into a large Alternative Dispute Resolution (ADR) scheme, the use of an arbitration model would make sense.

Viewing the Fund as a government benefit program, however, casts Feinberg's approach in a different light. When the Fund is viewed as a benefit program that confers entitlements on a particular class of individuals, Feinberg's approach appears more troubling in a number of respects. As the adjudicator of a government program, Feinberg is charged with the task of making governmental determinations concerning the rights of claimants. Regardless of whether the formal provisions of the APA apply, the task carries with it expectations of impartiality and neutrality that traditionally signal a need for detachment rather than engagement. At root, there are different norms that govern the conduct of mediators versus those who perform quasi-judicial roles.[144]

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141. The regulations allow claimants a choice between two procedural tracks. Under track A, a claims examiner issues a determination based on a paper record that is appealable to the special master or his designee. *See* 29 C.F.R. § 104.31(b) (2002). On appeal, the claimant may present evidence at a hearing that the claims examiner erred or that special circumstances warrant a departure from the presumed award amounts. *Id.* § 104.33. Under track B, the claim proceeds directly to a hearing before the Special Master or his designee. *Id.* § 104.31(b)(2). The determination is not appealable. *Id.*

142. *See id.* § 104.33(g) ("The Special Master shall notify the claimant in writing of the final amount of the award, but need not create or provide any written record of the deliberations that resulted in that determination."). Apparently, Feinberg does provide some form of oral explanation to claimants. Conversation with Justin Green, Kreindler & Kreindler (Apr. 2, 2003).

143. *See* 28 C.F.R. §§ 104.33(g) ("There shall be no further review or appeal of the Special Master's determination."); 104.34 (reserving the right to publish selected awards as "general guides" that should not be "viewed as precedent binding on the Special Master or his staff").

144. Feinberg's conflation of the role of mediator and adjudicator appears to owe a heavy debt to his mentor Judge Jack Weinstein, whose active role in mass tort litigation has drawn both criticism and praise. *See* SCHUCK, *supra* note 23, at 265-66 (critiquing the active role of Judge Weinstein in the Agent Orange case); Minow, *supra* note 62, at 2010 (describing and assessing Judge Weinstein's conception of the judge as the "problem-solver to the entire situation"); David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064 (1997) (commenting on Minow); Mullenix, *supra* note 62 (rejecting Judge Weinstein's approach as calling for judges to be "biased, feeling, involved, opinionated and result oriented").

Indeed, Feinberg has written sympathetically about Judge Weinstein's vision of a "communitarian ethic" in lawyering and judging—the idea that resolutions of mass tort litigation "must take into account broader public policy considerations tied to the social, economic and political needs of the community at large." *See* Kenneth R. Feinberg, *Lawyering in Mass Torts*, 97

Viewed through this lens, Feinberg's outspoken qualities pose a risk of creating the appearance of prejudgment. Feinberg's public statements reveal him to be an individual brimming with strong opinions and value judgments about the very matters he is called upon to adjudicate. Moreover, they display a great personal stake in how the Fund is perceived by victims and the public. When claimants are disappointed by their awards, as some undoubtedly will be, blame will inevitably fall on Feinberg because it is difficult to conceive of the decisions as anything other than an expression of his personal values and judgments. By personalizing the program, Feinberg has left little room for claimants to conclude that a decisionmaker has made a fair attempt to apply preexisting standards to their cases. Instead, each decision is likely to appear ad hoc and arbitrary, rather than the product of a system of law.[145] This danger is exacerbated by Feinberg's public statements urging claimants to file with the Fund. These statements will be construed as implicit promises that they will be happy with the result. Thus, in addition to the other problems, disappointed claimants may also feel misled.[146]

Feinberg's actions serving to personalize the Fund, therefore, have an ironic quality. Presumably, the tables were intended to establish a

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COLUM. L. REV. 2177 (1997). *See also* WEINSTEIN, *supra* note 23 (articulating "communitarian" ethic).

In one major respect, Feinberg's conduct is less troubling than the conduct of Judge Weinstein. Feinberg has been granted administrative authority by Congress, while Judge Weinstein has relied solely on powers conferred through Article III.

In some ways, however, Feinberg's approach appears more problematic, as he is free of some important constraints that have limited Judge Weinstein. First, unlike Judge Weinstein in *Agent Orange*, Feinberg's views about how to structure the Fund need not be accepted by parties through their consent to a settlement. Second, Feinberg's decisions on award amounts are completely insulated from judicial review, whereas Judge Weinstein operated against the backdrop of an appellate process. Even though Judge Weinstein possessed an abundance of means to extract consent and evade appellate review, these constraints served as some kind of check on his authority.

145. The *Schneider* decision makes this problem apparent. Plaintiffs submitted affidavits describing conversations with Feinberg in which he told one claimant that despite economic analysis showing losses between 14 and 15 million, the numbers were "far north of anything" he would award and that he would not give more than 6 million to any claimant. Schneider v. Feinberg, 345 F.3d 135, 141 (2nd Cir. 2003). The affidavits state that Feinberg told other claimants informally that he would award up to $7 million. *Id.* The Second Circuit viewed the inconsistencies as evidence that Feinberg is not using a fixed cap, rather than an indication that there is a cap but that it shifts from case to case based on unknown variables. *Id.* at 144.

146. When he is viewed as a disinterested adjudicator, Feinberg's success, measured by the number of claims as opposed to lawsuits filed, appears singularly inappropriate. The correct question is whether the Fund is providing the compensation to which claimants are entitled under law. Since the alternative of litigation is fairly dismal, Feinberg's formulation of his objective sets a low threshold for himself. While a mediator may be content with structuring the Fund so that victims find it marginally superior to litigation, a government adjudicator should seek simply to provide the benefits that claimants are due.

uniform set of principles that would furnish a coherent rationale for awards. The explanatory material that Feinberg has issued provides a reasoned basis for the judgments made in constructing the tables. Feinberg's repeated statements inviting claimants to make individualized showings and his disavowals that the tables represent real caps shift the focus away from the tables and back toward his unfettered and undefined discretion.

There is a strong argument that Feinberg's statements violate no formal standard of conduct. Although courts have required administrative officials engaged in adjudication to remain circumspect, officials engaged in rulemaking are not required to hold their tongues.[147] As is common in administrative government, Feinberg has the power to act in both capacities. Because his statements concern the Fund generally, rather than particular awards to particular claimants, it is likely that they would ordinarily fall on the more lenient rulemaking side of this dichotomy.[148] Nonetheless, because the rulemaking deals exclusively with how he will personally adjudicate claims, the arguments for circumspection that arise from the adjudicative context have considerable force.

Feinberg's decision not to provide written explanations of awards also undermines confidence in the fairness of the process. At first glance, it may appear that a written explanation of the award is unnecessary because awards are not subject to judicial review.[149] As the United States Supreme Court recognized in *Goldberg v. Kelly*,[150] however, the obligation of an administrative adjudicator to provide reasons for his determination is a critical form of accountability that serves to ensure that decisions rest on applicable legal rules and on

147. *Compare* Cinderella Career & Finishing Schs., Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970) (ordering recusal of FTC chairman from adjudicatory proceeding based on public statements which could be construed as indicating prejudgment), *with* Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979) (*Cinderella Career & Finishing Schools* inapplicable in the rulemaking context).

Canon 3(A)(6) of the Code of Judicial Conduct cautions judges against public comment on the merits of a pending case. MODEL CODE OF PROF'L RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (1980); *See In re* Boston's Children First, 244 F.3d 164, 164-167 (1st Cir. 2001) (ordering recusal of trial judge who told reporter that a pending case was "more complex" than a previous one); United States v. Cooley, 1 F.3d 985, 992-96 (10th Cir. 1993) (ordering recusal of judge who explained his decision on "Nightline").

148. *See* Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976) (holding decisionmaker not "disqualified simply because he has taken a position, even in public . . . on a policy issue related to the dispute").

149. *See* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402 (1971) (Contemporaneous explanation of administrative decisions is necessary to permit judicial review.).

150. 397 U.S. 254 (1970).

the evidence in the record.[151] The obligation to articulate a reasoned basis for determinations is one means of ensuring that decisions are in fact the product of reasoned analysis. Rather than making a written decision superfluous, the absence of judicial review heightens the importance of reasoned explanation because it is one of the only forms of accountability remaining. Feinberg's failure to explain his awards may well violate due process.

Feinberg's refusal to provide claimants with expert reports, prepared by his office as part of the claims evaluations process, is similarly troubling. In making determinations, Feinberg relies on economic analyses of each case performed by the accounting firm of PriceWaterhouse Coopers.[152] The reports, however, are not turned over to claimants, who are thereby denied access to critical information concerning the disposition of their claims.[153]

The omission of written decisions and the other aspects of procedural informality, such as the absence of a hearing record, is presumably based on an analogy to arbitration. The legitimacy of arbitration procedures hinges on the idea of consent—the notion that parties may opt out of the formal elements of due process.[154] As noted above, it is possible to view the Fund claimants as making such a choice by filing with the Fund rather than pursuing litigation. This view of the Special Master's function, however, is unsatisfying. All claimants for government benefits choose to apply for benefits. The decision to apply does not reflect any kind of waiver of due process rights even if the absence of procedure is apparent from the start. Similarly, claimants to the Fund have no choice but to apply in order to receive Fund benefits. The Supreme Court has resoundingly rejected the idea that applicants for benefits must "accept the bitter with the sweet," meaning that Congress cannot condition the provision of substantive benefits on the waiver of procedural rights.[155] The view that procedural protections

151. *Id.* at 271.

152. *See* Letter from Andrew Schilling, Assistant U.S. Attorney (Mar. 18, 2003), submitted to the court in *Colaio v. Feinberg*, 03 Civ. 0558 (AKH) 2003 U.S. Dist. LEXIS 7626 (S.D.N.Y. filed May 8, 2003). *See also* Plaintiffs' Joint Memorandum of Law in Support of Rule 56 Motions for Summary Judgment, Smith v. Ashcroft, No. 03 CV 1040 (AKH) at *5-6 2003 U.S. Dist. LEXIS 7626 (S.D.N.Y. filed Apr. 3, 2003) (describing Feinberg's refusal to turn over a PriceWaterhouse analysis of economic loss prepared in connection with a claim).

153. *See Goldberg*, 397 U.S. at 270 ("Evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that [it] is untrue.") (quoting Greene v. McElroy, 360 U.S. 474, 496-97 (1959)).

154. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . .").

155. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

can be dispensed with in the administration of the Fund because it is some kind of ADR mechanism rests on a conflation of substance and procedure that ignores the constitutional guarantee of due process.

Feinberg's conception of his role as that of a mediator and arbitrator has had repercussions for the legal representation of claimants. The Fund was originally described as an informal mechanism for cutting checks to victims within 120 days of application. The image of the process as a simple vehicle for dispensing funds was probably unrealistic to begin with—the amounts are simply too large to be doled out in a cavalier manner. The explanations issued by Feinberg supporting the tables reveal the large amount of technical data that must be considered in measuring economic loss and the many judgment calls about which data to use and how to use it. It is inevitable that most claimants facing such a process will choose to proceed through counsel. To its credit, the American Trial Lawyers Association (ATLA) stepped up and offered pro bono representation to Fund claimants. To date, approximately 1,500 victims have accepted this offer. Trial Lawyers Care (TLC), an offshoot of ATLA, coordinates the provided representation.[156]

But the spotlight on Feinberg himself has further complicated the process. The uncertainty about how he will actually decide claims, together with his volubility, has created a market for counsel beyond what would otherwise have been the case. Many claimants have decided to forego pro bono representation, choosing instead, to pay large sums for counsel, typically contingency fees of ten to fifteen percent.[157] Perhaps, there is nothing wrong with this development, but it is at least in part a by-product of the procedural regime that the Special Master has established.

Feinberg's conduct has contributed to this result by creating a market for expertise in the operation of the Fund, and in essence, a market for knowledge of Feinberg. Lawyers who handle a large volume of claims before the Fund have decided advantages over those who only handle one or two such claims. Because only very basic information about awards are published by the Special Master, lawyers with large inventories of claims can detect patterns in awards that lawyers

156. *See* Kasindorf & Jelveh, *supra* note 127. Approximately 1,200 lawyers are participating in the effort. *Id.*

157. *See* David W. Chen, *Saying No to Free 9/11 Aid, Many Families Hire Lawyers,* N.Y. TIMES, July 29, 2002, at B1; Diana B. Henriques, *Legal Representation and a 10 Percent Fee*, N.Y. TIMES, Mar. 29, 2002, at B8; O'Brien, *supra* note 116. Two firms specializing in aviation law, Baumeister & Samuels and Kriendler & Kriendler, have taken the lead in signing up clients on a contingency fee basis. Kriendler & Kriendler represents over 270 clients in connection with claims before the Fund. *See* Laurence, *supra* note 110.

with only one or two claims handled pro bono could not possibly uncover. Feinberg's accessibility and willingness to answer questions about the Fund in public adds to the problem by creating the impression that lawyers who attend as many of the Special Master's public appearances as possible will be better prepared to navigate the process. Because Feinberg does not flinch from predicting how he would resolve hypotheticals posed to him in public, his appearances are an important source of information that is provided in a relatively haphazard manner. Again, this places firms handling large numbers of claims at an advantage because they can cover more events and thus collect more information. The system, thus, places pro bono counsel who handle only one or two cases at a disadvantage.[158]

Finally, lawyers with personal relationships with Feinberg can trade on their connections. Variations on this practice range from statements by lawyers intimating that they meet regularly with Feinberg to discuss the Fund, or that they have known Feinberg for many years, or even that Feinberg asked them to handle claims before the Fund.[159] The implication of these statements is that claimants who retain lawyers who are known to and respected by Feinberg are likely to fare better than others. Given the absence of any governing laws or rules of decision, and the lack of judicial review, the concentration of power in a single individual may make inevitable this kind of marketing.

In general, the two different groups of counsel, pro bono and non pro bono, appear to have very different views of Feinberg and the Fund. The spokesmen for TLC have been effusive in their praise. Larry Stewart, the president of TLC, hailed early awards issued by Feinberg, stating that "these awards fulfill the commitment of the [S]pecial [M]aster to consider the individual facts of each case . . . I feel confident now that the victims compensation fund is going to work."[160] He concluded that Feinberg is "prompt, compassionate and fair."[161] In contrast, many of the lawyers representing claimants on a paying basis have been scathingly critical. James Kreindler termed Feinberg's regulations "insulting" and "absurd."[162] Michel Baumeister commented that "the regulations are a betrayal to the

158. TLC has sought to correct these imbalances through an impressive effort to provide training and disseminate information to its network of pro bono attorneys. *See generally* Trial Lawyers Care, *at* http://911lawhelp.org/info/lawyers/ (last visited Oct. 29, 2003) (TLC website for lawyers representing clients before the Fund).

159. A number of claimants have reported these and similar statements to the author.

160. *See* Austin Fenner, *Widow Takes Feds 9/11 Awards,* DAILY NEWS, Oct. 11, 2002, at 23.

161. *See* Kasindorf & Jelveh, *supra* note 127. Special Master Feinberg, in turn, has referred to the pro bono counsel as "heroes." *See* Laurence, *supra* note 110.

162. *See* O'Brien, *supra* note 116.

families who have suffered enormously as a result of the tragic events of September 11th."[163]

It is possible that this split in opinion on the Fund among counsel is simply coincidental—individual lawyers with strong views will frequently differ. But it is also possible that other factors are at work that render the division unsurprising. In the days after September 11th, ATLA urged a moratorium on litigation arising out of the disaster and lobbied for the creation of the Fund.[164] Its offer of free legal representation for claimants was featured in the congressional debate that led to enactment of the Transportation Safety Act.[165] Thus, ATLA has an interest in the success of the Fund that it helped to create. Moreover, TLC's supportive statements suggest that it approaches the Fund as a cooperative enterprise in which its lawyers help clients navigate an administrative process. Under this view, the Fund is not comparable to tort litigation, and counsel do not view their role as participants in an adversarial proceeding.[166]

In contrast, counsel who charge a fee for representing claimants have tended to use a more hard-edged adversarial style in dealing with the Fund. They have approached the task of representing clients before the Fund as a form of tort litigation, touting expertise in aviation law as an important asset.[167] These attorneys have tended to raise vociferous objections to the ways in which Feinberg's implementation of the Fund departs from a tort-based model of compensation. Moreover, their own compensation arrangements, largely based on contingency fees, clearly spring from a conception of a Fund claim as analogous to a tort claim.[168] Because Feinberg sees his role as con-

163. Comment of Michel F. Baumeister (Jan. 10, 2002), *available at* http://www.usdoj.gov:80/victimcompensation/interim/njan31/N002505.html (last visited Oct. 30, 2003).

164. *See* Bob Van Voris, *A Commitment to Victims of Attacks,* NAT'L L.J., Jan. 7, 2002, at A14.

165. *See* 147 CONG. REC. H5913 (daily ed. Sept. 21, 2001) (statement of Rep. Bill Delahunt attaching text of letter from president of ATLA). ATLA may well have been concerned about adverse publicity that would have resulted if an avalanche of personal injury cases were filed after September 11th. *See* Van Voris, *supra* note 163 (noting that ATLA's actions avoided negative publicity against lawyers).

166. This description is not meant to disparage the zealousness of representation provided through TLC. Plainly, many lawyers provide superb representation in facilitative settings. In any event, it is not clear how far TLC's conception of the Fund affects individual representation, because individual attorneys bring their own judgment to bear in representing clients.

167. *See* O'Brien, *supra* note 116, at 1 (quoting one attorney as explaining that "many families want to go to an aviation expert and in complex cases will need one").

168. The percentage rates are, however, significantly lower than these firms would charge for litigation work. Nonetheless, under a 10% contingency arrangement, fees are likely to average over $100,000 per case. Firms that can enjoy economies of scale by doing a large volume of claims stand to do very well indeed.

The Special Master's regulations are silent on the issue of attorneys fees, but the preamble states that "The Department believes that contingency arrangements exceeding 5% of a claim-

vincing claimants to file with the Fund, these attorneys could be seen as using the threat of litigation to strike the best deal for their clients. The aviation firms are clearly capable of going the litigation route in a way that TLC is not.[169] Additionally, an adversarial stance bolsters their contentions that legal work on claims is neither easy nor routine, and thus calls for lawyers with special expertise. If representation before the Fund appeared principally as a matter of filling out paper work, there would be little reason for clients to forego offers of pro bono assistance in order to retain the experts in the field.

It may be that money spent by claimants to retain firms such as Kreindler & Kreindler and Baumeister & Samuels is money well spent. It is also possible, however, that their clients will fare no better than those represented by pro bono counsel.[170] The swirl of legal activity around the Fund, however, is in itself significant. First, it reflects the fact that in personalizing the Fund, Feinberg has created a situation in which knowledge of Feinberg and his countless public and private statements about the Fund is a marketable form of legal expertise. Second, the disparity in approaches of TLC and the fee-charging aviation firms stems, at least in part, from the underlying difficulties in conceptualizing the Fund. Lawyers who view it as a feature of the tort system are not only likely to be unhappy with substantive aspects of Feinberg's implementation, but are likely to view the Fund through an adversarial lens. Lawyers who view the Fund as a government benefit program are much more likely to view their role as facilitative as they help to process cases through the system and achieve outcomes that are favorable to their clients.

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ant's recovery from the Fund would not be in the best interests of claimants." September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,280 (Dec. 21, 2001).

In the administrative context, contingency fees have been used for representation of claimants for Social Security benefits. The Social Security Administration has capped fees at 25% or $4,000, whichever is lower. *See* 42 U.S.C. § 406(a) (2000). In contrast with the Victims Compensation Fund, fee arrangements in Social Security cases are closely regulated and require administrative approval. *See generally* Gisbrecht v. Barnhart, 535 U.S. 789 (2002) (discussing contingency fees in the Social Security context). Moreover, Social Security proceedings generally occur in a context in which the attorney takes a substantial risk in entering into a contingency fee arrangement because a loss would result in no payment. The principal issue in representing clients before the Fund, however, concerns the amount of an award, rather than whether any award will be paid.

169. TLC will refer out clients who choose to sue rather than file with the Fund. *See* Dan Haar, *No Fee: Lawyers Pitch In To Aid Families; Terror in America: The Nation Fights Back,* HARTFORD COURANT, Oct. 11, 2001, at 23.

170. Of course, all pro bono counsel and all fee-based counsel cannot be lumped together. Given the large numbers of lawyers involved, it is inevitable that there will be a large range in the quality of representation that claimants receive.

V. CONCLUSION

The September 11th Victim Compensation Fund of 2001 is unique in the extent to which it uses tort principles to make distributive choices in a government benefit program. The Fund is also unique in its lack of a funding mechanism which serves to justify the use of private law distributional principles. Awards cannot be rationalized as a form of insurance or as a return on contributions. Thus, it is abundantly clear that every dollar paid by the Fund comes from public coffers. The use of a private law remedial scheme in the absence of such a funding mechanism places a strain on many notions of fairness that are traditionally implicated in the design of public benefits programs, such as the values of parity, administrative efficiency, and most importantly, payment based on need.

The fact that the Fund is beset by conflicting policies should not be construed as a condemnation. Almost all public policies that deal with complex problems represent compromises between competing objectives. The question, therefore, is whether the substantive policies and procedural mechanisms reflected in the Fund come to terms with these conflicts in a manner that tends to diffuse rather than exacerbate them. Feinberg has labored mightily to resolve the tensions raised by the Fund, but he has been placed in a situation in which he cannot possibly make everyone happy.

In the end, Feinberg has not succeeded in articulating standards and principles that enable him to resolve the basic tensions in a principled manner. The use of a presumptive award schedule on one level has helped tremendously, but at the same time, it only begs the key question of how the presumptions may be overcome. In the absence of clear guiding principles on this point, the Fund awards appear solely as the product of Feinberg's personal preferences. This appearance results not simply from the absence of an articulated standard, but also from the procedural regime that governs the Fund, particularly the statutory preclusion of judicial review and the failure to provide reasoned written determinations. It is also compounded by the manner in which Feinberg projects himself as the personification of the Fund, through countless public meetings, interviews, television appearances, and speeches about the Fund.

In addition, there is a disconnect between the way Feinberg talks about the Fund and his attitude towards its administration. Feinberg has repeatedly rejected comparisons between the Fund and the tort system, emphasizing instead its social welfare aspects. Yet at the same time, he conducts himself like a mediator in a mass tort litigation and treats the Fund as a settlement fund. Feinberg's recognition that gov-

ernment funding makes a difference in the substance of awards has not fully carried over into his conception of procedural fairness. The role of chief adjudicator of a multi-billion dollar government program calls for a different model of procedural fairness than that which governs the conduct of a mediator. It calls for a recognition that awards under the Fund are a matter of legal entitlement, rather than a brokered deal or an expression of the Special Master's own preferences and that claimants have both a right to compensation and a right to due process. Feinberg's conduct highlights the central weakness of the Fund as an administrative mechanism—its operation rests on the personal choices of a single individual, with little means of accountability or oversight. As Feinberg has construed his grant of authority, there are few governing legal standards, no real requirement that like claims be treated alike, no obligation to provide reasoned explanations, no limits on the amount that may be spent, and no means of judicial review. It is difficult to conclude that the Fund constitutes a responsible administrative mechanism for dispensing billions in public funds however wise and solomonic Feinberg's judgments may be.[171]

At root, much of the blame must be placed at Congress's feet. The establishment of an administrative scheme for compensation of victims of September 11th was not simply a good idea that meets the needs of victims and the public as well—it was also the exact response that so many have called for as a means of dealing with mass disaster.[172] The problem arises from the failure of Congress to articulate a principled system of compensation that is appropriate for the circumstance. In some respects, this failure is not surprising. As Joel Handler has pointed out, government benefit programs that implicate deeply felt conflicting public values often shunt conflicts down the chain of decision-makers, rather than resolving them at the outset.[173] In this instance, Congress's failure is replicated in the regulatory scheme which leaves key questions in an ambiguous haze to be worked out on a case-by-case basis. Because the resolution in each case occurs in a confidential proceeding that generates no written decision and is not subject to review, it has no means of filtering back up the system through a process of oversight or accountability. This cri-

171. *Cf.* Minow, *supra* note 62, at 2028 (noting that the judicial role "should be designed for the ordinary, not the extraordinary person"); Luban, *supra* note 144, at 2089-90 (expressing concern about whether the "heroic" model of judging is "risky and uncomfortable").

172. *See, e.g.*, Amchem v. Windsor, 521 U.S. 591, 628-29 (1997) (lamenting lack of congressional response to the crisis in asbestos litigation).

173. *See* JOEL HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT (1996).

tique is not intended to obscure the fact that thousands of claimants may walk away satisfied with their awards, and that this satisfaction will stem from Feinberg's efforts. But for those who are not satisfied, the Fund has few features that can legitimate its results. As an administrative system, this represents a significant shortcoming.