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DESIGNING COMPENSATORY FUNDS: IN SEARCH OF FIRST PRINCIPLES

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ABSTRACT

*The World Trade Center Victims' Compensation Fund of 2001 ushered in a new age of fund approaches to resolving claims for mass disasters in the United States. Since then, numerous funds have been created following several mass events injuring large numbers of claimants. The Gulf Coast Claims Facility, created in the immediate aftermath of the BP Deepwater Horizon oil platform explosion, represented a further expansion of fund design and operation. The funds that have been implemented since 2001, including the World Trade Center Fund, have been the object of both praise as well as criticism. Notably, all these funds have been designed and implemented after the events giving rise to a universe of mass claimants. This article suggests that the policy recommendations for future fund design largely fail to address antecedent threshold questions about the nature of the events giving rise to possible recourse to a fund for compensation of claims. Although such compensation funds have been intended to provide an alternative to the tort compensation system and to operate largely outside the purview of the judicial system, instead most fund designs have relied on tort notions of corrective justice that mimic the tort system. However, many funds have in practice entailed mixed theories of corrective and distributive justice, confusing the purpose, utility, and goals of such funds. This article asks fundamental questions about the goals of such funds and whether and to what extent disaster compensation funds comport with theories of justice. It suggests that certain types of mass disaster events ought not to be resolved through fund auspices at all, while only a limited universe of communitarian harms should give rise to *2 such a response. Finally, a communitarian fund designed ex-ante might more fairly be based on theories of distributive justice based on an egalitarian social welfare norm.*

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INTRODUCTION

On April 20, 2010, an explosion on the Deepwater Horizon rig killed eleven workers and unleashed the reputed worst oil spill in American history. Less than two months later, on June 16th, 2010, BP Oil--after meeting with President Barack Obama--agreed to set up a \$20 billion dollar fund to compensate victims of the disaster. Shortly thereafter, BP selected Kenneth Feinberg

to oversee the compensation fund and claims process. Feinberg served as the special master administering the World Trade Center Victims' Compensation Fund in the aftermath of the terrorist attack on the Twin Towers on September 11, 2001.¹

*3 Although only eleven workers were killed on the oil rig, the aftermath of the oil spill led to one of the most massive, complicated remediation crises that dwarfed the relief efforts that occurred in the wake of the events at the World Trade Center. Throughout the Gulf States, thousands of claimants came forward seeking compensation for any array of economic and non-economic harms that allegedly had resulted as a consequence of the oil spill and resulting contamination. In order to avoid adjudicating thousands of claims through the tort compensation system, BP agreed to and sponsored the creation of the Gulf Coast Claims Facility (GCCF) to address the burgeoning claim demands.²

Unlike the World Trade Center Victims' Compensation Fund, which was accorded relative admiration during its implementation and afterwards,³ the Gulf Coast Claims Facility almost immediately engendered less praise and considerable disapproval from claimants and critics alike.⁴ Although the Gulf Coast Claims facility functioned for several months and paid out numerous claims,⁵ the federal district court in Louisiana, overseeing the parallel *BP Gulf Oil Spill Litigation*, eventually shut down the operation of the GCCF.⁶

*4 The *BP Oil Spill Litigation* is still not resolved,⁷ and satellite litigation related to these events is likely to linger for several years, if not decades. It is difficult to forecast whether scholars eventually will evaluate the handling of the BP claims through the GCCF or the courts as a triumph of the legal system, a failure of various dispute resolution techniques, or something in-between. At this juncture, it may be observed that the BP oil spill gave rise to a somewhat unique scenario that included tort litigation pursued in tandem with an alternative fund mechanism for resolving claims functioning in the background.⁸ While the intricacies of the oil spill litigation under MDL auspices in the Eastern District of Louisiana will continue to supply substantial grist to the mass tort litigation academic mill, this article instead focuses attention on the impact of the BP events on thinking about fund approaches to resolving claims arising from mass disasters.

In spite of the praise of its supporters, the Gulf Coast Claims Facility exposed numerous fault lines in the design and implementation of this particular alternative fund. Since 2001 and the creation of the World Trade Center Victims' Compensation Fund, numerous other mass disaster events, especially mass shooting events, have prompted the creation of compensation funds.⁹ Logically, these funds have been brought into existence in the aftermath of the events, and there now is substantial information concerning the creation and execution of funds, which share many design characteristics. We also now know a fair amount about claimants' reactions to fund compensation and administration, which opinions are mixed.

Given commentators' varied appreciation (or lack thereof) of the GCCF and other subsequent funds, this article poses the question whether, based on what we have learned from a decade of experience, victim compensation *5 funds accomplish justice for claimants. Part I discusses the American involvement with alternative funds over the past decade, and explores what lessons have been learned from these various experiences. Part II then turns to an array of academic and public policy proposals for designing future funds, which draw on the existing models that have been created since the World Trade Center Victims' Compensation Fund. These proposals largely converge on suggestions for substantive and procedural justice.

Finally Part III addresses fundamental questions about the goals of such funds and whether and to what extent disaster compensation funds comport with theories of justice. In this portion of the article, the question is posed whether is possible to approach the problem of fund design *ex-ante*, in light of what we have learned from the experience of the funds that have been executed since 2001. Reflecting on this considerable experience, almost all fund designers have myopically focused on detailed consideration of the requirements of procedural justice, with relatively less attention paid to the accomplishment of substantive justice. Most telling, however, is the failure of most proposals to address threshold questions concerning whether the types of mass harm events that do or do not support or legitimate the creation of a fund alternative to the tort system.

Moreover, although compensation funds have been intended to provide an alternative to the tort compensation system and to operate largely outside the purview of the judicial system, instead most fund designs have relied on tort notions of corrective justice that mimic the tort system. In taking theories of corrective justice as their lodestar, alternative compensation funds miss the mark and contribute to a confused rationale justifying such funds.

This article suggests that the recourse to compensation funds ought to be limited to a fairly constrained universe of situations that give rise to a need for a public or charitable communal response, and might more fairly be based on theories of distributive justice. To the contrary, the creation of an alternative fund remediation scheme ought not to be countenanced in any situation where liable party is identifiable and capable of being held accountable for corrective justice.

I. THE AMERICAN EXPERIENCE WITH FUND APPROACHES: DEVOTEES AND DETRACTORS

In the aftermath of the WTC Victims' Compensation Fund, special master Ken Feinberg famously declared that the WTC Fund was a "one-off," *sui generis* fund that was not likely to ever reoccur.¹⁰ As a corollary, Feinberg opined that the lessons of the WTC Fund would not and could not be transposed to any future fund experiments.¹¹ Feinberg's own prognosis, however, proved inaccurate when he subsequently proceeded to design and implement the GCCF, which for all intent and purposes largely modeled itself on the WTC Fund.¹² In addition, Feinberg's general prediction that fund approaches would have limited future utility in the landscape of compensatory justice also has proven incorrect.

Prior to the creation of the WTC Fund, fund approaches to victim compensation were relatively under-utilized in the United States.¹³ Although a few historical antecedents existed, such as the federal Black Lung program,¹⁴ the lack of relative success in implementing these efforts placed funds in disfavor and relegated them to disuse. Since the advent of the WTC Fund, however, victim compensation funds have proliferated. Now, seemingly, almost every mass disaster or mass tort event inspires creation of a compensation fund.

¹⁵ Thus, in addition to the WTC Fund and the GCCF, victim compensation funds were created after the collapse of the IH-35 bridge in Minneapolis in 2007,¹⁵ the Columbine high school shootings,¹⁶ the bombing of the Alfred P. Murrah federal building in Oklahoma City,¹⁷ the shootings at the Virginia Polytechnic Institute,¹⁸ the base shootings at Fort Hood Texas,¹⁹ the parking lot shootings in Tucson, Arizona (that wounded Representative Gabrielle Giffords),²⁰ the movie theater shootings in Aurora, Colorado,²¹ the school shootings ²² in Sandy Hook, Connecticut,²² and the bombing during the 2013 Boston Marathon.²³

Although these funds share common characteristics, each fund was developed in response to the unique circumstances that gave rise to a shared public perception for compensatory justice. A typography of the different types of funds has emerged from this experience. Thus, some funds are legislatively authorized and payable with public funds; the WTC Fund is the archetype of this type of governmental enterprise. Other funds have been created through the underwriting and sponsorship of private entities; the Gulf Coast Claims Facility represents this type of effort. In addition, many of the funds created in the wake of mass shooting events have been set up as 501(c) charitable organizations.²⁴ Finally, an entirely different type of fund--with restitutionary rather than compensatory goals--has been underwritten by combined governmental and private corporate cooperation.²⁵ The Swiss Assets and Holocaust era restitutionary funds represent examples of these cooperative efforts.²⁶

Because of this typography of different fund paradigms, these varying examples counsel caution in drawing generalizations about victim compensation funds. Clearly, the WTC Fund, the GCCF, and the Holocaust-era funds embraced very large number of claimants, with recourse to mixed public and private financial support to pay claims. The charitable funds, on the contrary, typically have involved smaller aggregations of claimants, without recourse to ²⁷ public or private financial backing and generated funds of smaller magnitude.²⁷ Nonetheless, whether large or small, public, private, or charitable, these funds have

shared universal experiences in fund design, administration, and claimant satisfaction. The universal attributes of these different types of funds, then, provides a basis for thinking about optimal fund design.

A. Appraisals of the Funds

There is an extraordinarily large and rich academic literature relating to both the WTC Fund and the GCCF.²⁸ This literature sets forth in great detail the background, history, development, and implementation of these major examples of recent fund endeavors in the United States. Although much less documented, there also is a fair amount of journalistic reportage detailing the specifics of the other funds created in the wake of various school shooting events and the Boston Marathon bombing.²⁹

The object of this article is not to revisit those well-documented narratives but instead to focus on appraisals of funds from a broader perspective. In general, fund advocates give high marks to the fund experience for economic efficiency and expeditious claims processing.³⁰ Thus, funds are praised for the relative speed with which they are able to process claims and get money into the hands of needy claimants.³¹ Moreover, in comparison to pursuing claim resolution *10 through the adjudicated tort system, funds achieve economic efficiency by eliminating the transaction costs that adhere to litigation (such as attorney fees, court costs, etc.).³² Funds also are lauded for the relative simplicity of the claims processing experience, in contrast to perceived administrative complications related to judicial resolution of claims.³³ Remediation through a fund has been analogized to a no-fault payment system that thereby eliminates litigation risk.³⁴ Finally, in some instances, funds have been praised for promotion of strong civic values.³⁵ For all these reasons, fund approaches to claims resolution are rightly extolled.

On the other hand, experience with these funds has revealed repeated patterns of dissatisfaction and concern. The nature of these critiques tends to fall into two categories: uneasiness relating to issues of procedural justice, and disquiet or dissatisfaction relating to substantive results. Thus, across all fund experiences, external commentators and claimants alike have voiced discontent with both process and outcomes.

Critics and claimants have identified many problematic issues relating to process values. These include the relative failure of funds to provide for adequate democratic participation,³⁶ accountability,³⁷ transparency,³⁸ rationality,³⁹ *11 due process,⁴⁰ and personal autonomy.⁴¹ Reflecting on substantive outcomes -- that is, payments eventually awarded to claimants -- critics and claimants have voiced dissatisfaction with eligibility criteria,⁴² award determination,⁴³ non-recognition of collateral source funding,⁴⁴ lack of equality of treatment across claimants,⁴⁵ and inadequate or unfair compensation.⁴⁶

**12 B. Lessons from the Fund Experience*

Several lessons may be gleaned from the outpouring of critical analysis of the WTC Fund and the GCCF. In addition, journalistic reports that have surveyed victim responses to the creation and administration of charitable funds, in the wake of school and similar mass shootings, suggest certain repetitive themes.⁴⁷

First -- and perhaps most obvious -- victims' responses to mass disasters or mass incidents are not uniform. Individuals have cognitive pre-dispositions and biases that shape their reactions to events, which include their responses to efforts at post-event remediation.⁴⁸ Some individuals wish to protect their privacy and remain out of the spotlight; others seek a public forum to express personal outrage, grief, or an array of other emotional responses. Some seek to hold wrong-doers accountable, a reaction of many survivors of the World Trade Center events, even when it may be difficult or impossible to hold anyone accountable through the civil or criminal legal systems. Some seek retributive justice, desiring to punish the malefactor or to send a message to other potential perpetrators.

Other victims of mass disasters seek compensation for their losses or financial relief that will allow them to get on with their lives. Experience has demonstrated that victims vary widely in their views about the nature and scope of compensation, who should be eligible (or not) to receive compensation, what criteria should apply to determine and calculate any compensation awards, and rights to participate in the claims process. In addition, subjective evaluations of individual worth (or need) may collide with attempts to establish objective claim criteria. Academic studies and anecdotal victim interviews reveal that claimants typically are most unhappy where they perceive inequitable distribution of compensatory awards.⁴⁹ Whether claimants view a fund's administrator *13 as trustworthy and fair also plays a significant role in the implementation of a relief scheme. Moreover, victims may agree or disagree with decisions to allocate some portion of charitable funds to community purposes, as was the case with the Newton-Sandy Hook school massacre.⁵⁰

Individuals also have differing views with regard to participatory opportunities. Some persons desire robust involvement with establishing and implementing a compensation program; others prefer little or no participation, at all. Some view the existence of a meaningful claims process as affording victims the chance to achieve psychological catharsis or closure; others may have no such desire or need. Others may view engagement in remediation efforts as affording repeated occasions that perpetuate the wounds of the original events giving rise to creation of such funds.

Moreover, experience over the past decade with various funds has contributed to differing views concerning what circumstances merit the creation and support of a fund. Various commentators have questioned why certain events justify creation of a fund while others do not, such as the mass misfortune visited upon citizens by natural disasters such as Hurricane Katrina.⁵¹ Still others have questioned whether the public should undertake a shared burden of compensating victims of disaster, or not. Furthermore, the problem of fraudulent claim filings that developed chiefly during administration of the GCCF engendered *14 troubling concerns about citizens gaming these fund mechanisms for private and illegitimate gain.⁵²

Finally, some scholars have gleaned lessons from the fund experience as they relate broadly to administrative processes and theories of democratic governance.⁵³ These commentators suggest that funds should be evaluated to the degree that they satisfy criteria relating to majoritarianism, participation, accountability, transparency, rationality, equality, due process, efficiency, promotion of strong civic society, and personal autonomy.⁵⁴

In short, the experience derived since creation of the World Trade Center Victims' Compensation Fund in 2001 suggests a complicated tapestry of competing and often conflicting values and concerns. While it has been easy for commentators after the fact to critique the strengths and weaknesses of the various funds, the litany of complicated factors that pull in so many different directions has complicated the task of thinking about future fund design. Thus, while commentators are able to do a fair job of assessing what has not worked well, it is more challenging to design a fund to accomplish claimant satisfaction, avoid problematic hazards, and address broader considerations of participatory democracy and civic society.

II. DESIGNING A JUST FUND: CRITERIA TO GUIDE DESIGN AND IMPLEMENTATION

A. *Ex-Post Proposals for Ex-Ante Fund Design*

Both the experience of the WTC Victims' Compensation Fund and the GCCF, to a lesser extent, have prompted a substantial number of scholars and public policy analysts to discuss the problem of designing a compensation fund that achieves goals of justice, fairness, and efficiency.⁵⁵ As will be discussed, many of these proposals share common themes and reflect the scholars' considered assessments of the various fund experiences to date.⁵⁶ All these commentators *15 have focused on the problem of fund design in the aftermath of existing funds, using those experiences as the catalyst for assessing future fund design *ex ante*.

At the outset, it should be noted that all funds since the WTC Victims' Compensation Fund have been created in the immediate aftermath of the events giving rise to the disaster. This is logically so; one cannot plan for the randomness of many of the

calamitous events that have impelled creation of these funds. However, as a consequence, funds typically are created and implemented in relative haste in the context of emotional response to tragic circumstances.⁵⁷ Thus, a sense of immediacy permeates fund creation, which is a setting that may not be conducive to objective, tempered reflection.⁵⁸ It is not too far-fetched to suggest that fund designers, caught in the maelstrom of horrific events, do not turn to contemplative theories of justice in designing a remediation fund. This would explain, in some measure, the confusion of goals and rationales that have undergirded fund design in the past.⁵⁹

The scholars who have addressed the problem of fund design *ex ante* have tended to focus on similar lists of issues or key decisions that confront the creators of compensation programs. For example, Professor Deborah Hensler⁶⁰—reflecting on the experience of analogous mass tort class action settlement funds—suggests that program designers need to decide: (1) criteria for obtaining compensation from the program, (2) evidence to determine eligibility, (3) the methodology for claim evaluation, (4) evidence to support claim evaluation, (5) the scope or extent of individualized eligibility and compensation, (6) procedures for presenting claims, (7) opportunities for appeal of claim determinations, (8) opportunities for exit to the litigation system, (9) provision for claimant representation, (10) duration of the facility, (11) determination whether the facility fund will be capped, and (12) determination of apportionment of funding if more than one entity is responsible for funding the facility.⁶⁰

Similar to Hensler, Professor Francis McGovern⁶¹—who has served as a special master administering many mass tort and class action settlements—has ***16** drawn on this experience to assay broad principles of fund design. Thus, he has suggested that one of the main assets of claim resolution facilities is flexibility in design, that is, “the ability to tailor the key variables to the particular needs of a given case.”⁶¹ He indicates that there are a series of steps in developing a design strategy, which generically include:

- (1) understanding all the relevant factors that drive the success of the accepted norm that is to be changed in the new design;
- (2) making assumptions about uncertainties that emanate from the accepted norm;
- (3) identifying and disaggregating the variables that will be the focus of the new design;
- (4) identifying the actors and their preferences in reacting to the design;
- (5) selecting short- and long-term goals to be achieved;
- (6) devising a plan and an endgame;
- (7) anticipating resistance; and
- (8) revising the plan and adding continuous feedback loops.⁶²

In a more focused way, Professor Janet Alexander articulated a comprehensive set of fund design criteria in the aftermath of the September 11th Victims' Compensation Fund.⁶³ Reflecting on both the strengths and weaknesses of that program, Professor Alexander outlined characteristic features that fund designers should consider and address. These include: (1) the structure of the fund (*i.e.*, will it have legislative authorization and oversight by a special master?), (2) the program's institutional home (will it be within the jurisdiction of the Department of Justice, or subject to the jurisdiction of Article I or Article III courts?), (3) who should run the program?, (4) who should appoint the head of the program?, (5) how should subordinate program officers be chosen?, (6) how should the program be activated?, (7) how should the program be coordinated with litigation?, (8) how should the program be coordinated with other payments? (the problem of collateral source funding), (9) what procedures should exist for determining awards, (10) what provisions should be made for appeals and judicial review, (11) eligibility requirements, and (12) provisions for reducing cost and delay.⁶⁴

Scholars reviewing both the WTC Victims' Compensation Fund and a compensation fund created in the aftermath of the Minneapolis bridge collapse formulated a similar list of issues that need to be considered in designing a compensation fund.⁶⁵ Their list included: (1) considering the political questions ***17** involved, (2) defining the compensable event, (3) determining entitlement to coverage, (4) establishing the type and amount of compensation, (5) establishing the procedures to be used in determining who is to be compensated and in what amounts, (6) determining the impact of fund compensation on tort

claims, (7) determining the treatment of collateral source payments, (8) consideration of third-party matters, subrogation, and reimbursement rights, and (9) consideration of waivers of liability.⁶⁶

In assessing the creation of a federal smallpox vaccine immunization compensation program, several scholars suggested that program designers ought to focus on key legal and ethical questions: (1) was the government the actor who caused the harm?, (2) was the harm foreseeable?, (3) was exposure to the harm voluntary and informed?, (4) did the harm occur in the context of an attempt to avert a greater harm?, (5) can causation and legal or moral responsibility be established?, and (6) can equity be established among claimants?. In addition, they suggest that other logistical concerns have moral elements; for example: (1) the funding source, (2) methods for compensation allocation, and (3) the scope of compensation.⁶⁷

Apart from the laundry lists of proposed criteria for fund design, other commentators have focused more narrowly on certain aspects of fund design they believe deserve consideration in the future. Thus it has been suggested that fund designers ought to pay better attention to agency costs and the role of restitution in an effective compensation scheme.⁶⁸ Another scholar has opined that fund designers should adjust settlement procedures to account for and capitalize on claimants' cognitive biases.⁶⁹ And finally, other commentators, also analyzing *18 the experience of the WTC Victims' Compensation Fund, have focused exclusively on procedural values considered most important in American society as the framework for future fund design.⁷⁰

B. Unpacking the Problem of Substantive and Procedural Justice

This survey of proposed approaches to fund design reflects various responses to the September 11th Victims' Compensation Fund and the GCCF, as well as other wide-scale compensatory efforts. The array of proposals illustrates not only considerable overlap in thinking, but also the sheer complexity of the task of attempting to design a compensation fund in advance of calamity. The task, as it turns out, is so multifaceted as to induce despondency in even the most hopeful and optimistic of social reformers. Hence, Professor Alan Morrison has written:

I used to think that, after the [September 11th] Fund was wrapped up, cool heads would sit down and develop a prototype for future funds, including a set of statutory conditions that would automatically trigger their operation, based on objective factors that would justify a public expenditure program like this one. It seemed so rational to do the thinking in advance and not let the emotions of a given moment interfere with the analysis. It was a neat, logical approach, but I have now concluded that there is no way that a law like that will ever be enacted, or if it were, that it would come up with the right set of answers.⁷¹

In reviewing the array of proposals for fund design, these public policy analysts and their propositions cannot be faulted for a lack of comprehensiveness. Ranging from Professor McGovern's generic prescriptions to the high degree of specificity in most other suggestions, one rapidly becomes lost in the weeds of fund design. Several things are striking throughout almost all the proposals: (1) the level of concrete detail, (2) the almost exclusive focus on substantive and procedural issues, and (3) the lack of value-based theory.

III. DESIGNING A JUST FUND EX-ANTE

A. The Mismatch of Theories of Justice Applied to Mass Disaster Events

As suggested above, a basic problem with the various discussions of fund design is that very few of these proposals, if any, proceed from first principles. Because the proposals are derived as deliberations or reflections on the problems entailed in past fund ventures, each takes as a starting point the goal of *19 compensating victims of disaster without questioning the nature of the events giving rise to the need for a fund, or the goals of the resulting fund. Consequently, the myopic focus of analysts on procedural details tends to overwhelm consideration of first questions.

As some have suggested, not all catastrophic events should appropriately be addressed through a fund resolution of claims. Thus, it becomes important at the outset to define what events are best suited for claims resolution through a fund, while other types of mass disasters perhaps less so. A schema of categories of disaster events is thus useful in thinking about when a fund resolution of claims is appropriate, or not.

Mass harmful events may be categorized according to differing circumstances. First, there are certain types of occurrences for which victims are blameless but there is no wrongdoer who is responsible for the harms to the injured. In this instance, communitarian values and governmental response play a prominent role in encouraging the provision of aid to fellow citizens in distress. Natural disasters, such as hurricanes, tornadoes, catastrophic flooding and such are examples of this type of disaster. The commitment of federal and state disaster relief in many of these instances illustrates this type of collective community response to a mass natural disaster.⁷²

Second, there are events in which victims are blameless for their injuries but the alleged wrongdoers who are responsible for the harms are unavailable as a source for remediation. The numerous school, theatre, and other recent shooting events, or the Boston marathon bombing, provide examples of this type of tragedy. In some of these instances, the perpetrator committed suicide; in others, the perpetrator was committed to the criminal justice system and most likely financially incapable of making reparation or restitution to his victims.

Similar to natural disaster catastrophes, when a wrongdoer is unavailable to provide remediation, communitarian values may then prompt provision of aid to the distressed. The outpouring of charitable contributions and creation of charitable funds in the aftermath of recent shootings and the Boston marathon bombing illustrate this notion. In addition, state-created compensation funds for *20 victims of criminal events⁷³ also illustrate this type of circumstance. Arguably, the bombing of the Alfred P. Murrah federal office building in Oklahoma City is another example.

Third, catastrophic events that result in mass harms may be attributable to an actual, alleged wrongdoer. In this instance, the adjudicative or alternative dispute resolution systems play a role in determining responsibility, fault, and allocation of fault. If the resulting mass injuries are found to be a consequence of the alleged wrongdoer's intentional or negligent tortious conduct, then the wrongdoer will be held responsible for remediation to the victims of its conduct. Since the late 1970s, most mass torts illustrate this type of mass harm; the BP Gulf Oil spill provides an additional example. As will be discussed below, this type of mass harm seems least appropriate, and least principled, for resolution through a fund approach.⁷⁴

In the context of this schema, the September 11th disaster at the World Trade Center presents a more challenging event for categorization. Initially, the WTC Fund was justified, in part, as a communitarian response to an unprecedented attack on the United States, analogized to the attack on Pearl Harbor in 1941.⁷⁵ Also, special master Ken Feinberg urged victims to seek remediation from the fund based on the theory that it would be difficult to identify and hold responsible the agents for the disaster.⁷⁶ The legislation that created the fund indemnified the airlines from liability,⁷⁷ and the Saudi nationals flying the airplanes all were killed in the disaster.

*21 Thus, supporters of the WTC Fund sought to categorize those events as analogous to a natural disaster scenario, where such a characterization justified the allocation of federal treasury funds to compensate victims. As it turned out, however, those victims who elected to seek remediation through the tort system were able to identify defendants to sue.⁷⁸ Because alleged tortfeasors eventually were capable of identification and culpability, this makes the characterization of the WTC events a hybrid affair. It also places the WTC Fund on a continuum of disasters for which fund approaches seem more dubious and less appropriate.

Thus, disaster events that are suitable for fund resolution might be comprehended on a continuum, running from natural disasters (most suitable) to traditional intentional or negligent tortious conduct (least suitable). Contemplating this approach, the creation

and implementation of funds are most justified in the context of natural disasters and blameless community tragedies, such as mass shootings. Funds are least justified in traditional tort situations, where there is an identifiable alleged wrongdoer who has purportedly committed mass harms.⁷⁹ In this regard, the GCCF exemplifies an unjustifiable fund and, similarly, the pending General Motors auto defect fund likewise is unjustifiable.⁸⁰

B. Principles of Justice Derived from Tort Law

Traditional tort law concepts can and should be related to thinking about appropriate responses to the different types of mass disasters as well as forms of fund design. In the context of bipolar litigation, scholars have articulated three broad theories of justice undergirding traditional tort theory, which have equal application to mass harms. These theories embrace different concepts of justice: corrective, distributive, and retributive.⁸¹ As we shall see, a fundamental problem with previous fund ventures has been the opaque, confusing conceptual basis for each fund, often without a clear commitment to a theoretical concept of justice providing the rationale for creation and implementation of the fund.

As tort scholars and others have noted, corrective justice in the tort system seeks to remediate the victim of tortious injury by providing compensation for those injuries.⁸² Theories of corrective justice posit a responsible wrongdoer whom the law requires to make whole the victim of the wrongdoer's harm. The classic definition of corrective justice postulates that liability rectifies the injustice inflicted by one person on another.⁸³ Corrective justice does not require a communitarian response to individual or mass harms; corrective justice addresses the requirement that particular, responsible parties provide remediation for the harm they have occasioned.

As a consequence, compensatory justice requires attention to a victim's highly individualized injury as well as his or her circumstances both before and after the injury.⁸⁴ As is well-known, in personal injury cases, compensatory justice contemplates remedial and special damages, including actuarial accounting of life expectancy, future earnings, and the like. When mass harms occur, theories of compensatory justice generally eschew remediation schemes that would confer comparable equity across all claimants. Compensatory justice, then, distinguishes individual cases of injury from one another and is highly particularized.

Distributive justice, on the other hand, deals with the distribution of whatever is divisible among participants in a political community,⁸⁵ which includes a fair apportionment of the burdens and benefits of risky activities.⁸⁶ Broadly construed, distributive justice concerns a socially just allocation of goods in a society.⁸⁷ In the context of mass harms, theories of distributive justice pertain to more inchoate situations where it is difficult, if not impossible, to identify a perpetrator of harm, but victims of misfortune nonetheless have suffered injury.⁸⁸ In some situations, there simply may not be a party responsible for another's injury. Some types of accident cases may be subsumed in this concept, as well as natural disasters. Theories of distributive justice, then, embrace a communal response to injury and reflect the notion that the broader society desires to assist victims of misfortune to get on with their lives.⁸⁹

Unlike theories of corrective justice, which seek to make a victim whole presently and in the future and to hold accountable the wrongdoer for such compensation, theories of distributive justice in tort law instead seek to get an injured party back on his or her feet.⁹⁰ Distributive justice is concerned with comparative equity. In mass injury situations, distributive justice addresses the problem of compensatory equity across all claimants and allocation schemes to accomplish such equity.

The third theory of justice undergirding traditional tort law is that of retributive justice, most closely associated with criminal offenses rather than civil offenses. But some scholars have suggested that theories of retributive justice may have equal application to mass civil harms, as well. Similar to theories of compensatory justice, retributive justice also posits an identifiable and responsible wrongdoer. The theory of retributive justice, however, obviously seeks to punish the wrongdoer beyond the

punishment afforded by compensation of the wrong-doer's victim.⁹¹ Retributive justice may serve a number of normative purposes, and in tort law, punitive or exemplary damages are an embodiment of retributive justice.⁹²

***24** As is well-known, the general purpose of punitive damages is not to compensate the victim of harm but to reform or deter the responsible party from engaging in similar conduct.⁹³ While standards for the award of punitive damages vary under state law, such damages generally are available where it can be shown that the defendant's conduct was egregious and manifested a reckless disregard for the health and well-being of individuals. When available and appropriate, punitive damages are often awarded where compensatory damages are deemed an inadequate remedy to a victim of harm.

One of the major critiques directed at the WTC Victim's Compensation Fund was the confused theoretical basis for that fund's creation and subsequent implementation.⁹⁴ In legal formalism, this problem has been identified as a lack of "rationality" supporting the fund's design and administration.⁹⁵ Professor Robert Rabin, among others, noted early on that the WTC Fund represented a confused "hybrid" of goals, embracing both corrective and distributive justice.⁹⁶

This was indeed true. As eventually implemented, the WTC Fund essentially was a massive exercise in corrective justice, although Special Master Feinberg subsequently justified this approach as compelled by the federal authorizing legislation. Thus, Feinberg and his assistants performed highly individualized evaluations of each claimant's personal circumstances and relationship ***25** to the disaster's victim.⁹⁷ Damage awards, as it turned out, were customized and tailored to the specific requirements of each claimant. In most instances, the claim resolution process mimicked damage that would have incurred assessments in ordinary, litigated tort injury claims, including the use of actuarial assessments of life expectancies and future earnings claims.

Notwithstanding the fact that the WTC Fund basically embodied a corrective justice approach to remediation, the fund represented a mismatch with this theory of justice. At the time the WTC Fund was created through Congressional legislation, there was no appreciable wrongdoer who might be held liable for compensatory damages, but this subsequently turned out not to be the case.⁹⁸ Instead, a primary motivating force for creation of the fund was a collective spirit of communitarian responsibility for aiding innocent victims of a catastrophic event. Thus, this attitude reflected a theory of distributive justice, which Feinberg manifested in other portions of his remediation program. For example, Feinberg eventually decided to grant a flat award of \$250,000 to each claimant for his or her victim's pain and suffering, without any differentiation among victims' circumstances.

Likewise, in Feinberg's creation and implementation of the GCCF, he again defaulted to a hybrid scheme based on theories of corrective and distributive justice.⁹⁹ Hence, the GCCF program involved a first round of flat fee awards to early claimants who waived subsequent rights to remediation;¹⁰⁰ later applicants were eligible for more customized claim awards tailored to more specific circumstances.¹⁰¹ In this instance, however, the need for a fund embracing attributes of both corrective and distributive justice seemed misplaced, as BP and other allied parties were available for remediation through traditional tort adjudicative auspices.¹⁰²

***26** Other funds that Feinberg subsequently supervised embodied similar hybrid approaches to corrective and distributive justice. In administering the \$7.5 million fund created in the aftermath of the university shootings at Virginia Tech Institute, Feinberg administered both flat monetary awards of \$180,000 to families of deceased students as well as individualized compensatory damage awards to victims injured in the events.¹⁰³ Although the individualized compensation awards reflected a tort-based theory of corrective justice, the Virginia Tech Fund, set up as a charitable entity, reflected communitarian values. Moreover, in this situation, there was no available wrongdoer to hold liable for the mass harms to the victims.¹⁰⁴

Finally, it should be noted that, to date, none of the various funds public, private, or charitable have included programmatic elements embracing a theory of retributive justice.¹⁰⁵ In circumstances where there is no available or responsible wrongdoer,

it makes sense to relinquish potential punitive damages in these fund designs. But it remains questionable whether the waiver of punitive damages that might address the concerns of retributive justice are appropriate in situations where there is an identifiable, liable bad actor who has perpetrated mass harm.

**27 C. The Case for Fund Design Based on Theories of Distributive Justice*

A basic premise of this article is that the creation of alternative, no-fault funds to remediate claimants in mass injury cases is fundamentally illegitimate in situations where there are identifiable, liable bad actors that might be held accountable for their actions. In such cases, the malefactors ought not to be relieved of liability for their actions or responsibility for compensation to the victims of actions. In other words, in circumstances for which corrective justice is appropriate, circumventing legal obligations ought not to be countenanced by recourse to fund alternatives. In this view, the CGGF was an illegitimate use of a fund by BP and other parties responsible for the events related to the explosion of the oil rig Deepwater Horizon.¹⁰⁶ The same can be said of General Motors' election to engage Kenneth Feinberg to administer a newly-created fund to compensate owners of defective GM vehicles.¹⁰⁷

On the other hand, certain types of mass disasters or mass harms seem more appropriate for fund resolution of such claims. These would be catastrophes imbued with communitarian consequences, thereby supporting communitarian responses to aid afflicted victims. Such events ought to be rare, and when they occur, ought to be subject to principles of distributive justice rather than corrective justice. The creation of such funds should be clear in purpose, goals, and intentions, and should not default to opaque, hybrid forms of remediation that have characterized almost all predecessor funds. As a corollary, such instances likewise would not support recourse to retributive justice.

Fund approaches to the resolution of claims ought to be limited to communitarian situations and governed by principles of distributive justice.¹⁰⁸ Theories of distributive justice provide moral guidance for those involved in designing political processes and structures that affect the allocation of benefits (and burdens) in societies. As political theorists and scholars generally are well aware, many schools of thought embrace different approaches to distributive justice *28 principles.¹⁰⁹ Nonetheless, some of these constructs might provide a useful guide for fund design based on principles of distributive justice.

A strict egalitarian approach to distributive justice calls for the allocation of equal material goods to all members of society. In the context of fund design, this might require that all claimants receive a fixed, flat amount award without regard to individual circumstance. In an interesting footnote to the WTC Fund, Special Master Feinberg indicated that he favored such an approach.¹¹⁰

An alternative distributive principle, embodied in John Rawls' difference principle, permits divergence from strict equality so long as any inequalities would make the least advantaged in society materially better off than they would be under strict equality. Other philosophers have noted the roles that luck and responsibility play in economic life, and have attempted to design distributive principles sensitive to these considerations.

Advocates of utilitarian, welfare-based principles argue that material goods and services have no intrinsic value but are valuable only insofar as they increase welfare. Hence, distributive principles should be designed and assessed according to how they affect maximizing or distributing welfare. Libertarians, on the other hand, criticize any distributive ideals that consider welfare maximization or equality, arguing that the pursuit of economic goals conflicts with important moral demands of liberty or self-ownership.

Against this backdrop of competing theories of distributive justice, once it is determined that certain events justify the creation of compensation funds, fund designers ought to turn to a discussion of the theory of distributive justice that should govern compensation awards. As indicated above, almost all the commentary on existing funds has focused myopically on designing compensation funds to accomplish substantive and procedural justice. Nonetheless, scholars have noted that, although

distributive and procedural justice are viewed independently, they actually are interrelated and address similar values.¹¹¹ Therefore, fund designers who proceed from a first principle of distributive justice will likely embrace values that address the problems of procedural justice, as well.

*29 CONCLUSION

The past decade has witnessed an outpouring of commentary by scholars and public policy analysts articulating concepts for improved design of compensation funds. These proposals have been inspired by the growing trend towards the resolution of mass harms through fund approaches, beginning with the experience of the WTC Victims' Compensation Fund, the GCCF, and other smaller charitable funds that the government, private entities, or charitable enterprises have established in the aftermath of tragic events.

In contemplating better fund design, policy makers have reflected on the experience of these past funds and have somewhat myopically focused on building a better mousetrap through various mechanisms to enhance procedural justice. This is a fine and not unwarranted approach to thinking about better fund design, but, as a consequence, almost all design proposals track through highly similar laundry lists of items for improvement. These fund designers have proven skilled at identifying what has worked less optimally in past funds, but their suggestions only tinker at the edges of existing past funds. In addition, the fund designers have paid relatively less attention to questions of substantive justice and how to achieve substantive fairness in administering a fund.

The problem with the fairly extensive literature on fund design is that comparatively few policy makers begin from first premises. Thus, few ask the initial question of whether particular circumstances or events justify and legitimate the creation of an alternative fund resolution of mass harms in the first place. The failure to ask this question is no doubt driven by the fact that the starting point for future fund designers is the contemplation of past funds for which that question essentially was never asked nor answered.

With the creation of a fund approach to resolving General Motors' automobile liability problems, there can be no doubt that we are now experiencing perhaps a troubling "fund creep." A significant irony of the last decade is Ken Feinberg's repeated insistence that funds are unique events not likely to be repeated; yet Feinberg has been, is, and will continue to be the go-to guy for the creation and administration of funds. Simply by tracking Feinberg's career, one may draw a long arc from the *Agent Orange* settlement fund through the WTC Victims' Compensation Fund, the GCCF, the Hokie Spirit Memorial Fund, the Aurora Fund, the Newtown-Sandy Hook Fund, the Boston One Fund, and now the GM Auto Fund (and other smaller charitable funds).¹¹²

***30** Against the backdrop of this "fund creep," this article suggests that not all situations of mass harm should legitimate the creation and implementation of a compensation fund. The experience of the WTC Fund first exposed the theoretical and practical fissures in creating a publically underwritten compensatory fund with awards based on corrective justice principles that were essentially derived from parallel tort law. The hybrid nature of the WTC Fund and the resulting confusion and dissatisfaction with it were then transposed onto the experience of the GCCF. This is unsurprising, given the central role Ken Feinberg played in the creation and implementation of both funds.

Hence, in deliberating about future fund design, the first question that ought to be addressed is whether the circumstances of the mass harm justify creation of a fund. We ought to distinguish between traditional tort situations where there is an identifiable, responsible party and those where there is not. Alternative compensation funds ought not to administer quasi-corrective justice that is divorced from the tort system but instead based on the authority of a single special master's sense of corrective justice. A sure sign that a fund is illegitimate is if it devotes detailed attention to individualized calculations of specific awards. And, where alternative fund mechanisms appear to be illegitimate circumventions of the adjudicative tort system by a responsible

private party or entity, and in turn set up compensation schemes that imperfectly mimic notions of corrective justice, a fund should not be permitted to operate outside judicial auspices.

On the other hand, when communitarian disasters occur where it is difficult if not impossible to locate blameworthiness, this should support creation and implementation of a fund. Communitarian disasters ought to call forth communitarian responses, which justify either governmental subsidization of a fund or charitable resources voluntarily given. The creation of compensation funds in such circumstances is legitimate precisely because it is not, essentially, an alternative to the tort system. Furthermore, funds created in such situations should not look to theories of corrective justice to determine awards; rather theories of distributive justice seem most apt in balancing equity and fairness in response to such catastrophic events.

*31 Concededly, there are many philosophical approaches to concepts of distributive justice, each of which might compel a different compensation scheme. Furthermore, debates over an appropriate approach to distributive justice ought not to impair or impede fund design at the outset. In communitarian disasters, however, there is much to be said for an egalitarian approach, which also would address many if not most of the issues relating to procedural justice. As a reflection on his own experience in administering the complex corrective justice scheme of the WTC Fund, Feinberg, in hindsight, endorsed the concept of a flat fee award. And, in smaller charitable funds he subsequently administered, he implemented this egalitarian approach.

Finally, with the advent of the General Motors automotive fund, there seemingly are scant means to stem the oncoming tide of mass tort alternative funds or to constrain their operation. However, as Judge Barbier has demonstrated in overseeing the BP MDL Oil Spill proceedings in the Eastern District of Louisiana, the judiciary is not without resources to curb the parallel funds created and operating outside the judicial system.

Footnotes

- ^{a1} Morris & Rita Atlas Chair in Advocacy, University of Texas School of Law.
- ¹ See KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), available at http://www.usdoj.gov/final_report.pdf.
- ² See Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims - A Fund Too Far*, 71 LA. L. REV. 819, 826 (2011) (describing creation and implementation of the Gulf Coast Claims Facility with a comparison to creation and implementation of the World Trade Center Victims' Compensation Fund); Myriam Gilles, *Public-Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility*, 61 DEPAUL L. REV. 419, 427-36 (2012) (describing events leading up to creation of the GCCF).
- ³ See, e.g., Gilles, *supra* note 2, at 444 (noting that in the 9/11 fund "Feinberg ultimately came out a hero who, working pro bono for three years, had taken on a difficult and emotional task, and done a tremendous job."). Almost all initial appraisals of the WTC Fund were laudatory. Critical appraisals of the WTC Fund only developed slowly subsequent to the Fund's implementation, as scholars explored detailed aspects of the Fund's design and implementation.
- ⁴ See, e.g., Arthur J. Ewencyk, *For a Fistful of Dollars: Quick Compensation and Procedural Rights in the Aftermath of the 2010 Deepwater Horizon Oil Spill*, 44 J. MAR. L. & COM. 267 (2013) (explaining that GCCF was not a good model for government involvement in the resolution of mass torts, requiring victims to forego rights and failing to provide claimants with robust due process guarantees of judicial adjudication); Colin McDonnell, Comment, *The Gulf Coast Claims Facility and the Deepwater Horizon Litigation: Judicial Regulation of Private Compensation Schemes*, 64 STAN. L. REV. 765 (2012) (detailing efforts by plaintiffs' lawyers to have the federal court intervene to undo some of the claims processing and releases in the GCCF).
- ⁵ See GULF COAST CLAIMS FACILITY, OVERALL PROGRAM STATISTICS (2012).
- ⁶ See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014) (arguing that the class action settlement accomplished through the BP Gulf Oil MDL proceedings, and which superseded the

GCCF, resulted in better payments to claimants). Similar to the American experience in Vietnam, the proponents of the Gulf Coast Claims Facility declared victory and went home.

- 7 [In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010](#), 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010) (discussing the creation of multidistrict litigation to transfer and consolidate all litigation relating to the oil spill); [In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010](#), MDL No. 2179, slip op. at 12 (E.D. La. Oct. 19, 2010) (case management order).
- 8 Claims resolution in the wake of the World Trade Center embraced both a fund approach as well as traditional tort litigation. However, the tort litigation based on the events at the World Trade Center were chiefly pursued after the closing date for making an election to receive compensation from the fund, or to instead institute traditional tort litigation. The World Trade Center litigation was supervised and managed by Judge Alvin Hellerstein. *See, e.g., In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 614 n.3 (S.D.N.Y. 2008). For an extended discussion of the history, organization, and evolution of the World Trade Center litigation, see Robin J. Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199, 203-21 (2008).
- 9 *See* discussion *infra* notes 16-23.
- 10 KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 178 (2005) (indicating that “it would be a mistake for Congress or the public to take the 9/11 fund as ... a model in the event of future attacks”); FEINBERG, *supra* note 1, at 83-84; Kenneth R. Feinberg, *Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation*, 19 WASH. U. J.L. & POL’Y 21, 29 (2005) (“9/11 was unique and gave rise to a unique response. That is the only way, I think, to explain it.”); Kenneth R. Feinberg, *The Building Blocks of Successful Victim Compensation Programs*, 20 OHIO ST. J. ON DISP. RESOL. 273, 276-77 (2005); Kenneth R. Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DEPAUL L. REV. 473, 475-77 (2003); *Q&A: Kenneth Feinberg, Special Master of the 9/11 Victim Compensation Fund* (C-SPAN television broadcast July 10, 2005) (stating that the 9/11 Fund was an aberration and unique).
- 11 FEINBERG, *What Is Life Worth?*, *supra* note 10.
- 12 *See* Mullenix, *supra* note 2, at 843-44. Feinberg also subsequently served as special master or administrator of the funds that were set up to compensate victims of the shootings at the Virginia Polytechnic Institute and the One Boston Fund (Boston Marathon bombing); *see infra* notes 18, 25.
- 13 *See* Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703-10 (2005) (describing the Black Lung Benefits Act, the National Childhood Vaccine Injury Act of 1986, and state legislation regarding birth-related neurological injuries); *see also* Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 293 (2003) (describing various legislation aimed at providing direct relief to victims who suffered physical and property damage in the Whiskey Rebellion, the 1827 fire in Alexandria, the slave rebellion in Santo Domingo, and other early Republic “calamities”).
- 14 Rabin, *supra* note 13, at 703; *see also* Naomi Seiler, Holly Taylor, & Ruth Fadden, *Legal and Ethical Considerations in Government Compensation Plans: A Case Study of Smallpox Immunization*, 1 IND. HEALTH L. REV. 1, 23-24 (2004) (discussing problems and failure of the Black Lung program, as a function of flawed program design).
- 15 *See generally* Mike Steenson & Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524 (2009).
- 16 The Mile High United Way created the Healing Fund to aid victims of the shooting at Columbine High School. *See generally* WILLIAM H. ERICKSON, THE REPORT OF GOVERNOR BILL OWENS’ COLUMBINE REVIEW COMMISSION (2001), available at http://www.schoolshooters.info/PL/Official_Reports_files/Columbine%20Governor%27s%20Commission%R#report.pdf.
- 17 *See* THE OKLAHOMA CITY COMMUNITY FOUNDATION DISASTER RELIEF FUND, BKD LLP, OKLAHOMA CITY DISASTER RELIEF FUND FORENSIC INVESTIGATION REPORT (2013), available at <http://www.occf.org/documents/OklahomaCityDisasterReliefFdreportissued-20-13.pdf>.
- 18 *See* The Hokie Spirit Memorial Fund, Virginia Tech Victim Assistance Program Final Protocol, August 15, 2007, available at <http://www.virginialawreview.org/inbrief/2007/08/27/protocol.pdf>; *see generally*, Kenneth R. Feinberg, *Compensating the Victims*

of Catastrophe: The Virginia Tech Victims Assistance Program, 93 VA. L. REV. IN BRIEF 181 (2007) (Feinberg served as administrator of this fund).

- 19 The Association of the United States Army, Fort Hood Chapter, established a victims' compensation fund after the base shootings, which collected \$1 million dollars. *See Fort Hood Tragedy: How You Can Help Right Now*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), http://www.huffingtonpost.com/2009/11/05/help-fort-hood-victims-do_n_347821.html; Associated Press, *Fort Hood Charity Tight-Lipped About \$1 Million Collected*, ARMY TIMES (Nov. 4, 2013, 10:19 AM), <http://www.armytimes.com/article/20131104/NEWS/311040008/Fort-Hood-charity-tight-lipped-about-1M-collected>.
- 20 The Tucson Together Fund was administered in coordination with Arizona's Victim Compensation Fund and a federal Anti-Terrorism Relief grant. *See generally* Kent Burbank, *A Training Outline: Tucson's Experience in Managing Multiple Victim Funds After the January 8th Tucson Tragedy*, https://www.ncjtc.org/CONF/Ovconf/AttMat/Understanding%20Victim%20Compensation_Burbank_Handout.pdf (last visited Nov. 4, 2014). The Tucson Together Fund was closed in 2013.
- 21 The Aurora Victim Relief Fund was established by the State of Colorado and the Community First Foundation. *See* Ben Brumfield, *Payments From Aurora Victim Relief Fund Finalized*, CNN (Nov. 18, 2012, 5:58 PM), <http://www.cnn.com/2012/11/17/us/colorado-aurora-compensation/index.html>.
- 22 The Newtown-Sandy Hook Community Foundation Fund was established by the United Way of Western Connecticut and the Newtown Savings Bank. *See* United Way of Western Connecticut, *Sandy Hook*, <http://www.uwwesternct.org/sandyhook> (last visited Nov. 4, 2014); *see also* Associated Press, *Plan Endorsed for Sandy Hook Community Foundation Distributions*, THE NEWTOWN BEE (July 17, 2013), <http://www.newtownbee.com/news/2013/07/17/plan-endorsed-sandy-hook-community-foundation-dist/150154> (last visited Nov. 4, 2014).
- 23 The One Fund Boston was established by various donors. *See Thank You*, ONE FUND BOSTON, <https://secure.onefundboston.org/pages/thank-you> (last visited Nov. 4, 2014).
- 24 *See* discussion *supra* notes 16-23.
- 25 *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 167 (E.D.N.Y. 2000) (approving settlement in class action against Swiss banks concerning bank accounts belonging to Holocaust victims); *see generally* MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S* (2009) (providing a historical description and evaluation of the litigation); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795 (2002) (describing the joint governmental, diplomatic, and private creation and implementation of the Holocaust era settlement and restitution fund).
- 26 *See Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 167.
- 27 *See* discussion *supra* notes 16-23 (describing numbers of claimants and size of the funds generated by charitable donations).
- 28 *See generally* Jeffrey Jackson, *After Deepwater Horizon*, 30 MISS. C. L. REV. 149 (2011); Alfred R. Light, *Designing the Gulf Coast Claims Facility in the Shadow of the Law: A Template from the Superfund §301(e) Report*, 40 ENVTL. L. REP. 11,121 (2010); Robert L. Rabin, *September 11 Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 464, 478-79 (2006); Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573 (2001); Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769 (2003); Byron G. Stier, *The Gulf Coast Claims Facility as a Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255, 271 (2011); Elizabeth M. Schneider, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003).
- 29 ONE FUND BOSTON, *supra* note 23.
- 30 *See, e.g.*, Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 220 (2005) (explaining that “efficiency was a major reason for the Fund, and because of both the manner in which it was tailored and the laudable, professional efforts of the Special Master and his staff, the efficiency goal was met. Claims were processed expeditiously; the 120-day timeline was strictly adhered to”); Tracy Hresko, *Restoration and*

Relief: Procedural Justice and the September 11th Victim Compensation Fund, 42 GONZ. L. REV. 95, 113-18 (2007) (asserting that “the [WTC] Fund embodied the principles of efficiency extremely well”).

31 Ackerman, *supra* note 30.

32 See, e.g., Ackerman, *supra* note 30, at 190-91 (“Even so, when measured against the likely (rather than theoretical) outcome of a conventional tort action, even absent the constraint ... the Fund looks like an excellent option for the overwhelming majority of claimants.”); Tracy A. Thomas, *Symposium: Remedies for Big Disasters: The BP Gulf Oil Spill and the Quest for Complete Justice*, 45 AKRON L. REV. 567, 573 (2012) (praising the GCCF for implementing ADR-type mechanisms to resolve collective harms efficiently).

33 See Colin McDonell, *The Gulf Coast Claims Facility and the Deepwater Horizon Litigation: Judicial Regulation of Private Compensation Schemes*, 64 STAN. L. REV. 765, 770-72 (2012) (describing the claims process for BP oil spill victims).

34 Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1836-37 (2002) (describing the WTC Fund as having an inescapable lineage as a “no-fault plan”).

35 See Ackerman, *supra* note 30, at 221 (noting how the WTC Fund contributed to the promotion of a strong civic society).

36 See *id.* at 201 (noting that time constraints that attended creation of the WTC Fund afforded claimants little opportunity for direct participation by potential beneficiaries in the making of the Fund legislation, but subsequent town meetings afforded participatory opportunities); see also *id.* at 208-09 (lack of democratic participation); George L. Priest, *The Problematic Structure of the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 527, 545 (2003).

37 Ackerman, *supra* note 30, at 211-12 (giving the WTC Fund a “C” grade for accountability of the special master and staff in being subject to executive or judicial oversight for their decisions in implementing the fund, noting the broad discretion vested in the special master).

38 Ackerman, *supra* note 30, at 214-15 (noting that WTC awards did not need to create or provide a written record of the deliberations that resulted in the determination); Stier, *supra* note 28, at 258 (lack of transparency on compensation issues); Mary M. Owens, Comment, *Settling the Unknown: Why Congress Should Adopt Reopener Liability Under OPA 90 to Compensate Victims of the Deepwater Horizon Oil Spill*, 57 LOY. L. REV. 589, 605-07 (2011) (GCCF's lack of transparency).

39 Ackerman, *supra* note 30, at 215 (“A number of commentators have suggested that the Fund's chief weakness stemmed from Congress' failure to articulate a consistent rationale for compensation. Whether the Fund was a corrective justice mechanism, based on the tort model, or a distributive justice mechanism, based on the social welfare model, was an issue that would trouble Feinberg as well as others.”); Ewencyk, *supra* note 4, at 270 (noting lack of due process in administration of the GCCF); Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 432 (2003); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 384 (2003).

40 Ackerman, *supra* note 30, at 219-20 (noting commentators who criticized the WTC Fund as a mere “shut up fund” that failed to comport with due process standards (citing authorities). In response to those critics, Ackerman suggests that “[p]erceptions of procedural justice are enhanced to the extent that disputants perceive (1) that they have had opportunity for voice, (2) that a third party considered their views, concerns, and evidence, (3) that they were treated in a dignified, respectful manner in a dignified procedure, and (4) that the decision-maker was even-handed and attempted to be fair. These elements were very much evident in the Fund's procedures, although as noted previously, issues of respect and fairness were matters very much in the eye of the beholder.”).

41 Ackerman, *supra* note 30, at 223-24 (concluding that potential beneficiaries of the WTC Fund lacked personal autonomy at the establishment of the fund, but were provided with opportunities to exercise personal autonomy subsequently).

42 See Kenneth R. Feinberg, *Unconventional Responses to Unique Catastrophes*, 45 AKRON L. REV. 575, 578-79 (2011-12) (discussing problems with determining eligibility criteria for both the GCCF and the WTC Fund); Gilles, *supra* note 2, at 433 (noting thin underlying documentation for how Feinberg determined eligibility criteria in the WTC Fund and the GCCF).

43 See Denise M. Pilie, *Satisfying Deepwater Horizon Oil Spill Claims: Will Ken Feinberg's Process Work?*, 58 LA. B.J. 176, 178-79 (2010) (noting states' official objections to award determinations).

- 44 See Deborah E. Greenspan & Matthew A. Neuburger, *Settle or Sue? The Use and Structure of Alternative Compensation Programs in the Mass Claims Context*, 17 ROGER WILLIAMS U.L. REV. 97, 128 (2012) (methodology for award determination in GCCF; reduction of awards for collateral source funds); Stephan Landsman, *A Chance To Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393, 412 (2003); Pilie, *supra* note 43, at 178 (concern of state officials that certain GCCF awards would be reduced by funds received from collateral sources).
- 45 See Ackerman, *supra* note 30, at 217; Hensler, *supra* note 39, at 434-35; Tyler & Thorisdottir, *supra* note 39, at 371.
- 46 See Lee Kreindler, *WTC Victims' Compensation: A Sad Disappointment*, N.Y. L.J., Jan. 4, 2002, at 3.
- 47 See *supra* notes 15-22.
- 48 See generally Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105 (2010) (discussing the problem of cognitive bias and how recognition of such bias should interact with future fund design).
- 49 See generally Hensler, *supra* note 39 (discussing unhappiness of WTC Fund claimants when asked to value the lives of their relatives, and made comparative evaluations of other victims).
- 50 See *supra* note 21.
- 51 See John G. Culhane, *What Does Justice Require for the Victims of Katrina and September 11?*, 10 DEPAUL J. HEALTH CARE L. 177, 177-79 (2007) (noting differential treatment of victims of the World Trade Center events and Hurricane Katrina in new Orleans, Louisiana; arguing in favor of a distributive theory of justice in such disasters); Robert L. Rabin & Stephen D. Sugarman, *The Case for Specially Compensating the Victims of Terrorist Acts: An Assessment*, 35 HOFSTRA L. REV. 901, 913 (2007): [During Hurricane Katrina], more than 1000 people were killed, and yet nothing special whatsoever has been provided to acknowledge the dignity of the victims, or to assure basic compensation to their survivors. Perhaps this is explained by the fact that people knew they lived in an area at risk for hurricanes Perhaps, the indifference to Katrina victims is realistically explained by the predominant racial and socioeconomic status of the victims, but this is too odious to accept as a matter of principle. Or, perhaps the indifference is explained by the absence of a perceived need to insulate a vital industry like the airlines from liability in the case of Katrina. In the end, we are left with the point that the 9/11 Fund emerged from a catastrophe that touched the collective conscience of the nation as no other since Pearl Harbor.
- 52 See Shannon L. Sole, Note, *BP's Compensation Fund: A Buoy for Both Claimants and BP*, 37 J. CORP. L. 245, 253 (2011) (GCCF administrator Feinberg noting that fraud was ever-present problem in claims administration).
- 53 See Ackerman, *supra* note 30, at 205-27.
- 54 See Ackerman, *supra* note 30, at 205-27
- 55 See generally Deborah R. Hensler, *Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 STAN. L. REV. 1429, 1430 (2005) (asking whether it might not be more efficient to create single administrative entity to deliver compensation; seeking to provoke broader debate about proper design of such facilities).
- 56 Special Master Ken Feinberg has also weighed in on the "fund design" debate, with his own suggestions that largely reflect the measures he took in creating and administering the WTC Victims' Compensation Fund, but prior to his appointment as the administrator of the GCCF. See generally Feinberg, *supra* note 10 (briefly discussing substantive and procedural issues that need to be addressed in creating and administering a compensation fund).
- 57 See Alan Morrison, *Lessons to Be Learned: The Victim Compensation Fund*, 53 DEPAUL L. REV. 821, 825 (2003).
- 58 See *id.*; Seiler, Taylor, & Fadden, *supra* note 15, at 3, (2004) (suggesting that a badly flawed compensation program was the result "because we never paused for a key philosophical debate").
- 59 See *infra* notes 93-103.
- 60 See Hensler, *supra* note 55, at 1432-33.

- 61 See generally Francis E. McGovern, *The What and the Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1375-79 (2005).
- 62 *Id.* at 1375.
- 63 Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 661-688 (2003).
- 64 *Id.*
- 65 Steenson & Saylor, *supra* note 16, at 528-30.
- 66 *Id.*
- 67 See Seiler, Taylor & Fadden, *supra* note 15, at 14-25.
- 68 Missteps in the BP Oil and GCCF scheme should encourage future compensation scheme designers to be more responsive to agency costs. See David F. Partlett and Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341, 1375 (2011). Restitutionary rules “play an indispensable role in the design of an effective compensation scheme... [L]iability rules, ... with restitutionary remedies, make up the substance of a well-designed scheme.” *Id.*
- 69 See Zimmerman, *supra* note 48, at 1105 (“Accordingly, ‘fund designers’ - judges, lawmakers, and special masters - should adjust settlement procedures to account for cognitive bias. I call this process “funding irrationality” identifying and, in some cases, capitalizing on people’s cognitive biases in large settlement funds by altering the context, timing, and sequence of their settlement options. Fund designers, however, should avoid reforms that unduly eliminate settlement options, or that impose excessive administrative costs. Rather, the benefits of any reform - preventing avoidable harm to irrational claimants - must outweigh the potential costs, including the value of client autonomy, the chance of error, and the burden on the courts and public administrators.”).
- 70 See generally Hresko, *supra* note 31.
- 71 Morrison, *supra* note 57, at 825.
- 72 See generally John K. Pierre, *Understanding the Stafford Act: Providing Disaster-Related Legal Assistance to Individual Victims of Hurricanes and Other Natural Disasters*, 54 LA. B.J. 86 (Aug./Sept. 2006) (discussing the Stafford Act, 42 U.S.C. §§ 5121, 5148, 5155, 5164, 5170, 5174 (1988)).
- 73 See generally Elly Del Prado Dietz, *The Texas Crime Victims’ Compensation Act*, 60 TEX. B.J. 320 (1997); Julie Goldscheid, *Crime Victim Compensation in a Post 9/11 World*, 79 TUL. L. REV. 167 (2004) (comparing remediation schemes for victims of crime to the WTC Victims’ Compensation Fund).
- 74 See Gilles, *supra* note 2, at 458 (noting GCCF’s public-private status and questioning the propriety of this arrangement in the mass tort context).
- 75 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) (comparing the World Trade Center events to the attack on Pearl Harbor on December 7, 1941).
- 76 See George W. Conk, *Will the Post 9/11 World Be a Post-Tort World*, 112 PENN. ST. L. REV. 175, 182 (2007) (noting that “the ‘September 11th Victim Compensation Fund of 2001’ was a legislative expression of the enormous outpouring of shock over the appalling attack and national sympathy for the victims of the suicide attackers. Potential tort action defendants had immediately sought to avoid liability for negligent operation of the security systems evaded by the hijackers, for defects in the design of the readily overcome cockpits, and for negligence in the management of the World Trade Center where evacuation plans and routes proved deeply flawed.”); see also Gilles, *supra* note 2, at 453-54 (describing difficulties of 9/11 disaster claimants in locating negligent or liable defendants as source for compensation).
- 77 Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2006).
- 78 *In re Sept. 11, 2001, Litig.*, No. 21 MC 97 (AKH), 2003 WL 22077747 (S.D.N.Y. Sept. 9, 2003); *Sept. 11 Suits May Proceed*, N.Y. Judge Rules, 21 No. 14 Andrews Aviation Litig. Rep. 3 (Sept. 16, 2003); see also Effron, *supra* note 8, at 204 (noting several defendants in the World Trade Center litigation coordinated before Judge Hellerstein in the Southern District of New York).

- 79 See Gilles, *supra* note 2, at 463 (“Further, in urging claimants to seek relief solely through the GCCF rather than litigate their claims through the civil justice system, the government may be signaling that the tort regime is deeply broken and that tort lawyers are not trustworthy. President Obama’s “top man,” Feinberg, has made dozens of statements encouraging Gulf residents to file claims with the GCCF rather than sue in court, and at times, he has sounded actively anti-lawyer.”).
- 80 See Jeff Bennett, *GM Compensation Fund to Offer Payments for Recall, Payouts Expected to Range from \$20,000 to Several Million*, WALL ST. J., June 30, 2014; Tom Higgins and Betty Liu, *GM Victim Program Sees “Cautious Optimism,” Feinberg Says*, BLOOMBERG BUSINESSWEEK, July 11, 2014, <http://www.bloomberg.com/news/2014-07-11/gm-victim-program-sees-cautious-optimism-feinberg-says.html>; Hilary Stout, *As Recalls Expend, G.M. Offers Plan for Victims of Faulty Ignition Switch*, N.Y. TIMES, June 20, 2014, at A1.
- 81 See Hensler, *supra* note 55, at 421-28 (discussing theories of deterrence, distributive, corrective, and procedural justice).
- 82 See Robert M. Ackerman, *Mitigating Disaster: A Communitarian Response*, 9 CARDOZO J. CONFLICT RESOL. 283, 289-90 (2008) (explaining that the tort system is a scheme of corrective justice, not distributive justice; the system transfers loss from the victim to the wrongdoer only if the latter is found to be at fault for an intentional tort or negligence); Culhane, *supra* note 51, at 182-83 (discussing theories of corrective justice in relation to natural and man-made disasters); Hensler, *supra* note 55, at 421-23. (explaining the theory of corrective justice).
- 83 See Ackerman, *supra* note 82, at 289-90; Culhane, *supra* note 51, at 185 (explaining that corrective justice only comes into play where a specific act or actor are identified).
- 84 See Hensler, *supra* note 55, at 423-27 (explaining theories of distributive justice).
- 85 See Culhane, *supra* note 51, at 181-83 (discussing theories of distributive justice in relation to natural and man-made disasters); *see generally* Ackerman, *supra* note 82 (same).
- 86 See Hensler, *supra* note 55, at 423-24.
- 87 *Id.*
- 88 *See generally* Ackerman, *supra* note 82.
- 89 *Id.*
- 90 See Culhane, *supra* note 51, at 243 (defining retributive justice as a theory of punishment; discussing theories of distributive and corrective justice in the context of the WTC Fund).
- 91 See Tyler & Thorisdottir, *supra* note 39, at 361 (2003) (discussing victims' need for holding perpetrators responsible, beyond desire for compensation (citing Robert J. Boeckmann, *An Alternative Conceptual Framework for Offense Evaluation: Implications for a Social Maintenance Model of Retributive Justice* (1996) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author))).
- 92 See, e.g., Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1015-20 (2007); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1794-95 (2009).
- 93 See, e.g., Sebok, *supra* note 92; Solomon, *supra* note 92.
- 94 See, e.g., Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL. J.L. & PUB. POL'Y 75, 79-80 (2007) (explaining that the WTC Fund was a complex hybrid of different approaches to compensation); Culhane, *supra* note 51, at 183 (noting that the WTC Victims' Compensation Fund ignored distributional justice issues and instead treated claimants as though they were successful tort plaintiffs, and that “the creation of the Fund showed Congressional failure to understand the differences between distributive and corrective justice”); John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027 (2003) (arguing that the WTC Fund confused two theories of justice); Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 720-22 (2003) (noting mixed distributive and corrective justice features of the WTC Fund).

- 95 See Ackerman, *supra* note 82, at 215-16 (“A number of commentators have suggested that the Fund’s chief weakness stemmed from Congress’ failure to articulate a consistent rationale for compensation.”); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 DUKE J. L. & CONTEMP. PROBS. 279, 285-86 (2004) (explaining rationality as a core value).
- 96 Kenneth R. Feinberg, *Response To Robert L. Rabin, September 11 Through The Prism Of Victim Compensation*, 106 COLUM. L. REV. 483 (2006). See Rabin, *September 11 Through The Prism of Victim Compensation*, *supra* note 28, at 784 (“So, the Fund steers a somewhat uncertain course between collective principles that would emphasize timely compensation and filling the gaps of unmet need, on the one hand, and individualized recovery that would pull in the direction of the tort model on the other.”).
- 97 See Feinberg, *supra* note 18, at 483 (noting that the Fund’s special master was required by statute to calculate economic loss, pain and suffering, and emotional distress in processing each individual application, a clear reference to basic tort law).
- 98 See *supra* notes 77-79.
- 99 See Gilles, *supra* note 2, at 464-65 (“In the rush to create a private, administrative response to the Gulf Coast oil spill, the federal government has helped to produce a hybrid approach to resolving mass claims (a private settlement fund with the government’s imprimatur and legitimacy) overseen by a hybrid-administrator (in the sense that Ken Feinberg is paid by BP but appears deeply responsive to the Obama Administration). All of this is an effort to avoid the tort system, but without any serious investigation into the criteria that might warrant concern about the infirmities of tort law.”).
- 100 See *id.* at 433-34 (describing initial early emergency payments to claimants).
- 101 See *id.* at 434-39 (describing three payment options for Phase Two claimants).
- 102 See *id.* at 425 (“The rush to create the GCCF may represent the apotheosis of this paradigm shift away from tort and toward a private, administrative solution with the trappings of public enforcement but none of its protections, transparency, or even its difficulties.”).
- 103 Feinberg, *supra* note 18, at 484. Commenting on the approach to compensation he implemented with the Virginia Tech Hokie Spirit Memorial Fund, Feinberg noted:
“Distancing itself far from the tort principles that guide access to our civil justice system, the Fund avoids the practical and philosophical problems associated with individual calculations. Instead, it calls for flat payments of \$180,000 to each of the thirty-two families who lost a loved one on April 16. There is no attempt to make value distinctions among the dead. And, although there are varying payments when it comes to the approximately thirty individuals who were physically injured on April 16, these payments are tied directly to the number of days of hospitalization required by the injured. Hospitalization becomes an objective measure of payment -- students and faculty hospitalized for more than three days but fewer than ten days receive a flat payment of \$40,000, plus free tuition; the two students hospitalized for more than ten days receive \$90,000 each and free tuition. The Fund Administrator has no discretion to vary this payment schedule.”
- 104 There are such examples of hybrid funds administered by Feinberg. See Lenny Bernstein, *Boston Marathon Fund Releases Compensation Formula for Bombing Victims*, WASH. POST, May 15, 2013; Michelle Hamilton, *Some Boston Bombing Victims Criticize One Fund*, RUNNER’S WORLD, Apr. 21, 2014; John Schwartz, *To Run Victim Fund, Boston Calls On the Specialist*, N.Y. TIMES, May 14, 2013, at A10.
- 105 See, e.g., Conk, *supra* note 76, at 196 (noting that the circumstances leading to the creation of the WTC Victims’ Compensation Fund suggested that imposition of retributive principle was less compelling).
- 106 Partlett & Weaver, *supra* note 68, at 1356-57 (noting that Judge Barbier of the Eastern District of Louisiana did not hold BP to be the sole responsible party for the Gulf oil spill related events; described Feinberg and the GCCF as performing a hybrid function confusing to claimants; and ordered restrictions on Feinberg and the operations of the GCCF).
- 107 See *supra* note 80.
- 108 See Bornstein & Poser, *supra* note 94, at 97 (“Thus, when the culpable party - whether a foreign terrorist, Mother Nature, or a criminal - cannot be compelled to compensate its victims, it appears that governmental and non-governmental plans to do so are here to stay.”).

- 109 *See id.* at 81-82 (outlining different theoretical approaches to thinking about distributive justice).
- 110 *Id.* at 97; Feinberg, *supra* note 10, at 177-88.
- 111 Bornstein & Poser, *supra* note 94, at 84 (asserting that distributive and procedural justice concepts are interrelated); *see also* Partlett & Weaver, *supra* note 68, at 1364-65 (discussing the need for a fund administrator to demonstrate trustworthiness, creating confidence in claimants that they will be treated fairly and equitably).
- 112 *See* Schwartz, *supra* note 104 (“Feinberg is working on funds more often as the cycle of tragedy and charity accelerates. In 1984, he was put in charge of the lawsuit settlement fund to compensate Vietnam veterans who had been exposed to the herbicide *Agent Orange*. From that time to the 2010 Gulf oil spill, he worked on five funds. He is currently managing or has recently completed five others, including one for the collapse of the stage at the Indiana State Fair and one for the young people molested by Jerry Sandusky when he was a Penn State coach.”).

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