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GRIEF, PROCEDURE, AND JUSTICE: THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

*Elizabeth M. Schneider**

INTRODUCTION

The September 11th Victim Compensation Fund of 2001 is unprecedented in the American legal system. The Victim Compensation Fund emerged from congressional efforts to bail out the airlines from lawsuits arising from the September 11th tragedy. The compromise was to give those who lost family members, or were injured, something in return for waiving the right to sue the airlines—to give them compensation for their loss.

In this Article, I examine the Fund through the lens of the extraordinary grief and trauma—both collective and individual—that has shaped our post-September 11th psychic, social, and political landscape. The grief and trauma that we have experienced as individuals and as a nation is unprecedented—a level of fear, anxiety, sadness, and a sense of horror as what was previously unimaginable has now become imaginable. Because the grief and trauma experienced as a result of September 11th has been so profound, so widely shared, and so public, it is especially important to consider these issues in assessing the Fund.

Grief and trauma are the critical human dimension, the backdrop, the shaping experience that leads to tort litigation and claims resolution in situations of disaster, as well as in accidents, medical malpractice, and many other cases. But precisely because grief and trauma are always present in these situations, and it is difficult to distinguish

* Rose L. Hoffer Professor of Law, Brooklyn Law School. This Article is based on a presentation at the Ninth Annual Clifford Symposium on Tort Law and Social Policy, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, on April 24, 2003, at DePaul University College of Law. Thanks to Steve Landsman for inviting me to participate and to all the participants for stimulating and generative discussion. I am grateful to Susan Herman and the other participants at the National Roundtable on Victim Compensation, convened by the National Center for Victims of Crime in Washington, D.C. on June 9-10, 2003, who helped me think more deeply about these issues. Thanks to Margaret Berger, Saralyn Cohen, Mary Jo Eyster, Tom Grunfeld, Susan Herman, Minna Kotkin, Martha Minow, Tony Sebok, Larry Solan, Aaron Twerski, and Peter Woodin for comments on earlier drafts, and to Ashley Van Valkenburgh, Chelsea Chaffee, and Timothy Sini for helpful research assistance. The Brooklyn Law School Faculty Research Fund generously supported my work.

between degrees of horrible, tort litigation and claims processing systems often take grief and trauma for granted and render them invisible or irrelevant. In this Article, I bring grief and trauma to the fore. I argue that experiences of grief and trauma are relevant to assessment of claims resolution processes and civil litigation, and provide important perspectives on the efficacy and meaning of these processes. While I was beginning my research, hearing Kenneth Feinberg, Special Master of the Fund, describe that what kept him up at night was the fear that numbers of potential claimants would neither apply to the Fund by the deadline of December 22, 2003, nor sue because of their experiences of grief and trauma,¹ underscored the importance of these issues and fueled my work.

As the December deadline approached, the impact of grief on the effectiveness of the Fund was widely recognized. Although ninety-seven percent of all eligible families ultimately filed death claims with the Fund, one-third of the 2,884 death claims, and more than half of the 4,185 injury claims filed, were filed in December 2003.² A front-page article in the Sunday edition of the *New York Times* on August 31, 2003 reported that “[f]ederal and local officials are growing increasingly concerned that nearly [sixty] percent of families who lost relatives in the September 2001 terror attacks have not filed claims with the victim compensation fund established by Congress.”³ By the end of November, about 1,800 families, or only about sixty percent of those eligible, had filed claims.⁴ The number was even lower among the families of police officers, firefighters, and other uniformed officers who were killed or injured on September 11th.⁵ The Special Master’s answer as to why—“one that was echoed by the leaders of some family groups that coalesced after the disaster—is that many people are still too paralyzed by their grief to confront the logistical burden and emotional pain of filing a death claim.”⁶ “I have met with

1. Kenneth Feinberg, Presentation at Association of American Law Schools (AALS) Annual Meeting Section on Torts, Washington, D.C. (Jan. 5, 2003).

2. David W. Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, with Reservations*, N.Y. TIMES, Jan. 1, 2004, at B1.

3. Diana B. Henriques, *Concern Growing as Families Bypass 9/11 Victims' Fund*, N.Y. TIMES, Aug. 31, 2003, at A1.

4. David W. Chen, *As Deadline for 9/11 Aid Nears, Many Relatives Haven't Filed*, N.Y. TIMES, Nov. 22, 2003, at A1. “Even if the current pace of filing continues, however, the [F]und is likely to reach its December deadline with hundreds, if not thousands, of eligible families empty-handed.” *Id.*

5. Winnie Hu, *Families of Uniformed Victims Are Urged To File 9/11 Claims*, N.Y. TIMES, Sept. 3, 2003 (Late Edition), at B2, available at LEXIS News Library, NYT File.

6. *Id.* In September 2003, Christy Ferer, Mayor Michael Bloomberg’s liaison to the families of September 11th victims, said some families had also delayed applying “because they were still coming to terms with their grief.” *Id.* Ms. Ferer’s husband, Neil D. Levin, the Executive Direc-

thousands of families,” Feinberg said. “And you would be amazed at the number of people who, when I say the deadline is approaching, still come up to me in tears and say, ‘I’m not ready.’”⁷ Feinberg now acknowledges that he “underestimated the extent and the depth of the families’ grief.”⁸

To this subject of grief and the Fund, I bring perspectives shaped from different vantage points. I live in downtown Manhattan not far from the World Trade Center and watched the planes fly into the Twin Towers on September 11th around the corner from my home. Like so many others living near the heart of the disaster, the events of September 11th have irrevocably affected my thoughts and daily life. As a civil procedure teacher, I teach about grief and trauma, process values, claims resolution, litigation, and settlement through the Buffalo Creek Disaster case and other mass tort cases.⁹ As a women’s rights lawyer and scholar, I have advocated for the legal system to recognize the problems of grief and trauma of a particular category of victims and survivors—battered women—in cases involving domestic violence or what Isabel Marcus has called “terrorism in the home.”¹⁰

I begin with a description and brief overview of the mechanisms of the Fund. I turn to psychological literature on grief and trauma generally, and research on societal and individual experiences of grief and trauma after September 11th. I examine the Fund through the lens of grief and trauma, focusing on the centrality of compensation, the procedural framework, the statute of limitations, and the need for survivors to have a sense of repair. I consider Fund processes in

tor of the Port Authority of New York and New Jersey, was killed on September 11th. *Id.* “I myself am just going to try to file this month,” she said. *Id.*

7. Henriques, *supra* note 3.

8. David W. Chen, *Applicants Rush to Meet Deadline for Sept. 11 Fund*, N.Y. TIMES, Dec. 23, 2003, at A1.

9. GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976). See also KAI T. ERIKSON, *EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD* (1976). In 1972, a coal company dam burst, causing a devastating flood that destroyed an entire town, killing more than 100 people and leaving everyone homeless. Many law teachers use the Buffalo Creek Disaster case as an introduction to civil procedure. For discussion of my use of Buffalo Creek in civil procedure, see Elizabeth N. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41 (1987), and Elizabeth M. Schneider, *Structuring Complexity, Disciplining Reality: The Challenge of Teaching Civil Procedure in a Time of Change*, 59 BROOK. L. REV. 1191 (1993).

10. See Isabel Marcus, *Reframing “Domestic Violence”: Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). See generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000); CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001); Brief of Amici Curiae, *New York State Coalition Against Domestic Violence et al., Nussbaum v. Steinberg*, 703 N.Y.S.2d 32 (App. Div. 2000) (on file with author). See *infra* notes 151-154 and accompanying text.

comparison with tort litigation, and conclude with thoughts on the need for both claims resolution systems and civil litigation to integrate the realities and experiences of survivors' grief and trauma.

II. THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

In the aftermath of the terrorist attacks at the World Trade Center, the Pentagon, and Shanksville, Pennsylvania, Congress passed the Air Transportation Safety and System Stabilization Act (the Act).¹¹ The Act was initiated by lobbyists who sought a bailout for the American airline industry. By September 20, 2001, the framework of this legislation had been developed. However, Democratic members of Congress argued that compensation for victims had to be part of the Act. The details were negotiated over twenty-four hours, ending on September 21, 2001.¹² The Act limits the exposure of the airlines (a later amendment includes additional defendants) in any civil litigation to their insurance coverage and provides the airline industry with \$15 billion in loans and guarantees. Title IV of the Act creates the September 11th Victim Compensation Fund of 2001.¹³ The purpose of the Fund is to provide compensation to eligible individuals who were physically injured as a result of the attacks or to the personal representatives of those killed.¹⁴

The Fund was developed as a no-fault alternative to litigation. It is *sui generis*, the first time that the government has ever compensated victims for loss in this way.¹⁵ Individuals who choose the Fund are barred from suing all defendants except the terrorists and their organizations. The Act authorizes the Attorney General to designate the Special Master of the Fund and for the Master to promulgate substantive and procedural rules for the administration of the Fund.¹⁶ Kenneth Feinberg, an experienced mediator and expert on mass tort

11. Pub. L. No. 107-42, 115 Stat. 230 (2001) (signed into law by President George W. Bush September 22, 2001).

12. Diana B. Henriques & David Barstow, *Fund for Victims' Families Already Proves Sore Point*, N.Y. TIMES, Oct. 1, 2001, at A1. For a history of the congressional process, see Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events not Likely To Be Duplicated*, 53 DEPAUL L. REV. 209 (2003).

13. Pub. L. No. 107-42, § 401-409, 115 Stat. 237-41 (2001) (codified as amended at 49 U.S.C.A. 40101 (West Supp. 2001)).

14. *Id.* § 403. See September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. § 104 (2002)).

15. For historical perspectives, see Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251 (2003); Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289 (2003).

16. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,274.

claims resolution, was appointed Special Master by Attorney General John Ashcroft on November 27, 2001.¹⁷ He was the key player in the Agent Orange settlement, the Dalkon Shield, breast implant, and asbestos cases, among others.¹⁸ On December 21, 2001, Special Master Feinberg released the Interim Final Rule, a set of regulations that were intended to be the substantive and procedural rules of the Fund, determining who could make claims and how much they could collect as well as delineating the ways in which claims would be made and awards granted.¹⁹ After substantial comment and response, the Final Rule was promulgated on March 13, 2002.²⁰

The Fund affects two categories of claimants: survivors of individuals who were killed and individuals who were injured. The Act and the regulations define eligibility to include claims brought on behalf of an individual killed in the attacks and rely on state law or relevant foreign law to determine who the appropriate claimants are.²¹ The rules that relate to victims who were injured in the attacks limit eligibility to those who suffered “physical harm” while “present at” one of the three locations at the time of the attacks or in the “immediate aftermath” and sought medical treatment within twenty-four hours of their injury or rescue, or seventy-two if they were unable to realize the extent of their injuries at the time, or medical assistance was unavailable.²² “Physical harm” is limited to those suffering physical injury

17. Diana B. Henriques & David Barstow, *Mediator Named To Run Sept. 11 Fund*, N.Y. TIMES, Nov. 27, 2001, at B1.

18. See description of the work of The Feinberg Group, the firm that Feinberg founded, at www.feinberggroup.com (last visited Jan. 22, 2004).

19. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,274.

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

21. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,242-11,243 (Mar. 13, 2002) (codified at 28 C.F.R. § 104.4 (2002)). For discussion of some of the complex family law issues that are involved in the determination of appropriate claimant and valuation of loss, see generally Karen Gross, *Portraits of Grief: A Focus on Survivors*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 261 (2003); Carlin Meyer, *Who Cares: Reflections on Law, Loss, and Family Values in the Wake of 9/11?*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 283 (2003); Martha F. Davis, *Valuing Women: A Case Study*, 23 WOMEN'S RTS. L. REP. 219 (2002); Nancy E. Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785 (2003); Richard P. Campbell, *The View from the Chair: Model Compensation*, Winter 2002, at 4 (A.B.A. Tort & Ins. Practice Section), available at WL 31—SPG-BRIEF 4 (2002); Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31 (2002); and Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher In a New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 WM. & MARY J. WOMEN & L. 207 (2003).

22. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,242. “Present at” is defined as physically present in the buildings destroyed in the crashes, or in the contiguous area such that there was a demonstrable risk of harm from the crash. 66 Fed. Reg. at 66,274.

who sought medical treatment.²³ The regulations allow the Special Master to consider injuries suffered or discovered after this seventy-two-hour period for rescue personnel.²⁴ The Act requires that all claims with the Fund must be filed by December 22, 2003.²⁵

Two types of losses may be covered: economic and noneconomic. The Act defines economic loss as pecuniary loss resulting from harm and lists earnings, employment benefits, replacement services, and burial costs as examples, as governed by available state law.²⁶ Economic loss to injured victims is described as loss of earnings or other employment benefits, medical expenses, replacement services, and lost opportunities.²⁷ The Special Master released presumptive loss calculation tables, based on age and current income levels, together with explanations for the calculation of those presumptive awards.²⁸ These award tables calculate loss for income levels only up to the ninety-eighth percentile of individual income in the United States.

Claimants can also be awarded noneconomic losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, and loss of consortium. Here, the regulations of the Fund give a flat-rate award, \$250,000 per deceased victim with an additional \$100,000 for the deceased victim's surviving spouse and each dependent child, although the Special Master has termed this a "presumption."²⁹ There is no presumed amount for noneconomic loss for injured victims because each victim's injury is deemed "unique."³⁰

Collateral sources, such as life insurance, pension funds, social security, workers' compensation, and death benefit programs, are then deducted from this total amount of economic and noneconomic dam-

"Immediate aftermath" is defined as a period of twelve hours after the particular crash for civilians and ninety-six hours for rescue workers. *Id.*

23. See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,234, 11,242. It was originally twenty-four hours. See September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,282.

24. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,242 (codified at 28 C.F.R. § 104.2 (2002)).

25. *Id.* at 11,235.

26. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 402(5), 115 Stat. 237 (2001) [hereinafter Air Transportation Safety and System Stabilization Act].

27. *Id.*

28. See U.S. DEP'T OF JUSTICE, EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, available at http://www.usdoj.gov/victimcompensation/vc_matrices.pdf (last visited Oct. 29, 2003).

29. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,239. The Interim Final Rule awarded only \$50,000 per spouse and child. *Id.*

30. See U.S. DEP'T OF JUSTICE, VICTIM COMPENSATION FUND FREQUENTLY ASKED QUESTIONS, available at <http://www.usdoj.gov/victimcompensation/faq6> (last visited Nov. 7, 2003).

ages. The Act does not define collateral sources but provides examples.³¹ This is the most controversial aspect of the program. In the Final Rule, the Special Master adjusted the proposed collateral offsets of the Interim Rule, and the regulations provide that charitable gifts are not offset.

As to the procedures involved in the claim submission, the Act sets forth the requirements of a claim form, the contents of that form, the issues that may be reviewed and determined by the Special Master, and the time frames for processing and payments.³² Claimants can be represented by an attorney and present evidence to the Special Master,³³ but the Act does not provide claimants with a right to a “hearing on the record.”³⁴ It preserves “any other due process rights determined appropriate by the Special Master” and mandates that the findings of the Special Master are not subject to judicial review.³⁵

The Special Master developed a two-track system for claims processing. If a claimant chooses Track A, a Claims Evaluator will determine eligibility and the claimant’s presumed award based upon the documentary evidence supplied, and “within 45 days of the date the claim was deemed filed” (the date all required documentation is submitted), the claimant will be informed in writing of the Evaluator’s determinations.³⁶ At that time, the claimant may accept the award and request payment or request a review before the Special Master or his designee. At this review hearing, the claimant may submit additional evidence of “extraordinary circumstances” indicating that the presumed award does not adequately address the claimant’s losses.³⁷ This review by the Special Master is the only appeal available, and it must be completed within 120 days of the claim filing.³⁸ The result of this hearing is not subject to any further review or appeal. Within twenty days of the final determination, payment must be authorized.³⁹

If a claimant chooses Track B, the claimant will proceed directly to a hearing with the Special Master or his designee.⁴⁰ At this hearing, which is deemed “nonadversarial,” the claimant can produce evi-

31. Air Transportation Safety and System Stabilization Act, *supra* note 26, § 402(4).

32. *Id.* § 405.

33. *Id.* § 405(b)(4)(B).

34. *Id.* § 405.

35. *Id.* § 405(b)(3), (b)(4)(C).

36. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,279 (Dec. 21, 2001) (codified at 28 C.F.R. § 104 (2002)).

37. *Id.* See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,243-44 (Mar. 13, 2002) (explaining use of the term “extraordinary circumstances” in the Final Rule).

38. See Air Transportation Safety and Stabilization Act, *supra* note 26, § 405(b)(3).

39. See *id.* § 406(a).

40. See September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,279.

dence, by way of documentary evidence and live witness testimony, of the “extraordinary circumstances” that demonstrate why the presumptive award amounts do not provide adequate compensation.⁴¹ The claimant can, but need not, be represented by counsel at this hearing.⁴² Although the Interim Final Rule had limited the length of this hearing to two hours, the Final Rule modified this limit.⁴³ There is no appeal or review of the findings made in a Track B hearing.⁴⁴

In light of the crucial decisions that claimants have to make as to whether to go with the Fund, the Special Master attempted to make the Fund accessible.⁴⁵ He has recognized that it may be unfair to ask claimants to waive all rights to litigation before they have any idea what they might recover from the Fund. The Final Rule provides for claimants to seek and to obtain a preliminary, nonbinding estimate of recovery within the Fund, in order to help claimants make a more informed decision as to whether or not to file with the Fund.⁴⁶ Feinberg has urged claimants to use this provision, and many families are trying to take advantage of it.

The Fund is Feinberg. As one commentator explained: “To the extent [the Fund] has a logic, Feinberg as Special Master has imposed it. It is Feinberg who drafted the rules for disbursing the Fund, Feinberg who is determining how the rules are administered, and Feinberg who will hear appeals from people unhappy with the way the rules have been applied.”⁴⁷ He refers to the Fund as “my Fund.”

The claims that were filed came in slowly. Feinberg estimates that there are approximately 3,000 potential death claimants and, by the December deadline, 2,884 had been filed, ninety-seven percent of the estimated total.⁴⁸ But by the end of November, only sixty percent had filed with the Fund.⁴⁹ In the summer of 2003, Feinberg hired additional staff to help process what he hoped would be many new claims, and he held highly-publicized town meetings for potential claimants in the fall. He made an all-out effort to get all claimants to file by the December 22, 2003 deadline, which was ultimately successful. How-

41. *Id.* at 66,279-80.

42. *Id.* at 66,280.

43. *See id.* September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,244 (Mar. 13, 2002) (codified at 28 C.F.R. §104 (2002)).

44. 66 Fed. Reg. at 66,279.

45. *See* discussion of the Fund *infra* notes 121-122 and accompanying text.

46. 67 Fed. Reg. at 11,234.

47. Elizabeth Kolbert, *The Calculator*, NEW YORKER, Nov. 25, 2002, at 42, 43-44. Feinberg is not being paid for his work on the Fund. *Id.* at 44.

48. Chen, *supra* note 4.

49. *Id.*

ever, Feinberg, government officials, and survivors' groups now recognize that the families' continuing grief was an obstacle to their filing.⁵⁰

III. GRIEF, TRAUMA, AND RECOVERY

Grief and trauma are always in the background of tort litigation or the claims resolution process—they are the “silent partners” in these cases.⁵¹ Whether it is Agent Orange, Dalkon Shield—mass tort cases—or the everyday individual medical malpractice and accident cases in which there has been serious harm, we take for granted that there is loss, suffering, grief, and trauma for the individuals and families involved. In the legal system, individual or collective grief and trauma become almost invisible; they are the necessary context that is never mentioned or emphasized. As medical malpractice and tort litigation has increased, it is arguable that there has been an increased numbing of the recognition of grief and trauma in the larger society. People frequently read about terrible situations of death, accident, or injury in newspapers or hear about them on television when there is a lawsuit. The issue is narrowed to compensation—what did the individuals who were suing “get” in monetary terms for the harm that they claimed to suffer?

Recent terrorism disasters have brought grief and trauma more directly into our national experience. The Oklahoma City bombing and the first World Trade Center bombing brought mass disaster directly into public consciousness. But the September 11th disaster was on an entirely different level. It involved a combination of horrifying situations that were previously unthinkable—airplanes flying into the World Trade Center and the Pentagon, and multiple coordinated airline hijackings and suicide bombings—that placed our government at risk. A huge number of people were killed and many died in particularly horrible ways. There was enormous damage to New York City and Washington, D.C. that emphasized the vulnerability of these centers of government and finance. The events were constantly replayed on national television, and thus relived by the public in this country and around the globe. September 11th consumed our national consciousness and became a defining moment. The entire country was in mourning—experiencing loss, grief, and trauma—not only for the individuals who died or were injured and for their families and friends,

50. Feinberg, *supra* note 1; Henriques, *supra* note 3. In November, Feinberg remained optimistic that most claimants would file by the deadline. Kenneth Feinberg, Presentation at Brooklyn/Cardozo Faculty Workshop on Ethical, Economic and Social Issues in Mass Torts (Nov. 4, 2003).

51. I am grateful to Aaron Twerski for this phrase.

but for ourselves as individuals and as a nation, for the horrors that we had collectively witnessed, and for the loss of our sense of safety and invulnerability as a country.

Grief and trauma are distinguishable. Grief is a feeling that we ordinarily assume is experienced by a living person in response to the death of another, while trauma can be experienced by persons who have themselves been injured, a person responding to another's death, or by others in a community more broadly. However, in the context of September 11th, this distinction may be less meaningful. Families and friends certainly experienced profound grief for people close to them who died. But there was a sense of mass grief; people felt grief for victims and for the victims' families and friends on a level that they could not have imagined even if they did not personally know anyone who died. The *New York Times*' "Portraits of Grief," commemorating the victims' lives "interrupted as they were being actively lived,"⁵² powerfully reflected these feelings and elicited extraordinary reactions from readers around the country and the world. Pamela A. Mann, a lawyer in Manhattan, expressed this sense of collective grief when she wrote to the *Times* that "[r]eading these portraits is my act of Kaddish."⁵³ Many people in New York, in Washington, D.C., throughout this country, and around the world, were traumatized by these events, even if they did not lose friends or family. Many people suffered pervasive anxiety and fear that similar events would happen again. Collective and individual experiences of grief and trauma merge and overlap in this circumstance, and the strands are difficult to separate.

There is, of course, an extensive psychological literature on the experience of both grief and trauma. Some of the important psychological theorists of bereavement, such as Elisabeth Kübler-Ross and John Bowlby, describe stages of grief and bereavement.⁵⁴ Kübler-Ross de-

52. Howell Raines, *Foreword* to *PORTRAITS 9/11/01: THE COLLECTED "PORTRAITS OF GRIEF" FROM THE NEW YORK TIMES* viii (2002). Raines notes, "Nothing published in the *New York Times* during my twenty-four years on the newspaper has elicited a reader response like the one we've gotten on 'Portraits of Grief.' Those who've been here longer say the same thing." *Id.* For discussion of *Portraits of Grief* and its implications for law, see generally Gross, *supra* note 21, and Meyer, *supra* note 21.

53. Janny Scott, *Introduction* to *PORTRAITS 9/11/01: THE COLLECTED "PORTRAITS OF GRIEF" FROM THE NEW YORK TIMES*, *supra* note 52, at ix. Kaddish is the Jewish prayer for the dead. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1230 (1993).

54. ELISABETH KÜBLER-ROSS, *ON DEATH AND DYING* (1969); JOHN BOWLBY, *LOSS: SADNESS AND DEPRESSION* 85-96 (1980). Although Kübler-Ross' framework was first developed with patients who had terminal illnesses and was based on their experiences in coming to terms with their illnesses, it has now developed as a framework for bereavement in general. Betty J. Kramer, *Analysis of End-of-Life Content in Social Work Textbooks*, 39 J. SOC. WORK EDUC. 299, 311 (2003).

scribes these stages as denial, anger, bargaining, depression, and acceptance;⁵⁵ Bowlby describes a period of numbing (with occasional outbursts of anger), yearning and searching for the lost figure, disorganization and despair, and then a lesser or greater degree of organization.⁵⁶ But both emphasize that these stages are not tidy or necessarily linear. The critical point is that one does not simply “get over” grief and “move on,” putting the loss behind.

Indeed, psychological literature on grief challenges a central assumption that lawyers make about the legal system—the notion that litigation or claims resolution always provides “closure.”⁵⁷ We assume that to recover from the loss of a loved one, it is necessary for a survivor to confront the loss, reflect on the events that caused the death and the memories of the person who died, and work toward detaching oneself emotionally from the deceased.⁵⁸ But mental health professionals tell us that litigation is no easy panacea for “moving on” from grief. Social worker Paul Rosenblatt argues that “[i]nvolvement in litigation may speed up, slow down or alter an individual litigant’s grieving . . . [t]he completion of litigation, no matter what the outcome, may lead to new or renewed grieving and relationship problems.”⁵⁹ Margaret and Wolfgang Stroebe explain why this might be so. They

55. KÜBLER-ROSS, *supra* note 54, at 34-121.

56. BOWLBY, *supra* note 54, at 85.

57. By assessing the impact of legal process on emotions, this inquiry is consistent with work on therapeutic jurisprudence. Therapeutic jurisprudence considers the law as a force or agent that affects social behavior, having an impact on individuals’ psychological well-being and emotional life. David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000). Emerging from mental health law, therapeutic jurisprudence has now been applied to a number of legal areas, including criminal law, juvenile law, family law, and tort law. *Id.*, at 129. See generally David B. Wexler & Bruce Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991) (mental health law); David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders “Make Good,”* 38 CT. REV. 18 (2001) (criminal law); Gene Griffin & Michael J. Jenuwine, *Using Therapeutic Jurisprudence To Bridge the Juvenile Justice and Mental Health Systems*, 71 U. CIN. L. REV. 65 (2002) (juvenile law); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997) (family law); Daniel W. Shuman, *Making the World a Better Place Through Tort Law?: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739 (1993) (tort law). See generally ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991). For example, in the area of personal injury law, compensation is usually thought of as a means to make injured people whole again, to put them into the position they were prior to the accident. Therapeutic jurisprudence, however, looks at compensation as part of the process of recovery from personal injury, and examines the effects of legal procedures on psychological well-being. Wexler & Winick, *supra*.

58. Daniel W. Shuman, *Therapeutic Jurisprudence: The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 62 (1994) (citing Margaret Stroebe & Wolfgang Stroebe, *Does “Grief Work” Work?*, 59 J. CONSULTING & CLINICAL PSYCHOL. 479 (1991)).

59. Paul C. Rosenblatt, *Grief and Involvement in Wrongful Death Litigation*, 7 Law & Hum. Behav. 351, 351 (1983).

challenge the “truism” that to recover from bereavement, one needs to do one’s “grief work . . . the cognitive process of confronting the reality of loss, of going over events that occurred before and at the time of death, and of focusing on memories and working toward detachment from the deceased.”⁶⁰ The Stroebe’s empirical study of widows and widowers in Southern Germany explored the dimensions of conjugal bereavement in order to assess the coping strategies of confronting versus avoiding grief—meaning avoiding reminders of the deceased person. The results of the study suggested a gender difference for widows and widowers in which, “men [were] more likely to manage to block confrontation with their loss more completely than widows, who, even when they try not to dwell on their grief, are more frequently confronted with it.”⁶¹ Because of gender differences in homemaking roles, they concluded that the opportunities for distraction from grieving are far greater for men than for women.⁶² This literature suggests that the notion of “closure” for grief is overly simplistic.

Trauma is another matter, and here, the psychological literature is also nuanced. In her book *Trauma and Recovery*, psychiatrist Judith Herman writes about the connections between personal harm, political terror, and trauma. Although she focuses primarily on trauma experienced by people who have suffered violence themselves,⁶³ her insights on trauma have more general application. She writes that “traumatic events overwhelm the ordinary systems of care that give people a sense of control, connections and meaning.”⁶⁴ They “are extraordinary . . . because they overwhelm the ordinary human adaptations to life . . . and generally involve threats to life or bodily integrity, or a close personal encounter with violence and death.”⁶⁵ They confront human beings with the extremities of helplessness and terror, and evoke the responses of catastrophe. According to the *Comprehensive Textbook of Psychiatry*, the common denominator of psychological trauma is a feeling of “intense fear, helplessness, loss of control and threat of annihilation.”⁶⁶ Herman describes the psychological response to trauma, post-traumatic stress disorder (PTSD), as involving

60. Stroebe & Stroebe, *supra* note 58 at 479.

61. *Id.* at 481.

62. *Id.*

63. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 2 (1997). Herman’s focus is on sexual and domestic violence, as well as combat veterans and victims of political terror. *Id.*

64. *Id.* at 33.

65. *Id.*

66. *Id.* (quoting N.C. Andreason, *Post-Traumatic Stress Disorder*, in *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 918-24 (H.I. Kaplan & B.J. Sadock eds., 4th ed. 1985)).

“hyperarousal . . . the persistent expectation of danger . . . intrusion . . . the indelible imprint of the traumatic moment,” and “constriction . . . the numbing response of surrender.”⁶⁷ The *Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition* defines PTSD as a response that involves “intense fear, helplessness or horror (or in children, the response must involve disorganized or agitated behavior).”⁶⁸ Yet there is no simple agreement among experts about what trauma is. Experts debate the meaning of trauma, and recognize that trauma may be shaped by cultural and political forces.⁶⁹

Disasters carry particular traumatic meaning. Jenny Edkins writes, “[a]n incident is seen as traumatic if it involves an exposure to an event so shocking that our everyday expectations of how the world works are severely disrupted.”⁷⁰ She describes “[o]ne of the most striking images of September 11 was that of people on the sidewalks in New York, their hands clasped over their mouths, transfixed in horror as they watched the impossible turning into the real in front of their eyes.”⁷¹ The traumatic impact of mass disasters was documented in the Buffalo Creek disaster case, involving a flood in West Virginia that killed 125 people and left thousands homeless in 1972. Kai Erikson, a sociologist at Yale University, Richard Honig, a psychiatrist at the University of Cincinnati, and others developed evidence concerning the psychological trauma that individuals suffered, as well as the traumatic impact of the resultant loss of community and social ties. Their evidence documented elevated rates of anxiety, alcoholism and depression, nightmares, flashbacks, a feeling of numbness in which survivors isolated themselves from friends and family, and “under-achieving at work, avoiding even the slightest risk.”⁷² Erikson’s book on the disaster, which emphasized the loss of community ties, has become a classic.⁷³

There is now extensive psychological literature on the trauma that resulted from September 11th, both in New York and nationally. One study that was conducted to determine the prevalence of psychopathological disorders in Manhattan after September 11th found that in

67. *Id.* at 35 (internal quotation marks omitted).

68. Felicia R. Lee, *Is Trauma Being Trivialized?*, N.Y. TIMES, Sept. 6, 2003, at A13 (examining the debate among psychologists and psychiatrists about trauma and whether it is being diagnosed correctly).

69. *Id.*

70. Jenny Edkins, *Forget Trauma? Responses to September 11*, 16 INT’L REL. 243, 245 (2002).

71. *Id.* at 243.

72. Jonathan Eig, *How a Tiny Stream May Help New York Recover from Tragedy*, WALL ST. J., Oct. 16, 2001, at A1.

73. ERIKSON, *supra* note 9, at 186-245; see also KAI T. ERIKSON, A NEW SPECIES OF TROUBLE: EXPLORATIONS IN DISASTER, TRAUMA, AND COMMUNITY 236 (1994).

the area below 110th Street, approximately 67,000 had acute PTSD, and approximately 87,000 had depression within two months after the incident.⁷⁴ For those who lived south of Canal Street, and closer to the World Trade Center, the prevalence of PTSD was even higher.⁷⁵ Not surprisingly, the prevalence of PTSD was higher among persons who were more directly exposed to the attacks or their consequences than among persons with less exposure.⁷⁶ Factors traditionally associated with grief, such as loss of a family member, increased the likelihood of depression.⁷⁷ Other studies show considerable workplace stress for employees who have suffered September 11th-related psychological injuries, and most of these claims were likely to be covered by workers' compensation.⁷⁸ Congress held hearings on the mental health needs of communities affected by September 11th, recognizing the severity of the mental health problems.⁷⁹ Many have documented the particular impact of September 11th on their daily work life and institutional communities,⁸⁰ as well as psychological functioning in general.⁸¹

One counselor described the range of different reactions and psychological dynamics that occurred nationally in response to September 11th: immersion in the media coverage; avoidance; denial and detachment; tunnel vision and becoming task-oriented; triggering memories and pain from previous trauma; inappropriate reactions and behaviors such as looting and price-gouging; becoming hyperreactive;

74. Sandro Galea et al., *Psychological Sequelae of the September 11 Terrorist Attacks in New York City*, 346 *NEW ENG. J. MED.* 982, 985 (2002).

75. *Id.* at 985-86.

76. *Id.*

77. *Id.* at 986.

78. Frances Codd Slusarz, *Workplace Stress Claims Resulting from September 11th*, 18 *LAB. LAW.* 137, 144-62 (2002). See also Deborah Katz & Avi L. Kumin, *Family and Medical Leave Act Issues Post-9/11, Including PTSD Requests for Flexible Leave Schedules and Work From Home* (A.L.I.-A.B.A. Course of Study, Apr. 2002), available at WL VPC0411 121.

79. *Psychological Trauma and Terrorism: Assuring That Americans Receive the Support They Need: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 107th Cong. 1-2 (2001) (statement of Sen. Edward M. Kennedy, Chairman, Senate Comm. on Health, Education, Labor, and Pensions).

80. *Id.* See generally Tanina Rostain, *When the Towers Collapse Outside Your Window: Teaching Law in the Aftermath of 9-11*, 34 *CASE W. RES. J. INT'L L.* 197 (2002).

81. See generally Mark J. Maggio, *September 11th and the Crisis Response for the Federal Courts*, 66 *FED. PROBATION* 11 (2002); Karen Sawislak, *September 11 and New York City: Patterns of Urban Disaster in the United States*, 34 *URB. LAW.* 599 (2002); Patrick B. Johnson & Linda Richter, *The Impact of 9/11 and Its Aftermath on Substance Use and Psychological Functioning: An Overview*, 30 *FORDHAM URBAN L.J.* 1455 (2003).

and trying to get back to everyday routines.⁸² There was a “shattering of one’s assumptions about what to expect in everyday life; preoccupation with environmental dangers and associated anxiety, fear and isolation and/or loss of both a personal and a national ‘sense of safety.’”⁸³ Another common set of reactions was emotional: breaking down and crying, difficulty going to or staying asleep, irritability, temper outbursts, mood swings and surges of depression, grief or rage, nausea or body aches, and marked appetite changes. Survivor guilt has also been a problem for some, although much more so for persons who were directly connected with the dead and missing; others have experienced feeling very helpless, pessimistic, or extremely frustrated.⁸⁴

The demographics of the tragedy suggest that the median age of those who died was thirty-nine, about three quarters were men, and many had spouses and children.⁸⁵ As a result, many of the survivors are widows with children. An issue of *People* magazine highlighted this with a cover photo of thirty-one widows and their children a few months after the disaster.⁸⁶ Thus, for many of the survivors who are confronted daily with human and financial challenges, getting themselves and their children up in the morning, and making it through the day, Stroebe and Stroebe’s insights are particularly relevant.⁸⁷ Every day is a reminder of the loss and its impact on their lives. “Closure” is next to impossible. Each anniversary, each holiday season, each birthday is a reminder of the grief.⁸⁸

Loss of community for the families of September 11th has been a serious problem. In an article focusing on the September 11th fami-

82. Raymond Monsour Scurfield, *Commentary About the Terrorist Acts of September 11, 2001, Posttraumatic Reactions and Related Social and Policy Issues*, TRAUMA, VIOLENCE & ABUSE, Jan. 2002, at 3-14.

83. *Id.* at 4-8.

84. *Id.* at 7-8.

85. Gross, *supra* note 21, at 274.

86. Galina Espinoza et al., *Small Blessings*, PEOPLE WKLY., Feb. 25, 2002, at 48-74.

87. Stroebe & Stroebe, *supra* note 58.

88. The first anniversary of the disaster presented tremendous challenges to counselors. One observed:

This kind of anniversary evokes emotional and physiological responses in the victims directly affected, regardless of whether they witnessed the suffering, injury, or death of others, or if they were themselves injured. Additionally it is disturbing to millions everywhere, producing a variety of emotions and reactions in people across the country. September 11, 2002, was a time to remember, grieve, and look to the future. It was also a time of heightened awareness of our vulnerability, fear of additional terrorism, and concern for losing more lives.

Karin Jordan, *What We Learned from the 9/11 First Anniversary*, 11 FAM. J.: COUNSELING & THERAPY FOR COUPLES & FAMILIES, April 2003, at 110.

lies one year later, Kirk Johnson observed, “a year later, the families of Sept. 11—a small city’s worth of widows, parents and other kin touched by terror—say that what defines them most is their sense of separation from other Americans.”⁸⁹ Articles have linked the Buffalo Creek disaster with September 11th, quoting Kai Erikson on the post-traumatic stress experience of survivors,⁹⁰ with an emphasis the common problems of loss of community.⁹¹

Herman and Erikson’s work emphasizes the human and social dimensions of repair, and focuses on the affirmative need for community—the formation of strong social and community ties—as primary vehicles of repair.⁹² Herman writes:

Traumatic events destroy the sustaining bonds between individual and community. Those who have survived learn that their sense of self, of worth, of humanity, depends upon a feeling of connection to others. The solidarity of a group provides the strongest protection against terror and despair, and the strongest antidote to traumatic experience. Trauma isolates; the group re-creates a sense of belonging.⁹³

For Herman, the “stages of recovery” are establishing safety, remembrance and mourning of the traumatic experience, reconnection to reclaim the world, and recognition of commonality with others.

IV. IMPLICATIONS FOR THE VICTIM COMPENSATION FUND

In this section, I consider aspects of the Fund from the perspective of the grief and trauma that families and survivors have experienced. I focus on the centrality of compensation, procedural aspects of the Fund, the statute of limitations, and the need for repair.

A. Only Money

Compensation is the focus of the Fund. But the distributive principles of the Fund are unclear.⁹⁴ Congress did not make them clear or spell them out. Feinberg has tried to shape these principles in his Rules and in their application to individual claims. The Fund can be viewed as a replacement for the tort system or as a social welfare pro-

89. Kirk Johnson, *In Bereavement, Pioneers on a Lonely Trail*, N.Y. TIMES, Sept. 8, 2002, at A1.

90. *Id.* See, e.g., Kirk Johnson, *New Yorkers Lose Their Inner Rand McNally: Sept. 11 Rips Up Mental Maps That Guide City Dwellers’ Lives*, N.Y. TIMES, Nov. 11, 2001, at A1; Erica Goode, *Lessons from Abroad on Dealing with Anxiety*, N.Y. TIMES, Oct. 28, 2001, at B10.

91. *Eg.*, *supra* note 72.

92. See generally HERMAN, *supra* note 63 (1997).

93. *Id.* at 214.

94. Kenneth Feinberg, Presentation at Ninth Annual Clifford Symposium on Tort Law and Social Policy (Apr. 24, 2003).

gram, and seems to have elements of both,⁹⁵ perhaps because Feinberg attempted to infuse the tort framework of the Act with a social welfare perspective in the Final Rule.⁹⁶ But, whatever it is, it is indisputably a compensation fund, an “administrative agency” in which Feinberg has attempted to provide money for claimants with “rough justice.”⁹⁷ The default assumption is that all the government can provide is money—compensation to repay families of those who died or survivors of the tragedy for the loss of life or the harms that were suffered. The assumption embedded in our tort system, from which the Fund and other claims resolution programs flow, is that money for loss of life or limb is the primary, if not sole, vehicle of repair for loss. When there is a death, physical injury, or a terrible tragedy, compensation for damages is what we expect.

It is useful to look at the way that concepts of grief and trauma are reflected in the tort and social welfare systems. Traditionally, grief did not play a clear role in terms of damages in wrongful death actions—actions brought by family members for death of a loved one. Wrongful death statutes protected only the pecuniary interests of survivors, so nothing could be “recovered for the survivor’s mental anguish or the loss of love and affection that resulted from the death.”⁹⁸ Bereavement is assumed to be in the background of all wrongful death cases, so it is not “an adequate discriminating principle.”⁹⁹ By the 1990s, recovery for emotional harm or anguish in wrongful death actions was permitted in many states.¹⁰⁰ Trauma experienced by survivors might be compensable as “pain and suffering.” In an ordinary tort action in which the individual is suing for his or her own harm, it is likely that the trauma that he or she experiences will be treated as damages for “pain and suffering.” In a social welfare system that pro-

95. See Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719 (2003).

96. *Id.*

97. Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 955 (2001) (describing the Fund as an “administrative agency [overseen by a special master]”); Feinberg, *supra* note 94 (describing the Fund as a form of rough justice).

98. DAN DOBBS, *THE LAW OF TORTS* § 297, at 811 (2001).

99. Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 802 (2003).

100. DOBBS, *supra* note 98, at 812. This change has been through new state statutes and judicial interpretation. Dobbs explains that “[s]ome of the statutes now provide for it directly, usually in addition to the claims for lost companionship, society, guidance and the like. Elsewhere, some courts have expanded liability to include mental anguish recovery under statutes that do not specifically authorize it.” *Id.*

vides a capped amount, recognition of grief and trauma could simply be implicitly reflected in the amount of the government benefit.¹⁰¹

In the Fund, the Special Master made an explicit decision to cap noneconomic damages—what might otherwise be compensable in the tort system as “pain and suffering”—and award them as a flat add-on at \$250,000 to the claimant per deceased victim for what the deceased experienced prior to death. He explained that was so because he did not think it would be fair to have to assess and compare the different horrible ways that people died.¹⁰² This is a controversial aspect of the Fund because in the tort system a pain and suffering claim could result in a huge amount of money depending on the nature of death and the circumstances. In addition, Feinberg decided to only include the physical injuries that injured survivors experienced because if he had included mental injuries, that would have added four million New Yorkers, and many others as well.¹⁰³ In New York, damages for emotional distress are recoverable in negligence only if the plaintiff suffered a physical impact (caused by the defendant) or was in the “zone of danger.”¹⁰⁴ Feinberg’s decisions have led to considerable unrest and confusion among claimants. Some of the opposition has been highly organized, like that from the high-earning Cantor Fitzgerald families.¹⁰⁵

The compensation offered by the Fund is problematic because it is only money. For many potential claimants, getting the money is not enough. The claim “award” does not provide the more affirmative possibilities that litigation might appear to offer—investigation, finding out what happened, attempting to make change so the next time it will not happen again. One commentator observed,

[t]he U.S. government made two promises to the families of those who died in the Sept. 11, 2001, terror attacks: A special Justice Department Fund would compensate their financial losses and official investigations would uncover the security failures that enabled al-Qaeda to kill 3,027 people. Uncle Sam asked one thing of the families in return: Don’t drag the battered airlines and their affiliates into court.¹⁰⁶

Because the “second promise” of “official investigations” has not been met, the flat sum that the Fund offers makes brutally clear what

101. Diller, *supra* note 95.

102. Feinberg, *supra* note 94.

103. *Id.*

104. Anthony Sebok, Comment on Draft (Nov. 2, 2003). See generally DOBBS, *supra* note 98, § 309, at 839-40.

105. See *infra* note 120 and accompanying text.

106. Martin Kasindorf, *Some 9/11 Families Choose Lawsuits Over Federal Fund*, USA TODAY, July 14, 2003, at A1.

litigation frequently obscures until the end, that compensation is all that the government can provide.

In contrast, litigation offers hope that discovery and investigation will be a source of information that will assist in further prevention of harm. The Fund is static—it gives money, it ends. It is not transformative—it does not investigate the problem, help others, make change for the future, or prevent another attack. Feinberg argues that litigation in this context will not accomplish this more investigative and transformative purpose, and that may be realistic, but families are likely to still hold out hope.¹⁰⁷

Some families are suing. Although, on August 26, 2003, relatives of 1,995 deceased victims had submitted claims, received settlement checks that averaged nearly \$1.5 million, and agreed not to sue airlines, security companies or other U.S. entities,

with official findings of blame for the attacks slow in coming, hundreds of victims' survivors are spurning the government cash and flocking to federal courts. Undeterred by the difficulty in proving that anyone was culpably negligent—or by roadblocks set up by Congress and the Bush administration—the determined survivors are seeking money and facts on their own.¹⁰⁸

Kathleen Ashton of Woodside, New York, whose son Thomas Ashton, died at the World Trade Center, put it in the following way:

Someday, please God, I will see my son again . . . I need to be able to look at him and say, "Tommy, I did the right thing." The right thing is not to take the government money. The right thing is to try to get answers, to see what sort of lapses allowed the murderers to do what they were able to do.¹⁰⁹

Nearly 100 individual and class-action lawsuits have been filed. In July 2003, New York State extended the statute of limitations for wrongful death claims, which would have expired on September 11, 2003, by six months to March 2004, so more lawsuits are likely to be filed.¹¹⁰ The September 11th families are suing not only United and American Airlines and others in the aviation industry, but they are

107. See discussion of the government withholding of documents to the September 11th Commission *infra* notes 158-184 and accompanying text.

108. Kasindorf, *supra* note 106.

109. *Id.*

110. On July 8, 2003, Governor George Pataki signed a bill extending the usual two-year statute of limitations for wrongful death suits by six months, making the deadline for filing March 11, 2004. Anthony Ramirez, *Sept. 11 Legal Deadline Extended*, N.Y. TIMES, July 9, 2003, at B6. Governor Pataki says the extension is meant to reflect "New York's ongoing commitment to providing support, compassion and assistance to those who lost loved ones in this great tragedy." Joe Mahoney et al., *Metropolitan Report Six More Months To File WTC Lawsuit*, N.Y. DAILY NEWS, July 9, 2003, at 16, available at LEXIS News Library, DLY NWS File.

also suing Osama bin Laden, Saudi royal princes, Arab banks, Muslim charities, and the governments of Iraq, Iran, Sudan, and Afghanistan. Commentators have suggested that it is unlikely that plaintiffs will be able to recover money from Al Qaeda, so some of the lawsuits seek to go after the alleged “financiers” of terrorism because they have deeper pockets.¹¹¹ And the litigation process has unearthed some evidence. For example, in one of the lawsuits, evidence has been proffered in discovery that boxcutters were among the potential weapons that screeners were supposed to confiscate.¹¹² In another case, a default judgment has been entered against Iraq to pay \$64 million to the families of two businessmen who were killed at the World Trade Center.¹¹³ Judge Alvin Hellerstein, the federal judge in the Southern District of New York who is overseeing all the September 11th cases, refused to dismiss lawsuits brought by individuals against the airlines, World Trade Center defendants, and others, so these cases will now proceed to discovery.¹¹⁴ Some commentators, surprised by this decision, have argued that it could give September 11th claimants undue optimism about the ultimate success of the lawsuits.¹¹⁵

The implicit premise of the Fund is that the claimants can rationally decide about whether to sue or file with the Fund. But it assumes that it is simply the outcome, the money, that will affect the decision-making process and that will ultimately determine the claimant’s decision.

B. *Procedures of the Fund*

The focus on compensation alone flies in the face of the work of procedural justice theorists—RAND studies, Deborah Hensler, and Tom Tyler—that process matters to people in their claiming decisions more than outcome. In evaluating a process, individuals will value how fair the process appears and what the process feels like. Tyler observes that “[f]airness of a decision-making procedure is especially

111. See Kasindorf, *supra* note 106.

112. *Id.*

113. *Id.*

114. *In re* September 11 Litig., No. 21-MC-97, 2003 U.S. Dist. LEXIS 15522 (S.D.N.Y. Sept. 9, 2003) (order denying Defendant’s Motion to Dismiss) .

115. Anthony J. Sebok, *The Hardest Job in the Law: Judge Who Hears 9/11 Suits* (Sept. 25, 2003), at <http://www.cnn.com/2003/LAW/09/25/findlaw.analysis.sebok.911.compensation> (last visited Nov. 12, 2003). Feinberg has also expressed concern with the decision. Kenneth Feinberg, Presentation at Cardozo Faculty Workshop on Ethical, Economic, and Social Issues in Mass Torts (Nov. 4, 2003).

relevant when it is difficult to determine what is an appropriate compensation for a loss.”¹¹⁶

Tyler’s work has emphasized that “disputants prefer procedures that offer them an opportunity to voice their needs and opinions, and perceive such procedures as fairer than others because they believe that having a greater opportunity for voice enhances the likelihood of obtaining a satisfactory dispute outcome.”¹¹⁷ Tyler emphasizes four aspects of procedures that influence judgments about fairness: first, whether authorities are trustworthy; second, whether authorities are viewed as neutral, unbiased, honest, and principled in their decision making; third, whether the processes that are established allow people an opportunity to state their case; and fourth, whether people are treated with dignity and respect.¹¹⁸

With respect to the Fund, Tyler has some important observations. The failure to clearly elucidate the distributive principles means that the procedural aspects of the Fund are likely to be more important. People want to have a voice in the proceedings and to structure their own arguments, which suggests a negative reaction to the standardized forms and applications. They want to know how their arguments have been considered, whether they were accepted or rejected, and why.¹¹⁹

In the Fund process, there are also many discretionary factors that enter in and could seem unfair. The Cantor Fitzgerald families have argued this in their report and in their lawsuit challenging the Final Rule.¹²⁰ Feinberg has made the program “his,” and the fact that there is one decision maker with so much discretion increases perceptions of unfairness. Making the program “his” has all sorts of problematic dimensions. It leads to a sense that he will make individualized “deals,” and indeed, he does. Lawyers can claim to trade on “insider” access to, or contact with, him. Most important, there is no written

116. Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 379 (2003).

117. Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 92-93 (2002) (citing E. Allen Lind et al., *Individual & Corporate Dispute Resolution Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 225 (1993)).

118. Tyler & Thorisdottir, *supra* note 116.

119. *Id.*

120. See Cantor L.P. et al., Submission of Cantor Fitzgerald, L.P., Espeed, Inc. and TradeSpark L.P. to the Special Master of the September 11th Victim Compensation Fund of 2001 and to the United States Department of Justice, available at <http://www.cantorusa.com/vcf/DOJsubmission.pdf> (last visited Nov. 12, 2003). See generally Jonathan D. Melber, *An Act of Discretion: Rebutting Cantor Fitzgerald's Critique of the Victim Compensation Fund*, 78 N.Y.U. L. REV. 749 (2003).

record of hearings or discussions, no written basis for his decision, and his decision is unreviewable.

There are deep contradictions in the Fund. It has a bureaucratic dimension in terms of grids, baselines, and presumptions; but Feinberg has attempted to humanize and individualize the program. This is, in a sense, Feinberg's personal effort to recognize the grief and trauma that people have suffered. It provides victims and their families with an opportunity to have contact with the person who will be making a huge decision that will impact their lives. Feinberg describes letting people come to meetings to talk about their loved ones and share mementos, pictures, and videos. He has attempted to infuse the Fund process with an empathetic and human recognition of the claimants' need to talk and an acknowledgment of the grief that people have suffered.

There has been a serious effort to make the procedures of the Fund accessible and user-friendly. The Fund's administrators have used technology to communicate through an extensive website that details the regulations and provides forms, statistics, frequently asked questions, reminders about deadlines, and information about drop-in centers.¹²¹ But, of course, that assumes that family members have access to technology.¹²² Feinberg and his staff have traveled around the country to reach claimants and have contacted claimants individually. There has been a concerted effort to make the process of filing a claim simple. But, even with these best efforts, the process is still inevitably and realistically complicated and lengthy. Claimants still need lawyers. There is a lot of information to provide and many forms to fill out. Filing a claim requires complex documentation and takes time and effort.

But more significantly, filling out the forms and filing with the Fund requires that the claimant face the loss and translate human life into monetary formulae. First, there is the issue of determining who is the appropriate claimant. This may be complex, a source of family conflict, emotionally-laden, and time-consuming, and it adds an additional

121. See generally U.S. DEP'T OF JUSTICE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, GENERAL PROGRAM INFORMATION, available at www.usdoj.gov/victimcompensation/general_info.html (last visited Jan. 20, 2004).

122. There are, of course, special hurdles for families who do not speak English. Most of these people come from low-income households, and they do not have access to computers. For example, with respect to Spanish-speaking families, Feinberg has put information on the website in Spanish and has done outreach to families with a Spanish interpreter. Nonetheless, these individuals have an "uphill battle to even file with the VCF." E-mail from Saralyn Cohen, Pro Bono Attorney, Shearman and Sterling, counsel for several Fund claimants, to author (Nov. 24, 2003) (on file with author).

level of process. Then, once the appropriate claimant is determined, the claimant must face the difficult fact that the life of his or her loved one will be “worth” a number at the end of the process. Like any legal process, the claims filing process can be experienced, by those who must undergo it, as both dehumanizing and traumatic in its own right. Not surprisingly, many people have said that the process of filing a claim with the Fund is “retraumatizing.” While Feinberg is proud of the way in which the claims process here has been simplified, the Fund highlights some inherent tensions of this process.

The greatest advantage in a claims process is that a flat sum can be quickly obtained with an arguably minimum amount of hassle and work. That is the trade-off of the Fund. But despite best intentions, the Fund is arguably the worst of both worlds, rather than the best. With the Fund, there is neither a quick and flat sum, nor a purely “administrative” process.¹²³ The process is actually very complex and intimidating. Claimants need lawyers to assist them to figure out what to do, and they may also need economists.¹²⁴ For some who have made the decision to file with the Fund, the process itself has been overwhelming. Larry Stewart, former president of Trial Lawyers Care, told of one woman who had sought assistance over a dozen times, saying each time she was finally ready to file a claim. But she never sent in the paperwork, “because everything remind[ed] her of her loss.”¹²⁵ Jean Cleere of Newton, Iowa said, “They ask for a victim impact statement . . . I try to write something and I just can’t.”¹²⁶ For many, this is the most difficult part, and the words will not come out.¹²⁷ There is a threshold choice about whether to go to the Fund, a decision which is very complex and difficult to figure out—indeed, by Feinberg’s own admission, almost paralyzing to many people. Then there is the issue of determining the appropriate claimant, which may involve a separate legal process. And then once a claimant has filed with the Fund, there are many decisions—Track A versus Track B, economic documentation, possible hearings, and possible appeal. Each requires the claimant to deal concretely with the human and material reality of the victim’s life and the dimensions of the loss.

123. Weinstein, *supra* note 97.

124. See E-mail from Saralyn Cohen to author, *supra* note 122.

125. Lena Sun, *9/11 Families Slow To Seek Compensation; Some Weigh Lawsuits; Others Can’t Face Task*, WASH. POST, Sept. 10, 2003, at A6.

126. Leslie Reed, *9/11 Victims Fund Deadline Near, Manager Tells Kin*, OMAHA WORLD HERALD, Oct. 18, 2003 (Sunrise Edition), at 10A, available at LEXIS News Library, OMWHLD File.

127. *Id.* Donn Marshall wondered, “How do you get started, and how do you do justice to [the person who died]?” Sun, *supra* note 125.

Another problematic dimension of the compensation process is that it is totally individual. The claimant files on behalf of him or herself. There is no way to be part of any group or collective process of healing. Grief and trauma have been, of course, most profound for those who lost family members and loved ones and for the few individuals who were seriously injured or were in the buildings, but the Fund inevitably focuses solely on the individual claimant. At least there has not been a limited pie—so people are not directly competing with each other—but there is still a sense of profound isolation in the process.

C. *Grief and Statutes of Limitations*

A particularly problematic aspect of the Fund's procedures relates to the statute of limitations. The two-year limitation for filing claims with the Fund, by December 22, 2003, is set out in the Act. Although Feinberg was concerned that this deadline was too early, and he openly expressed these concerns, he had no discretion to modify it.¹²⁸ At the very top of the first page of the Fund website was a running time clock that prominently stated "57 days until Monday, December 22, 2003—the last day to file a claim."¹²⁹ This number changed daily as the clock ticked closer to the deadline. The website now reads: "The last day to file a claim was Monday, December 22, 2003."¹³⁰

Feinberg's concern, that people would choose neither to sue nor file a claim with the Fund by December 22, 2003 because they were still emotionally traumatized, grieving, and paralyzed by grief, appeared to be borne out by statements from survivors.¹³¹

William Doyle, whose son Joey died in the trade center and who maintains one of the largest e-mail networks of injury victims and survivors . . . said he was confident that most families know about the Fund and are aware of the approaching deadline. "But you have families out there that are still grieving," he said. "It's tough to wade through all this paperwork."¹³²

A widow who is part of Mr. Doyle's e-mail list told him in January 2003 that she did "not know one family that has settled" with the Fund. She still has not filed a claim with the Fund. "I have not given it much thought . . . I have been involved in other things just trying to get through each day . . . [c]onsidering where most people are in their

128. Feinberg, *supra* note 94.

129. U.S. Dep't of Justice, SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, *available at* <http://www.usdoj.gov/victimcompensation> (last visited Nov. 11, 2003) (updated periodically).

130. *Id.* (last visited Jan. 22, 2004).

131. See Henriques, *supra* note 3.

132. *Id.*

grief, from the people I know, the deadline Congress set is just too soon.”¹³³ Responses like this “haunt[ed]” Feinberg as he headed off to a new round of informational meetings across the country in September 2003. Even though he thought litigation was a mistake, he hoped people would do something—either choose to sue or file with the Fund.¹³⁴ He said, “I really worry about the people who will arrive at Dec. 22 having done nothing. Those people are united in their grief and fear, and they’re the people I’m trying to reach.”¹³⁵

At the end of October, with the December 22, 2003 deadline close on his heels, Feinberg, apparently anxious that fewer than half those eligible to file had done so, explained to the Association of the Bar of the City of New York how victims could secure the option of pursuing a lawsuit or seeking compensation from the Fund.¹³⁶ He stated that just beginning the application procedure would be sufficient to meet the December deadline.¹³⁷ All that would be required to “save a space” was the filing of Part One of the Victim Compensation Fund application by December 22, which consists of “bare minimums”: name, address, and phone number of the person filing and the name of the victim.¹³⁸ The next step in the process, providing economic and verification documents, would not be due until January 22, 2004.¹³⁹ With these numbers, Feinberg’s staff will give families estimates of their awards. Not until families have an idea of their estimated award will they actually have to complete the application, and not until that point do they waive their right to sue.¹⁴⁰ Taking into account New York’s statute of limitations extension and the ability to suspend September 11th-related lawsuits, this simplification of procedure is intended to permit potential filers to weigh their options for much longer.¹⁴¹

The deadline was too short. The grief was still overwhelming, many families had not faced the reality of their loss, and they found the choices presented between the Fund and suing overwhelming. There

133. *Id.*

134. *Id.*

135. *Id.*

136. Daniel Wise, *Feinberg Clarifies 9/11 Fund Filing Procedures*, N.Y. L.J., Nov. 3, 2003, at 1.

137. *Id.*

138. *Id.* Feinberg’s staff will be disbanded on June 15, 2004, so all awards must be issued by then. *Id.*

139. *Id.*

140. *Id.*

141. Feinberg says that the Fund office has also contacted claimants individually to encourage them to file. Some have said, “We will file,” and some have said, “Please go away, we can’t deal with this.” Feinberg, Presentation at Brooklyn/Cardozo Faculty Workshop on Ethical, Economic and Social Issues in Mass Torts (Nov. 4, 2003), *supra* note 50.

was recognition of this problem with respect to the option of suing because, in July 2003, the statute of limitations for filing wrongful death claims in New York State was extended for six months past September 11, 2003, when it would otherwise have run, in order to give possible litigants more time to choose to sue.¹⁴² Because of the difference in the limitation periods between the Fund and suing, claimants had to make the decision to file with the Fund by December 2003, and then may have a few more months in which to decide whether to sue, assuming they do not sue any of the defendants that are barred by their filing with the Fund. With the December 22, 2003 deadline for filing with the Fund, this extension will give people more time to weigh their legal rights. But survivors' groups say this is also very confusing: "Families are confused," says William Doyle, "Between the court and the Fund, there are a lot of different deadlines."¹⁴³

There was a push in Congress to extend the deadline for filing with the Fund by one year. On September 9, 2003, Senator Patrick J. Leahy introduced a bill entitled the September 11th Victim Compensation Fund Extension Act of 2003 to change the deadline from De-

142. See Ramirez, *supra* note 110.

143. Henriques, *supra* note 3. The federal statute mandates that the United States District Court for the Southern District of New York has "original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." September 11th Victim Compensation Fund of 2001 § 408(b)(3), 49 U.S.C. § 40101 (2002). It provides that the substantive law of the state in which the crash occurred will apply. *Id.* § 408(b)(2). Therefore, there still appears to be uncertainty whether people living outside of New York State are governed by their own state statutes of limitations, such as Massachusetts, which is three years. Dave Wedge, *9/11 Lawsuit Deadline Looms*, BOSTON HERALD, Sept. 5, 2003, at 001. Some lawyers say that if the victim died in New York, then the New York extension applies. But others are not so sure. Many lawyers advised their clients to err on the side of safety, and to file by September 11, 2003. Kreindler & Kreindler, a law firm in New York, representing about 450 victims, filed 60 lawsuits on September 10, 2003. Furthermore, a New Jersey bill to extend their two-year statute by one year is expected to be introduced in November 2003, and passage is expected. Mary P. Gallagher et al., *Inadmissible: Healing Time*, N.J. L.J., Sept. 15, 2003, at 3.

In response to requests from family members of those killed on September 11, who wanted to preserve their rights to file civil actions while their claims are pending with the Fund, Judge Hellerstein ruled that plaintiffs may file a complaint and place it on suspense. *In Re* September 11 Litigation, No. 21-MC-97, 2003 U.S. Dist. LEXIS 14411, at *2-3 (S.D.N.Y. July 22, 2003) (order providing for placement of cases on Suspense Docket). If they then decide to go with the Fund, their claims will be dismissed; if they decide to pursue the lawsuit, they will waive their right to the benefits of the Fund. *Id.* at *3-4. This was the road taken by many in the days before the two-year anniversary, when the statute of limitations would expire in most states, "simply to protect the option." Ben Weiser, *Two Years Later: Lawsuits; Families of Victims File To Meet a Legal Deadline*, N.Y. TIMES, Sept. 11, 2003, at A21 (quoting Mark S. Moller, partner with Kreindler & Kreindler). As one woman whose husband died in the Pentagon attack explained, "Anything I can get in the way of additional time for something like this is extremely helpful." *Id.*

ember 22, 2003 to December 31, 2004,¹⁴⁴ and identical measures were introduced in the House by Representatives John Conyers and Vito Fossella.¹⁴⁵ Members of New York's Congressional Delegation expressed concern that the Fund's goals would not be met if Congress did not extend the deadline;¹⁴⁶ however, by the end of November 2003, congressional officials from the New York area conceded that the effort to extend the deadline had failed.¹⁴⁷

There appeared to be widespread support for an extension among many victims and their families. In an on-line survey conducted by the National Center for Victims of Crime, nearly eighty-seven percent of 356 respondents who were eligible to apply to the Fund said they supported extending the deadline for one year.¹⁴⁸ Susan Herman, Executive Director of the National Center, stated:

The looming December 22 deadline is simply more than many victims can manage More time won't heal all their wounds, but our survey clearly shows that another year will allow many victims to make more informed, thoughtful decisions and deal with the burdensome application process, if they decide to file a claim with the Fund.¹⁴⁹

At a forum at the University of Nebraska-Lincoln in late October, however, Kenneth Feinberg seemed doubtful that Congress would extend the deadline, and continued to urge people to file by the current

144. Sun, *supra* note 125. A Bill To Amend the September 11th Victim Compensation Fund of 2001 To Extend the Deadline for Filing a Claim to December 31, 2004, S. 1602, 108th Cong. (2003), available at <http://thomas.loc.gov/bss/d108query.html> (last visited Nov. 2, 2003) (latest major action: referred to Senate committee Sept. 9, 2003).

145. To amend the September 11th Victim Compensation Fund of 2001 To Extend Deadline for Filing a Claim to December 31, 2004, H.R. 3084, 108th Cong. (2003) (latest major action: referred to House subcommittee Oct. 22, 2003), available at <http://thomas.loc.gov/bdd/d108query.html> (last visited Oct. 30, 2003); To amend the September 11th Victim Compensation Fund of 2001 To Extend the Deadline for Filing a Claim to December 31, 2004, H.R. 3116, 108th Cong. (2003), available at <http://thomas.loc.gov/bss/d108query.html> (last major action: referred to House Subcommittee Oct. 22, 2003) (last visited Oct. 30, 2003)).

146. Chen, *supra* note 4.

147. David W. Chen, *Senate Rejects Bid for Extra Year of Filing for 9/11 Awards*, N.Y. TIMES, Nov. 26, 2003 at B1. Chen notes, "Feinberg has not expressed support for an extension. He did not immediately return a call last night seeking comment on the latest congressional development." *Id.*

148. Press Release, National Center for Victims of Crime, *New Survey Shows Widespread Support for 9/11 Fund Deadline Extension: September 11th Victims Seeking More Time To Deal with Critical Choice* (Oct. 17, 2003), available at <http://www.ncvc.org/press/releases/11172003.html> (last visited Dec. 22, 2003). "The top three reasons survey respondents cited for supporting an extension were needing more time 1) to heal emotionally; 2) to collect the back-up documents required by the Fund; and 3) to manage more pressing concerns such as employment, housing, and other family matters. Victims also cited the need for more time to understand the Fund's application process and to find effective legal assistance." *Id.*

149. *Id.* (quoting Susan Herman, Executive Director of the National Center for Victims of Crime) (internal quotation marks omitted).

deadline: "What happens on December 23rd or 24th, when a family comes to me and says, 'We were in grief, but now we're ready to file?' . . . There's nothing I can do. Maybe Congress will extend the program—but don't bet on it."¹⁵⁰ Feinberg was right.

There are many situations in which individuals who might sue in tort experience serious trauma, and the law has recognized these issues with respect to statutes of limitations provisions in a variety of ways. Whether it is in the operation of the "discovery rule" or other tolling formulations, exceptions have been developed in laws relating to domestic violence,¹⁵¹ sexual abuse,¹⁵² and, most recently, clergy sexual abuse¹⁵³ to toll the relevant statute of limitations provision for the person who was harmed. Frequently, this is based on a recognition that trauma may involve memory loss or repression of memories. For example, regarding domestic violence, a New York court has recognized that a battered woman might be too traumatized to be able to "assert her legal rights" under a New York tolling provision.¹⁵⁴ These tolling modifications of the statute of limitations are suggestive and reflect an effort to accommodate a victim's trauma in some circumstances. Unfortunately, the Fund was constrained by Congress to do so.

D. Repair

Surely there is no easy repair, restoration, or healing for the families and friends who lost someone on September 11th and for all those who suffered trauma. But, in assessing the Fund, it is important to ask what might help play a role in restoration. I consider the psychological impact of compensation, the need for governmental investigation, and the impact of survivor groups and other collective processes.

150. Reed, *supra* note 126.

151. See generally DALTON & SCHNEIDER, *supra* note 10, at 845-67; Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001); Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW. ENG. L. REV. 321 (1997).

152. See generally Lisa A. Atkins, *Remembered Memories . . . True or False?—Should the Discovery Rule Be Applied to Toll the Statute of Limitations?*, 24 CAP. U. L. REV. 581 (1995); Margaret Cornish, *Tort Law—Applying the Discovery Rule To Toll the Statute of Limitations in Incest Cases—Olson v. Hooley*, 865 P.2d. 1345 (Utah 1993), 28 SUFFOLK U. L. REV. 323 (1994).

153. Francis S. Ainsa, *Permissive Statute of Limitation Policies*, 36 CATH. LAW. 83 (1995); John Caher, *Victims of Clergy Sexual Abuse Seek Bill To Suspend Three-Year Statute of Limitations*, N.Y. L.J., May 21, 2003, at 1.

154. *Nussbaum v. Steinberg*, 703 N.Y.S.2d 32,33 (App. Div. 2000). See also Brief of Amici Curiae, New York State Coalition Against Domestic Violence, *et al. supra* note 10 (on file with author).

The “psychology of compensation,”¹⁵⁵ how people react to receiving compensation for injury, is a subject on which little has been written. Daniel Shuman has considered this issue in the context of tort damage awards where there is a finding that the person or company that the plaintiff sued is liable for the harm that the plaintiff suffered.¹⁵⁶ Many people certainly believe that a lawsuit can be therapeutic or have beneficial impact, and that may well be shaping some of the choices that possible claimants have made to sue rather than file with the Fund, although deciding who to sue and who to blame is very complex.¹⁵⁷ But we do not know about the psychological impact of receiving money from a claims resolution process, no less the Fund. Certainly one impact is material, there will be money for claimants and their families to get help, therapy, and other support services. But ambivalent feelings about money as a default for the loss shape this issue.

The absence of full-scale governmental investigations of September 11th certainly has not helped the process of repair for families. Families considering whether to file with the Fund have had no opportunity to understand what happened on September 11th. For some, suing has taken on this role. If government investigations had been vigorously pursued and completed during these last two years, claimants might have viewed the Fund differently. The government’s “two promises” might have been met.

A joint panel of the House and Senate Intelligence Committees finally released a report in late July 2003 that “provided a scathing critique of the performance of the F.B.I. and C.I.A. before the 2001 terrorist attacks.”¹⁵⁸ It found that the Federal Bureau of Investigation and the Central Intelligence Agency had failed to respond to repeated warnings that Al Qaeda intended to attack the United States. The report referred to one newly disclosed intelligence document that read: “Plans to hijack U.S. aircraft proceeding well. Two individuals had successfully evaded checkpoints in dry run at [New York] airport.”¹⁵⁹ It had a classified section, that according to those who had

155. Shuman, *supra* note 58, at 39.

156. *Id.* at 51.

157. Anthony J. Sebok, *What's Law Got To Do With It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501 (2003).

158. David Johnston, *Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A1.

159. *Id.*

read it, focused on support for terrorism within Saudi Arabia.¹⁶⁰ A *New York Times* editorial concluded:

The Sept. 11 terrorist attacks might have been disrupted if America's foreign and domestic intelligence agencies had done a better job sharing information they already possessed about the activities of Al Qaeda members. That is the most chilling finding of an unflinching Congressional inquiry into the performance of the country's spy agencies in the years leading up to the attacks."¹⁶¹

Over the opposition of the White House, on November 27, 2002, more than a year after the attacks, Congress created a national bipartisan commission to investigate the September 11th terror attacks, in response to intense pressure from the families of victims. President Bush appointed former Secretary of State Henry A. Kissinger to be chair of the panel, but he quickly resigned after "family members of victims of the attacks protested" his appointment and "because of his ties to corporations and foreign governments that would come under scrutiny in the inquiry."¹⁶² The commission, the National Commission on Terrorist Attacks Upon the United States, is now chaired by Thomas H. Kean, the former Republican governor of New Jersey; the vice-chair is Lee H. Hamilton, a former Democratic member of the House of Representatives from Indiana. Although this ten-member Commission, split evenly between Republican and Democratic appointees, has an eighteen-month deadline to issue a report by May 2004, it only met for the first time in January 2003.¹⁶³

In April 2003, relatives of those who died in the attack and some survivors were finally able to testify at an all-day hearing held by the Commission at the United States Custom House in Lower Manhattan, not far from where the World Trade Center had been. But they were justifiably frustrated and angry. It was a nineteen-month wait "that they said was too long and too painful."¹⁶⁴ "I am convinced that this tragedy did not have to happen," said Stephen Push, a spokesman for Families of Sept. 11, which pressed for the establishment of the com-

160. *Id.* at A13. See also David Johnston & Douglas Jehl, *Bush Refuses To Declassify Saudi Section of Report*, N.Y. TIMES, July 30, 2003, at A1.

161. Editorial, *Before and After Sept. 11*, N.Y. TIMES, July 25, 2003, at A22. See also David Johnston, *The Warnings Were There. But Who Was Listening?*, N.Y. TIMES, July 27, 2003, § 4 (Week in Review), at 7.

162. Philip Shenon, *9/11 Committee Members Establish Rules on Financial Disclosures and Recusals*, N.Y. TIMES, Jan. 28, 2003, at A13. However, potential conflicts of interest within the Commission have continued to surface. Eric Lichtblau & James Riser, *2 on 9/11 Panel Are Questioned on Earlier Security Roles*, N.Y. TIMES, Jan. 14, 2004, at A24.

163. *Id.*

164. David W. Chen, *Beyond Numbers, 9/11 Panel Hears Families' Anguish*, N.Y. TIMES, Apr. 1, 2003, at A1.

mittee. ‘Too many politicians put re-election over national security.’”¹⁶⁵ At the hearing, Mindy Kleinberg, whose husband Alan, a securities trader at Cantor Fitzgerald, died on September 11th, pulled out some of her own research on questionable immigration documents submitted by one of the hijackers. “‘With no one being held accountable, how do we know this is still not happening?’ she said. ‘As the threat of terrorism mounts here in the U.S., the need to address the failures of Sept. 11 is more important than ever.’”¹⁶⁶

The Commission’s investigation has been moving very slowly, apparently with considerable resistance from the White House and necessary governmental agencies. Commission chairs have complained that the Commission’s “work was being hampered by the failure of executive branch agencies, especially the Pentagon and the Justice Department, to respond quickly to requests for documents and testimony” and released a statement saying that they had received only a small part of the millions of sensitive documents they have requested from the executive branch.¹⁶⁷ They noted that “the problems that have arisen so far with the Department of Defense are becoming particularly serious” and “suggested that the Justice Department was behind a directive barring intelligence officials from being interviewed by the panel without the presence of agency colleagues.”¹⁶⁸ Kean has stated that he believed the Commission would be forced to issue subpoenas to executive branch agencies because of continuing delays over access to documents, including Oval Office intelligence reports that reached President Bush’s desk in the weeks before the September 11th attacks.¹⁶⁹ President Bush initially declined to commit the White House to turning over reports to the Commission.¹⁷⁰

After substantial delay and under the threat of a subpoena,¹⁷¹ the White House offered the Commission a compromise to view the intelligence summary documents, known as the President’s Daily Briefs,

165. *Id.*

166. *Id.*

167. Philip Shenon, *9/11 Commission Says U.S. Agencies Slow Its Inquiry*, N.Y. TIMES, July 9, 2003, at A1.

168. *Id.*

169. Philip Shenon, *9/11 Commission Could Subpoena Oval Office Files*, N.Y. TIMES, Oct. 26, 2003, at A1.

170. Philip Shenon, *Bush Weighing Decision on Release of Classified Documents to Sept. 11 Panel*, N.Y. TIMES, Oct. 28, 2003, at A18.

171. Philip Shenon, *9/11 Panel May Reject Offer of Limited Access to Briefings*, N.Y. TIMES, Nov. 7, 2003, at A22; Philip Shenon, *9/11 Panel Issues Subpoena to Pentagon*, N.Y. TIMES, Nov. 8, 2003, at A13.

that had, until mid-November 2003, been withheld.¹⁷² While the precise terms of the agreement are not public by White House request, the Commission may choose two of its ten members to view the documents in their entirety; two more to view specific paragraphs excerpted by the White House; and all four members may take notes, subject to White House review and editing if something is determined possibly to compromise national security.¹⁷³ The White House will remove everything unrelated to Al Qaeda because the Commission is uninterested in anything else.¹⁷⁴ The White House is concerned that information in the documents “might be construed to suggest that the White House failed to respond to evidence suggesting that Al Qaeda was planning a catastrophic attack.”¹⁷⁵

The Commission has accepted the offer, saying that they “believe[d] it will prove satisfactory and enable [them] to get [their] job done.”¹⁷⁶ Some members seem to be taking the attitude that something is better than nothing, that the access will be adequate and at least there is “immediate access to important material that [they had] been long delayed in receiving.”¹⁷⁷ But this acceptance was met with considerable opposition from some Commission members, saying that the White House should not have the power to determine what is relevant to the investigation.¹⁷⁸ Former Representative Timothy J. Roemer of Indiana said, “In paraphrasing Churchill, never have so few commissioners reviewed such important documents with so many restrictions I am not happy with this agreement, and I will not support it.”¹⁷⁹ Not surprisingly, families are pleased neither with the compromise, fearing that it will “prevent a full uncovering of the truth,”¹⁸⁰ nor with the fact that the terms are kept secret, arguing that “this entire deal needs to be explained to the public This is an independent com-

172. Philip Shenon, *Deal on 9/11 Briefings Lets White House Edit Papers*, N.Y. TIMES, Nov. 14, 2003, at A24. The President’s Daily Briefs are 10-12 pages long and are compiled daily by the CIA highlighting what the CIA considers to be the most important intelligence information gathered that day. Philip Shenon, *Panel Reaches Deal on Access to 9/11 Papers*, N.Y. TIMES, Nov. 13, 2003, at A1. A former security advisor described the papers a “news digest for the very privileged.” Richard V. Allen, *An Intelligent Thing to Do*, N.Y. TIMES, Nov. 14, 2003, at A29.

173. Shenon, *Deal on 9/11 Briefing Lets White House Edit Papers*, *supra* note 172.

174. *Id.*

175. *Id.*

176. Shenon, *Panel Reaches Deal on Access to 9/11 Papers*, *supra* note 172.

177. *Id.* (quoting commission member Richard Ben-Veniste).

178. Shenon, *Deal on 9/11 Briefing Lets White House Edit Papers*, *supra* note 172.

179. Shenon, *Panel Reaches Deal on Access to 9/11 Papers*, *supra* note 172.

180. Shenon, *Deal on 9/11 Briefings Lets White House Edit Papers*, *supra* note 172 (quoting the Family Steering Committee).

mission that is supposed to be transparent, that is supposed to be open.”¹⁸¹

A *New York Times* editorial entitled “Facing the Truth of Sept. 11th,” described the Commission as being “in danger of becoming a study in recalcitrance by the Bush Administration,” and argued:

How can an unstinting investigation of the truth of Sept. 11 not be of paramount concern to any official sworn to protect the public? The approaching presidential election makes the administration’s evasions even more suspect. Failure to document and face the truth will only feed conspiracy theories and undermine the nation’s chances of weathering future threats.¹⁸²

These are very serious problems that raise questions about the likely completeness and accuracy of the Commission’s ultimate report. Perhaps even more serious is our failure as a country “to examine American foreign policy dispassionately, to inquire whether it legitimately provokes a level of anger that is likely to engender terrorism and other violent responses.”¹⁸³ But absence of a vigorous inquiry conducted by the highest levels of government during the years since September 11th has made it even more difficult for many families to file with the Fund, because filing makes them feel that they are giving up on any investigation. In a letter to the *New York Times*, Sally Regenhard, founder of one of the survivor groups, the Skyscraper Safety Campaign, argues that the “best ‘group therapy at ground zero’ for the families of the victims would be to . . . find out how 9/11 happened to our country; why the World Trade Center collapsed; and to hold persons and institutions responsible and accountable for this atrocity. That is the only therapy we need.”¹⁸⁴ This has had a serious impact on potential claimants’ view of the Fund.

The lack of democratic process in the establishment of the Fund or in the appointment of the Special Master exacerbates this problem of trust. This relates to Tyler’s concerns with “voice.”¹⁸⁵ September 11th families were given little opportunity to shape the process and the selection of the administrator, although there were many comments on

181. *Id.* (quoting Kristen Breitweiser, spokesperson for the Family Steering Committee) (internal quotation marks omitted).

182. Editorial, *Facing the Truth of Sept. 11*, N.Y. Times, Oct. 29, 2003, at A26.

183. Lawrence M. Solan, *Cognitive Foundations of the Impulse To Blame*, 68 BROOK. L. REV. 1003, 1024 (2003). See also W. Michael Reisman, *Aftershocks: Reflections on the Implications of September 11*, 6 YALE HUM. RTS. & DEV. L.J. 81 (2003).

184. Sally Regenhard, Letter to the Editor, *The Best 9/11 Therapy*, N.Y. TIMES, Jan. 11, 2003, at A14.

185. Tyler & Thorisdottir, *supra* note 116.

the Interim Final Rule that were posted to the website.¹⁸⁶ There has been far more democratic process concerning the new September 11th memorial at the former World Trade Center site than with the Fund. It is arguable that a fuller process would have meant that there would never have been a Fund because Congress had to act under immediate pressure to give the families something after bailing out the airlines. But as a result, some claimants experience the Fund as the government trying to “buy them out” or “shut them up.”¹⁸⁷

The fact that people experienced the September 11th disaster as a form of moral harm highlights a related dimension of problems with the Fund.¹⁸⁸ When people have been victims of moral harm, they do not seek material compensation, but instead look for an apology and for ways to restore moral balance.¹⁸⁹ Instead, the Act treats the terrorist attacks as an “accident” and focuses on providing compensation for harm. Victims are likely to view September 11th as a moral harm and “a symbolic assault on America and [will likely] want some way to bring someone to account for the occurrence of the event.”¹⁹⁰ For this reason, as the sole governmental response, the Fund is inherently limited.

Contrast, for example, the possibility of apology—apology by the United States government for intelligence failures that appear to have led to September 11th.¹⁹¹ One could argue that the reason that the Fund was passed so quickly by Congress is because the Fund is a form of implicit apology to survivors for the United States government’s role; if so, it is an apology without acknowledgment of the problem. Scholars have argued that meaningful apology would have to include the following five elements: “1) the hurtful act happened, caused injury, and was wrongful; 2) the apologizer was at fault and regrets participating in the act; 3) the apologizer will compensate the injured party; 4) the act will not happen again; and 5) the apologizer intends

186. Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417 (2003).

187. Thanassis Cambanis, *Seeking Answers at Any Cost: 9/11 Widow Passes Up \$1.85M Payment, Presses Wrongful-Death Suit*, BOSTON GLOBE, May 14, 2002, at A1. See generally Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (magazine), at 92.

188. Tyler & Thorisdottir, *supra* note 116.

189. *Id.*

190. *Id.* at 6.

191. Daniel Shuman discusses the role of apology in tort law. Shuman, *supra* note 58. Sharon Lamb discusses the way that “[a]pologies reconnect the wrongdoer to some party he or she has wronged, if only briefly, whether it is an individual or society.” Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK L. REV. 929, 954 (2003).

to work for good relations in the future.”¹⁹² None of these have happened. The Bush administration has not only claimed that the government was not at fault, but has barred the National Commission investigating September 11th from full access to government documents.

Perhaps the Fund could be viewed as a form of reparation, although the term is never used. Reparation is the “act or process of mending or restoring” and “of making amends, offering expiation, or giving satisfaction for a wrong or injury.”¹⁹³ Traditionally, the word has been associated with a nation defeated in war,¹⁹⁴ and more recently with African Americans and slavery.¹⁹⁵ The Fund is meant “to compensate those injured or killed in the September 11 terrorist attacks.”¹⁹⁶ Compensation means “something that makes up for a loss” and the “act or action of making up, making good, or counterbalancing.”¹⁹⁷ While not taking blame for the tragedies of the September 11th attacks, and recognizing that “[n]o amount of money can right the horrific wrongs done,”¹⁹⁸ the United States is arguably attempting to mend, to restore, and to “giv[e] satisfaction for a wrong or injury.”¹⁹⁹ The Special Master “believe[s] that America is unique in creating such a Fund that expresses the compassion, concern and determination of its people in coming to the aid of the victims of September 11.”²⁰⁰

In addition to the moral dimension—an aspect of the repair that Judith Herman discusses—there is also the social and human dimension of repair that she and others have emphasized. A lawsuit, particularly a group or class-action lawsuit, may appear to offer litigants the

192. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 469-70 (1986). For a discussion of apology, reparations, and truth commissions, see MARTHA MINOW & NANCY L. ROSENBLUM, *BREAKING THE CYCLES OF HATRED; MEMORY, LAW AND REPAIR* (2002).

193. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, *supra* note 53, at 1923.

194. Roger P. Alford, *On War as Hell*, 3 CHI. J. INT'L L. 207 (2002).

195. Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003); Lee A. Harris, “Reparations” as a Dirty Word: *The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409 (2003).

196. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,235 (Dec. 21, 2001) (codified at 28 C.F.R. §104 (2002)).

197. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, *supra* note 53, at 463.

198. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,233 (statement by Special Master).

199. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, *supra* note 53, at 1923 (language of the definition of reparation).

200. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,235 (statement by the Special Master).

possibility of some collective experience, even if, in reality, it may be illusory. The individual nature of the Fund necessarily emphasizes that each claimant is acting alone and that money—not building community or providing moral or social repair—is the goal. Many family members have formed or joined organizations of survivors after September 11th, and many different organizations have proliferated.²⁰¹ Some family members have described how becoming involved with these organizations and becoming politically active has been an important dimension of the process of healing. Sally Regenhart, of the Skyscraper Safety Campaign, has said: “The greatest balm to your grief and your wounds is getting justice When we get justice, it will change the world, but it’s probably going to take the rest of my lifetime.”²⁰² Monica Iken, founding member of another group, September’s Mission, said her organization is “how [she] get[s] up in the morning.”²⁰³ Protests on a range of issues, such as the construction site at ground zero, continue.²⁰⁴ These organizations have arguably provided survivors with some of the sense of community and solidarity that Herman and Erikson suggest as a means of healing and repair. But this sense of community has not been facilitated by the Fund’s processes. If anything, opposition to the Fund may have provided an incentive for organizing.²⁰⁵

201. Many September 11th survivors and victims’ families have channeled their anguish into a variety of collective actions. Some groups, such as the Families of September 11 (www.familiesofseptember11.org) and September 11 Advocates, have focused on lobbying Congress for accountability, and advocated for reforms to ensure that attacks like these do not happen again. Others, such as the Skyscraper Safety Campaign (www.skyscrapersafety.org), are demanding a federal investigation into why the towers collapsed, and that all skyscrapers meet fire and building codes. Still others, such as Give Your Voice (www.giveyourvoice.com) and 9/11 Widows’ & Victims’ Families Association (www.911wvfa.org), concentrate on proper recovery and burial of victims. September’s Mission (www.septembersmission.org) is one of the many groups that focus on the memorial to be built where the towers once stood. Still others, like the WTC United Family Group (www.wtcufg.org) and the NYFD Widows (www.nyfdwidows.net), focus on mental health and support through online chat rooms and links to other resources. September 11th Families for Peaceful Tomorrows (www.peacefultomorrows.org) strives to combat terrorism through peaceful alternatives. All organizations serve as support groups for those who have suffered losses. Some of these organizations are faith-based. Kellyanne Conway, *The Microeconomic Effects of the Terrorist Attacks on September 11: Americans Helping Americans*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 101, 113-16 (2002).

202. Johnson, *supra* note 89.

203. *Id.*

204. Michael Slackman, *9/11 Relatives Plan Protest at Ground Zero Work Site*, N.Y. TIMES, Sept. 3, 2003, at B5.

205. On the other hand, even some of those who were most active and vocal in opposing the Fund have now decided to file. On May 22, the *New York Law Journal* reported the following: Kenneth Feinberg, the head of the federal September 11th Victim Compensation Fund, won an important convert during a session at the Association of the Bar of the City of New York on Monday. Charles Wolf, who lost his wife at the World Trade Center, had

The South African Truth and Reconciliation Commission (TRC) is an example of a collective process that has involved investigation, getting at the “truth” of the abuses of the apartheid regime, and promoting “reconciliation.” Despite a range of views about the effectiveness of the TRC within South Africa today, the TRC was an unprecedented experiment in a form of “national consciousness-raising.”²⁰⁶ Testimony was heard by over 20,000 people, and hearings were broadcast on radio and television. The vast number of victims of state-sponsored violence who testified before the TRC sought restoration of their own sense of dignity through public recognition of the injustices they had suffered.²⁰⁷ With the Fund, there has been no public opportunity for families to tell their stories—and to have any recognition that society values what happens to them.²⁰⁸

These examples highlight alternative dimensions of healing. One can argue that the Fund was not established to repair or to heal, but to compensate (or as some argue, to buy off families who were being prevented from suing the airlines), so that these examples are simply irrelevant. But the exclusivity of the Fund as the only governmental response, and the concomitant absence of governmental investigation

been one of Mr. Feinberg’s most persistent and vocal critics. He runs a Web site called “Fix the Fund,” and has bashed the Fund in several national TV appearances. But at the City Bar, Mr. Wolf announced that he is filing with Fund and is urging others to do the same. He attributed his change of heart to the “compassion” Mr. Feinberg exhibited at the City Bar session, and to the recognition that the process of seeking compensation was an emotional “last hurrah” for his wife.

9/11 Fund Master Wins Over Persistent Critic, N.Y. L.J., May 22, 2003, at 1.

206. Judith Lewis Herman, *Peace on Earth Begins at Home*, in MINOW, & ROSENBLUM *supra* note 192, at 196.

207. *Id.*

208. Many countries, such as Argentina, Yugoslavia, and South Africa, have used truth commissions to bring about an understanding between victims and perpetrators, so that a nation can move on from past atrocities and begin anew with a common history. See Carrie J. Niebur Eisnagle, *An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT’L L. 209, 224 (2003). The TRC of South Africa established the Gross Human Rights Violations Committee, giving victims a medium to voice their stories to the nation through local public hearings and forums, and the Committee on Reparation and Rehabilitation, ensuring that these stories were heard and acknowledged by an official body. *Id.* at 228. In exchange for amnesty, perpetrators were also asked to “tell everything,” and victims were permitted to ask them questions. *Id.* at 228-29. Although there were many complex reactions to this experience, with some victims feeling that their individual stories were subsumed by the collective process, it was a start.

Although the harms suffered by the victims of the September 11th attacks at the hands of the U.S. government are different from those suffered by the victims of other regimes, in that the U.S. government failed to protect, rather than allowing government-sanctioned human rights violations, a truth commission on the U.S. government’s failings regarding September 11th would offer a forum for national recognition of the harms the victims have suffered and would explore the governmental accountability for the tragedy. Government blocking of the the National Commission’s access to information makes this option unimaginable.

and assertion of responsibility, highlight the moral and psychological ambiguity of compensation as the sole vehicle for repair. If we take the experience of grief and trauma around September 11th seriously, these are issues that must be faced.

V. COMPARED TO WHAT?

Surely it is not fair to examine the problematic dimensions of the Fund with respect to grief and trauma, without some discussion of the alternative, tort litigation. Some of the issues that I have raised with respect to the Fund are issues that would have been problems, perhaps even greater problems, with the tort system. Certainly, there would have been different problems. Can any legal process ever really take account of grief and trauma?

Although lawsuits have already been filed and some information on the attacks has resulted from discovery, it is arguable that tort litigation is not a credible alternative in this context.²⁰⁹ Despite Judge Hellerstein's decision permitting the cases against the airlines and other defendants to go forward to discovery, others have argued that it is not a real option.²¹⁰ Feinberg certainly agrees with this view. He says: "If people want to litigate, fine . . . I think it's a mistake, it's ineffective and protracted and it prevents closure—but at least they're making a choice."²¹¹ But even if tort litigation provided a more genuine alternative to the Fund, there would still be questions as to whether the tort system would handle issues of grief and trauma any better.

Certainly tort litigation can be devastating. The process of litigation is very time-consuming and very labor-intensive. Discovery can be brutal, and the emotional experience of counter-discovery, discovery conducted by defendants against plaintiffs, is often particularly difficult and stressful. The extent of available counter-discovery frequently surprises plaintiffs who tend to think of tort litigation as purely affirmative—as a means of "getting the defendants" for the harm that they have caused. Many plaintiffs are either not fully advised by their lawyers, or cannot really understand at the time that they are making the decision to sue, how much investigation the defendant will be able to do of them and their lives, and the degree to which their actions and lives will be part of the lawsuit. The fact that

209. Analysis of the tort issues presented by the disaster is beyond the scope of this Article.

210. Sebok, *supra* notes 115 and 157.

211. See Henriques, *supra* note 3.

litigation will take a long time can also be a serious problem for plaintiffs in dealing with grief and trauma.²¹²

Although the tort cases that have been brought as a result of September 11th are largely class actions, and therefore arguably provide more of a collective context, tort litigation, particularly litigation of wrongful death cases, is generally as individual and isolating as the Fund claims process.²¹³ And despite litigants' aspirations, this litigation may neither disclose much information, nor be transformative with respect to governmental investigation of the disaster, because the government is likely to withhold documents and block access, as it is doing with the National Commission on Terrorist Attacks Upon the United States. Of course, the way the litigation process would be experienced by individuals who were suing would very much depend on their experience with their lawyer, the judge, how the judge handles the case, and how the lawyer for the defendant handles the process. One difference is that suing necessarily involves lawyers, while in theory, the Fund does not.

The Fund was not intended to require claimants to have lawyers, because the procedures were supposed to be simple and accessible by lay people. But it has not turned out that way because of the complexity of the process, and the emotionally difficult aspects of making choices about what to do and of gathering materials in support of a claim. Many claimants have understandably felt the need for legal representation. Pro bono organizations such as Trial Lawyers Care and other organizations have been very much involved.²¹⁴ In general,

212. Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL. PUB. POL'Y & L. 880 (2000) (examining the harm that delay in the resolution of tort cases causes to both plaintiffs and defendants and concluding that a right to speedy trial is important in civil cases).

213. Judge Hellerstein dismissed the class action allegations in *Mulligan v. Port Auth.*, 2002 U.S. Dist. LEXIS 18667.

214. Charles Schleifer, a volunteer attorney for Trial Lawyers Care (TLC), notes, "[T]he figure is not magical. . . . There are a lot of things to be done to maximize the amount these people can get from these funds. . . . It really takes skill in taking the life history of these people and extrapolating the best way to show what their economic loss is," as well as their noneconomic loss. Laurie Stewart, *Local Attorney Provides TLC to Sept. 11 Victims*, LEGAL INTELLIGENCER, Nov. 22, 2002, at 7.

In the wake of the September 11th attacks, many lawyers offered services to the victims of September 11th, in what one scholar described as the "second wave of rescue efforts." Tanina Rostain, *Professional Commitments in a Changed World*, 70 FORDHAM L. REV. 1811, 1814 (2002). Various bar associations and firms set up hotlines, formed walk-in clinics for small business owners, adapted their websites to include September 11th legal and financial information, and coordinated pro bono efforts. *Id.* TLC (www.911help.org), formed by the Association of Trial Lawyers of America (ATLA) together with New York Trial Lawyers' Association (NYTLA), is one of the largest pro bono organizations representing victims and victims' families in cases seeking compensation from the Fund. *Id.* at 1818. The former president of TLC, Larry

a claimant probably fares better with legal representation.²¹⁵ But lawyers' fees can make this problematic. On the one hand, the government created the Victim Compensation Fund to compensate victims; some argue that this money should not be undermined or diminished by hefty lawyers' fees.²¹⁶ On the other hand, victims have a right to choose who they want to represent them, "to choose lawyers they believe will get them the most money from the [F]und."²¹⁷

As a result, there has been much controversy regarding legal fees. In the tort system, it is common for lawyers to represent plaintiffs on a contingency basis and then take a third or more of the recovery.²¹⁸ With the Fund, some lawyers have taken less,²¹⁹ but the fact that some have charged their clients at all has been the subject of some debate. The role of the lawyer in the Fund process is more abbreviated than it would be in most tort litigation, and there is no opposing counsel, only Special Master Feinberg who is the final decision maker. However, it is arguable that, given the appearance of the problem of "insider access" to the Special Master, access to a lawyer, and who that lawyer is, matters more with the Fund than it would with litigation. Although Feinberg sought to humanize the process in ways that a judge sitting

Stewart, estimated that their services are saving victims \$60 million in legal fees. Larry S. Stewart, Letter to the Editor, *Articles Fail to Recognize Trial Lawyers' Work*, N.Y. L.J., Aug. 28, 2002, at 2. (Larry Stewart is the former president of Trial Lawyers Care.). See also Rostain, *supra* at 1818.

215. Stewart, *supra* note 214.

216. Frank James, *Lawyers Fee Debate Holds Up New Terror Victims Fund*, CHI. TRIB., Nov. 3, 2002, § 1, at 11.

217. *Id.*

218. What has spurred a debate is whether one should *charge* for legal counsel. Traditionally, trial lawyers have charged a contingency fee, usually about 40% of the total award. Julie Kay, *Sad Dilemma*, BROWARD DAILY BUS. REV., Sept. 11, 2002, at A1. By September 2002 it was estimated that 500 families had retained counsel whom they had agreed to pay on a contingency basis. *Id.* See also David W. Chen, *Saying No to Free 9/11 Aid, Many Families Hire Lawyers*, N.Y. TIMES, July 29, 2002, at B1. Part of their reason in doing this was the delay in being assigned counsel through TLC; another part was that not all lawyers signed up for pro bono work, and there is still a belief of "getting what you pay for." *Id.* As one lawyer, whose firm is charging contingency fees up to 25%, put it: "The dream of every defendant is that the other side doesn't have lawyers. The second best, O.K., go to some free lawyers." *Id.* Most of the lawyers who are charging on a contingency fee basis are doing so at an extremely discounted rate of 10-20%. Kay, *supra*. See also Chen, *supra*; James, *supra* note 216. One small Staten Island firm is charging 5% for the first million, and 10% for anything over the first million. Chen, *supra*. A firm in Chicago is charging 10% of the Fund award, and up to 25% of any litigation award. *Id.*

219. Feinberg estimates that approximately one-third of all claimants have been represented by pro bono counsel, one-third by lawyers who have been charging an 8-10% contingency fee of the total award, and one-third who are not represented by lawyers. Kenneth Feinberg, Presentation at Brooklyn/Cardozo Faculty Workshop on Ethical, Economic, and Social Issues in Mass Torts (Nov. 4, 2003). See Chen, *supra* note 218. Some observers have suggested that the numbers of those represented by counsel are greater. Telephone interview with Susan Herman, Executive Director, National Center for Victims of Crime (Nov. 19, 2003).

on a wrongful death case might not, the Fund's procedures and resulting paperwork are still very intimidating. The role of lawyers dealing with the Fund and with litigation, and assisting families and survivors of September 11th in coping with their grief and trauma, is one of the many aspects of the Fund that needs to be documented and studied in order to assess the Fund.

One other difference with the Fund is that litigation can result in a judgment of liability determined by a judge or jury, a judgment that may feel to a grieving or traumatized person, as equivalent to a determination of right and wrong.²²⁰ Of course, it is not a moral determination, but a legal determination of responsibility for the harm. Frequently, there is no judgment entered by a court because much tort litigation is resolved by settlement.²²¹ How plaintiffs react to tort settlements when there is no dispositive finding of liability, compared with cases where there is a judicial determination of liability, is not clear.²²² It is reasonable to think that many plaintiffs will still experience a settlement with monetary compensation as a victory and interpret it as a finding that the defendant did something wrong or as an admission of responsibility for the harm. In contrast, the monetary "award" that the claimant gets from the Fund has no such meaning. The defendants who directly caused the harm are not even in the process, and to some degree, are still unknown. Although the government may be implicitly acknowledging some liability by compensating the families, this is not what the Act claims to be doing. The "award" is simply money, and money that carries a morally and psychologically ambiguous meaning.

VI. IMPLICATIONS FOR CIVIL LITIGATION AND CLAIMS RESOLUTION PROCESSES

Although the September 11th Victim Compensation Fund of 2001 is unique in many respects, the concerns that I have raised here respecting the Fund have implications for civil litigation and claims resolution process generally.²²³ These concerns, the exclusive reliance on money and compensation, the complexity of processes of the Fund, procedu-

220. For discussion of the pervasiveness of settlement in the federal courts, see Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1495 (2002).

221. For a thoughtful discussion of how jurors might assess 9/11 cases, see Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003).

222. There is a need for empirical research on this issue, as well.

223. The implications of the Fund for the tort system generally, and for "tort reform" in particular, are beyond the scope of this Article.

ral justice, the statute of limitations, and the need for alternative means of repair are important to consider in assessing these processes.

With the Fund, there are a number of circumstances coming together relating to grief that are likely to have caused the surprisingly low claimant rate until the month before the deadline. Claimants and family members, many of whom are now single parents, largely single mothers, have been faced with tremendous daily responsibilities just to keep themselves and their families going, both materially and emotionally. The work that one needs to do in order to get the process started, either with the Fund or by filing a lawsuit, seems immense. The choices are agonizing and, in many ways, overwhelming. Do I file with the Fund or sue? Do I need a lawyer? If I decide to file with the Fund, can I be designated as the claimant? If I can, do I file under Track A or Track B? How do I pull together the documentation that I need to file? If I sue, who do I sue? Who do I trust to talk to about all these decisions? All of the outcomes here are unpredictable. Individuals who are overwhelmed with the daily responsibilities of life are paralyzed by the choices that have to be made even to address these issues. Each of these choices involves facing the reality of the loss, as well as considerable emotion, documentation, and paperwork.

As the deadline approached, Feinberg attempted to respond to these feelings, urging potential claimants to file the minimum piece of paper in order to preserve their rights under the Fund and meet the December 22, 2003 deadline. As I write, in January 2004, the Fund is still accepting application material.²²⁴ But there may be other factors that account for the delayed filing. The earlier discussion of "closure" and the ambiguities of grief highlight the fact that common assump-

224. The week before the deadline, in an e-mail message to Bill Doyle, who maintains a large listserv for September 11 victims, Special Master Kenneth Feinberg wrote:

Bill,

You are doing the Lord's work in making sure that every family knows of the impending December 22 deadline. Please inform each of them that it will be compounding the tragedy of 9/11 if grief stricken families fail to take advantage of the generosity of the Fund. Scholarship funds can be created with the money, charitable foundations can be established and memorials funded all in the name of the blessed victim. Also, all I need by December 22 is the first few pages of the application form; I do not need any of the economic information until later. I ALSO WILL WAIVE THE JANUARY 22 DEADLINE FOR SUBMITTING THE REMAINDER OF THE MATERIALS IF THE FAMILY NEEDS MORE TIME TO GATHER TOGETHER THE DOCUMENTATION. Over three-quarters of all eligible 9/11 families (76%!) have now filed with the Fund. But there is only one week left, so all remaining families must act now to preserve their rights. The December 22 deadline will not be extended by Congress. You're the best!

Ken

National Center for Victims of Crime - 9-11: A Crime That Affects Us All - Getting Help, <http://www.ncvc.org/9-11/email.htm> (last visited Jan. 20, 2004).

tions about the Fund's processes, and what families can get from the Fund as a form of "closure," may be oversimplified. In addition, the fact that the Fund relied on one individual, the Special Master, for decision making, that there was a lack of trust in the Fund because of the unbounded discretion that Feinberg was provided by Congress, and a sense that by filing, one is letting the government "off the hook" compound these difficulties. Finally, in light of the history of the Act, the reasons for, and speed with which it was passed, Congress did not consider or anticipate the depth of grief and its impact on families, and in particular, the way that this might affect the statute of limitations.

Thinking more deeply about grief and its impact on civil litigation and claims resolution processes is important. Understanding that "closure" is complex and variable, is a start. Claims resolution or civil litigation may play many different roles—healing for some, exacerbating grief for others. It is also important to acknowledge the paralyzing impact of forum choice. The purpose of claims resolution processes is to simplify—to give a sum of money, to avoid the hassle of litigation. This purpose—simplification of the process—was undermined by the September 11th Fund because of the issue of choice. When survivors lose a family member in an airplane crash, they know that they have to sue if they want compensation—they have no other choice. Here, it is the choice of what to do—the Fund or sue—that has been so agonizing for so many victims.

With the Fund, the effectiveness of claims resolution has been reduced because of other factors as well, such as the complexity of the process, the documentation that is necessary, the discretion of the Special Master and of his decisions, and the fact that his discretion is unreviewable. Mistrust of government and the failure of the government to take responsibility for failures to protect the public, and possibly prevent the tragedy, have probably complicated survivors' responses. While these factors are unique with the Fund, they raise broader questions about the conception, structure, and procedural aspects of claims processing systems, and how failure to consider the realities of grief and impact of loss can limit the effectiveness of these processes.

VII. CONCLUSION

Experience with the September 11th Victim Compensation Fund of 2001 reveals that grief and trauma are critical issues that should be recognized in our assessment of civil litigation and claims resolution processes: Failure to recognize the severity of survivors' grief and

trauma and their moral and human needs limited the effectiveness of the Fund in a number of ways. Affirmative recognition of the grief and trauma that survivors experience can help us think differently about claims resolution processes and litigation and make these processes more meaningful.