The Dialectic of the Hurricane Katrina 9-11 Fund

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9/11-FUND

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INTRODUCTION

According to the American Heritage dictionary tragedy is defined as a disastrous event. America has had its fair share of tragedies in recent history: the terrorist attacks of 9/11, Columbine, the Virginia Tech shooting, the Sean Bell shooting, Hurricane Andrew, and Hurricane Katrina just to name a few. People typically associate tragedies with absurd violence, impoverishment, abjection, deep melancholiness and despair, negation, void, death. Many times this is all borne by unsuspecting victims of tragedies. Arguably just as tragic as the aforementioned events in American history, are occurrences where victims of tragedies are left to exist in their impoverishment, abjection, etc. without any recourse. An example of can be seen by the fact that Hurricane Katrina victims have had to subsist with meager assistance considering the amount of damage wreaked upon them. This point is particularly frustrating when victims of the terrorist attacks of 9/11—a tragedy comparable to Hurricane Katrina—have been substantially compensated through an effective and unique compensation fund. There is a feeling by many that there should be a 9/11 fund for Hurricane Katrina victims. But is such an endeavor feasible, is it practicable?

The purpose of this paper is to unravel the dialectic concerning whether there should be a 9/11 fund for Hurricane Katrina victims, and it is split into 4 parts. In the first part, I intend to
illustrate the 9/11 fund’s unique dynamic—a hybrid of both enterprise liability and corrective justice—and why such a fund was instituted for the victims of 9/11. Second, I will illustrate how Hurricane Katrina’s similarities to 9/11 might warrant a similar fund structure. Third, I will explain the implications of establishing such a fund for Hurricane Katrina victims. And lastly, I will elucidate whether this is a practicable option.

I

THE 9/11 VICTIM COMPENSATION FUND

The atrocities of the terrorist attacks of September 11, 2001 are well known and well documented. Considered to be the “worst assault on the American homeland in the 225-year history of the United States,” the attack created awe-inspiring levels of devastation, resulting in 2,741 deaths in New York, 189 deaths the Pentagon and 44 deaths in Pennsylvania. In response, Congress “established the September 11th Victim Compensation Fund of 2001” 10 days after September 11.

The Fund was designed by Special Master Feinberg, who has had considerable expertise “administering settlements.” Tables of presumptive awards, which utilized a set of factors including the “victim’s age, marital status, number of dependents, and income,” were to calculate victims’ economic loses. Noneconomic losses, in contrast, consisted of $250,000 caps for losses including “pain and suffering, loss of society and companionship, and loss of consortium.” The tables of presumed awards were not true caps, as claimants retained the option of arguing their case for why there should be an alteration of Feinberg’s calculated
figures. Both noneconomic and economic losses “were subject to collateral source offsets” which led to a total award reduction of 29%. “The top presumed economic loss was set at the 98th percentile of household income ($231,000), which actually significantly lowered many awards.” However, the total amount of claims paid out was still $7 billion.

A. THE 9/11 FUND WAS NOT INSTITUTED TO SAVE PRIVATE INDUSTRY

It has been suggested that this fund was instituted because airline “security lapses were . . . patent” particularly in regards to “inadequate cockpit security design and poor airport screening.” And that there was a need for governmental interference to deflect against the potentiality of a barrage of lawsuits, creating crippling levels of costs for the airline companies. But a more deep analysis finds that this suggestion is probably misplaced. In order for claimants to have viable tort claim, they must establish that these airlines had owed a duty to the victims of 9/11. But the New York-specific jurisprudence of *Palsgraf v. Long Island Railroad Co.* shows us that the airline companies only owe a duty to those victims within the zone of danger. This zone of danger would only include the victims on the plane and would most likely exclude the vast majority of victims on ground—which would mean that most of the victims of 9/11 would probably have no claim. And even the victims on the planes that may have a duty owed to them would most likely encounter unforseeability arguments from the airline companies that would undoubtedly affect the viability of their claims. This is perhaps best elucidated by the fact that
approximately 70 people have opted out of the Victim fund to seek compensation in a court of law and have been unsuccessful so far.  

**B. WHY THE 9/11 FUND WAS INSTITUTED**

So if the 9/11 fund was not really instituted to save airline companies from the impending doom of crippling tort litigation, then why was it instituted? Considering the socio-political climate at the time, with its aggrandized patriotism and anti-terrorist sentiment, the fund seems more accurately articulated as “a legislative expression of enormous outpouring of shock over the appalling attack and national sympathy for the victims of the suicide attackers.” There was a societal impulse to give everything within reasonable limits to help these unsuspecting victims. Also, the government, accused of failing its citizens, felt compelled to provide accessibility to compensation that would have not been available—due to the perceivable lack of viability of potential tort claims. It is this societal outpour and governmental sense of responsibility that has manifested the funds unique dynamic, a dynamic that encapsulates some of the ideological precepts of enterprise liability and corrective justice.

1. Enterprise Liability

The notion of enterprise liability reflects a view that “existing tort law is supremely ill-designed for delivering relief to accident victims.” Proponents of the Progressive movement criticized the malleable jurisprudential focus of tort law during the industrial revolution, as judges became conduits of economic promotion by protecting and cultivating the growth of corporations and big business. One of the ways judges effectuated this facet of laissez-faire was
through a plurality of “plaintiff-conduct defenses (contributory negligence, the fellow servant rule, and assumption of risk).”\textsuperscript{18} This emphasis on big business increased the difficulty for victims to achieve compensation from these corporations because of the judicially diminished means available to them. And even when these individuals may have had a viable claim after confronting these plaintiff-oriented defenses, victims were subjected to the uncertainty of the judicial process.\textsuperscript{19} Traditional tort law is not ideal in a compensatory sense.

There are numerous articulations regarding what exactly the philosophical specificity of enterprise liability is\textsuperscript{20} that will not be ventured into. However, in general the theory espouses a no-fault compensation system, offering need based relief, premised on the notion of getting funds to those who need them as quickly and efficiently as possible.\textsuperscript{21} Enterprise liability theorists argue that, since the industrial revolution “modern torts” exemplify this model:

“(1) Injuries resulting from predictable but unpreventable lapses accompanying large-scale, repetitive conduct; (2) claims by persons lacking the means to cover out-of-pocket costs and lost wages; and (3) defendants with the ability to spread losses through liability insurance or self-insurance.”\textsuperscript{22}

Enterprises such as “employers or product-manufacturers”—the defendants in this model—bear at least partial responsibility for injury that arises within the scope of their control. Many times, these enterprises oversee or are aware of activities or phenomenon which have a propensity for injury, and so accept this responsibility even though many times they are not directly responsible for the injury. These enterprises are in the best position to bear the costs of these injuries, since the multitude of potential victims the enterprise is accountable for may have limited or unpredictable access to compensation through traditional tort law. It seems sensible that
compensation limits such as economic caps, coverage only for lost wages, or the disclaiming or capping of any noneconomic damages would be instituted logistically to make such large scale compensation achievable as a practicality. Large scale loss is more readily compensable based on need, as opposed to individualized calculations based on loss. The enterprises then take these need-based costs they have incurred “and then [pass them] onto the consuming public” as a way of reallocating this loss.\textsuperscript{23} And so it seems that “central to the theory are the policies of victim compensation and loss spreading”\textsuperscript{24} and disbursing awards with a sense of “equal treatment, administrative efficiency, and [a] principle of payment based on need.”\textsuperscript{25}

2. Corrective Justice

Corrective justice “takes its cue from the commonplace theory that tort law seeks to restore the injured plaintiff to the status quo ante” and seeks to “restore an equilibrium that has been disturbed by the tortfeasor’s conduct.” More elaborately, the victim has unwillingly been subjected to the moral wrongness of an injury from a tortfeasor. This injury shifts the relationship between the two from what was once stasis to unbalance. The relationship is an unbalance in the sense that a negation or void that has been bestowed by the tortfeasor—that had not existed before his actions—is borne in totality by the victim, without the victim’s acquiescence, without his knowledge. This is an injustice. The tortfeasor therefore has a “normative connection” to the injury created, to the void borne by the victim, and this creates for the tortfeasor an obligatory moral responsibility to that victim.\textsuperscript{26} John C. P. Goldberg has developed a succinct articulation of what corrective justice ‘does’ at this point:
“[it] corrects the injustice . . . by ordering that the full value for the loss be transferred to the responsible party via a damage payment equal to the value of the loss.”

Corrective justice is concerned with the identification of who is responsible for the creation and bestowment of an injurious wrong upon another and mandates that the person(s) remedy it. If we are valuing injury—and therefore void—monetarily, a victim bearing the loss of an injury should be compensated equivalently to the amount of the loss, as this would correct—at least theoretically—the injustice monetarily, would restore a distorted equilibrium to its previous state. To best achieve this full compensation, there should be an individualized calculation of a set of personal factors that would reflect “compensation based on loss rather than need.”

And so there is a key ideological difference between enterprise liability and corrective injustice: enterprise liability seeks assured and efficient no-fault compensation for a plurality of victims, while corrective justice looks at the individual first, desiring tortfeasors remedy their victims’ injuries in entirety.

3. 9/11 Enterprise liability theory

A look at the 9/11 fund reveals a relational dynamic between these two tort philosophies. With regards to enterprise liability the government, in realizing the likely inefficacy of any potential tort claims brought against the airline industry, sought out a more reliable and predictable method of compensating the unfortunate victims. This methodology embraced the granting of awards without a showing of “negligence or any theory of liability.” The government “acted in compliance with its constitutional charge to ‘insure domestic tranquility’
and ‘provide for the common defense,’” and looks like an enterprise.\textsuperscript{31} As employers are responsible for its employers, the government is responsible for those within its scope of control or accountability—which in this case were the victims of the terrorist attack. And so the government bore a responsibility to compensate those injuries within its scope of control, especially considering that the victims would have limited access or probably no access at all to traditional tort compensation and would most likely reside in a realm of legal limbo. In order for such large scale compensation to be efficient and pragmatic, awards were granted with compensatory limits of presumptive tables, and caps on non-economic damages, to make it a practicable venture.

But since the government was not the tortfeasor, “the question of why the public should foot the bill for direct transfers of income of individuals moves to the foreground.”\textsuperscript{32} But under enterprise liability, the enterprise can reallocate the costs of compensating its victims, so as to diminish its impact. And since “the awards are paid out directly by the United States Treasury”\textsuperscript{33} the costs can be distributed to citizens’ taxes, effectively relocating the loss created by the terrorists.

4. 9/11 Corrective justice theory

Enterprise liability theory seems applicable to the 9/11 in regards to the no-fault-like compensation of the victims and the efficiency and predictability and pragmatic manner in which awards were granted. The outpouring of societal sympathy was not going to be satiated by the limited compensatory amounts normally dispersed by systems of enterprise liability, however. There was a desire to restore these unfortunate victims to at least quasi-wholeness, a desire to
restore the equilibrium distorted by the vile atrocity committed by the 9/11 terrorists—an injury that was not only borne by the victims, but by America and all Americans. Americans wanted to hold someone accountable, and yet, the actual tortfeasors could not be held accountable to remedy the injury that was caused. The government feeling partly responsible, and even condemned as being responsible by those who sought out justice, shouldered the moral responsibility of restoring the void. The desire for restoration influenced the fund by utilizing traditional tort principles: individualized factors such as age and income, which are used to give a better account of loss.

5. The 911 Fund is a Combination of these two theories

“The Fund is therefore an amalgam of two different systems for making payments to victims” reflective of two desires: a tempered governmental desire, knowing its responsibility to assist citizens in a practical and feasible manner, and societal desire wanting to ‘correct’ the totality of victims’ injuries. This marriage is not the happiest one: there will always be a relational tension between individualized compensation based on loss and generalized compensation based on efficiency and need. But “the choices of the Special Master were understandable and prudent.” And the fund achieved a functionality that was arguably optimal considering the circumstances. “In the end, the average award was $1,000,000—and that was completed far faster than tort litigation would have delivered that result.”

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II

A 9/11 FUND SHOULD BE INSTITUTED FOR HURRICANE KATRINA VICTIMS

When one sees the relatively recent and comparable tragedy of Hurricane Katrina, there is reflexive wonderment as to why there is no similar fund structure for those victims. It has been suggested that the “insolvency concerns that prompted the Fund are absent with respect to Hurricane Katrina…[as] no analogous private industry exists in the Hurricane Katrina scenario to provide similar pressures for a no-fault alternative to tort liability.”37 This suggestion seems to come from the assumption that the 9/11 fund existed as a liability shield to vulnerable airline companies, however, this assumption has been elucidated above as being unlikely. It is rightly posited that there are for the most part no private industry liability issues with Katrina, but this fact seems to diminish—not increase—the degree of separation between the two disasters. Because if the 9/11 fund was not an attempt to save private industry from victims’ claims but the opposite—an attempt to save victims from having no claims against private industry—we do not find private industry liability issues in either tragedy. And so the initial wonderment returns, why is there no similar fund structure for Hurricane Katrina?

As iterated before, the government in 9/11 bore responsibility for compensating those within its scope of control or accountability, because of the absence of tortfeasors and the perceivably insurmountable obstacles in tort law. Hurricane Katrina, being a natural disaster is also faced with the lack of a tortfeasor, but do Katrina victims not possess an avenue of legal recourse against responsible entities? To compensate Hurricane Katrina victims with a 9/11-like
fund, if they had viable legal claims, would be unnecessary and possibly even counter-productive. However, as the following two sections will elucidate, Katrina is even more similar to 9/11 in regards to the viability of legal claims of their victims. First, we will see that Hurricane Katrina victims indeed do have causes of action. But we shall see afterwards that, if and when Hurricane Katrina victims bring suits against those responsible, they will encounter “a series of high hurdles lie in their path to recover.”

A. HURRICANE KATRINA LIABILITY

“As the deadliest natural disaster in recent American History, Hurricane Katrina shined a spotlight on the government’s inability to protect its citizens from Mother Nature’s wrath.” Scrutiny of the anticipatory and reactionary responses to this natural disaster by “federal, state, and local governmental entities” reveals negligence on a multiplicity of levels, and suggests the liability of these entities. The 3 major areas in which negligence is evident are the levee system, evacuation measures, and relief.

1. Levees

Even considering the destructive magnitude of Hurricane Katrina, it did not help that the majority of the New Orleans area is below sea level—which creates a particular vulnerability to the damage of hurricanes and floods. Levees were designed by the United States Army Corps of Engineers to prevent against flooding after Hurricane Betsy in 1965. One would assume that taking into account the considerable vulnerability of New Orleans, the Corps would have designed and constructed levees with the ability to withstand the most deadly of hurricanes and
floods. However, even considering New Orleans’ vulnerability, levees were not designed or constructed to withstand hurricanes of Hurricane Katrina’s severity. The Corps designed levees to withstand Category 3 hurricanes, while Hurricane Katrina arrived on shore a Category 4 with winds in excess of 140 miles and hour.

The Corps was not only to blame for the levee failures. Once constructed, the maintenance was left to “a number of local administrative bodies.” Negligent maintenance by these administrative bodies impeded the levees’ functionality as “trees were allowed to grow at the base of the floodwalls and holes were left unpatched.”

It is not surprising then, considering the notable construction and maintenance failures of the levee system, that Hurricane Katrina “engulfed more than eight percent of the city to depths of excess of twenty-five feet.” Had there been better maintenance and better foresight, there would have been fewer breaches, and therefore much less resultant damage and lives lost.

2. Evacuation

With regards to natural disasters, especially those comparable to Hurricane Katrina, the implementation of effective evacuation measures is crucial. Swift and reasoned decisions are necessary to alleviate dangers; lives in precarious positions will be dependent upon these decisions. With all this in mind, the evacuation measures executed during Hurricane Katrina were considerably ineffective. The Governor of Louisiana Kathleen Blano and the Mayor of New Orleans C. Ray Nagin did not give a mandatory evacuation until 19 hours before landfall, even though they had warnings of Katrina’s impending arrival up to 56 hours before.
no definitive reasons for this hesitancy. However, officials have attributed the hesitancy to “reservations about creating necessary traffic congestion” and reservations concerning potential “lost revenues incurred due to a premature evacuation of customers.” This hesitancy saw the failure to evacuate “more than 70,000 individuals.” Perhaps even more peculiar than the reason for the evacuation hesitancy, is the fact that officials chose to make the Superdome a shelter as a form of evacuation substitute for those who were not evacuated. As a result of these ineffectual evacuation measures, “hundreds of people drowned in their homes and in the streets as floodwaters rose above roof lines.”

3. Relief

Only 20 percent of victims drowned due to the ineffectually constructed and maintained levees and poorly executed methods of evacuation. A much larger percentage died because of lack of necessities like water, shelter and food. The Department of Homeland Security “[shoulders] the primary responsibility for managing the national response to domestic catastrophic disasters.” If a disaster is declared to be an “incident of national significance” by the Department of Homeland Security, the “federal government’s most thorough response” will be launched. DHS Secretary Michael Certooff did not declare Katrina an incident of national significance until two days after it ravaged New Orleans even though he had sufficient information to declare it before it made landfall. This delayed federal response was much too late for a large number of people.
B. HURRICANE KATRINA IMMUNITY

The plurality of negligent actions and judgments thus elaborated harbor implications that the need of Hurricane Katrina victims for a fund similar to 9/11 may be unnecessary—the government seems to be accountable here. However there are numerous immunities—sovereign immunity, Flood Control Act, act of God defense, and the Stafford Act—which pose for victims of Hurricane Katrina, the problem of minimal accessibility to legal compensation that faced 9/11 victims.

1. Sovereign Immunity

“The doctrine of sovereign immunity provides a jurisdictional bar to suits brought against the government.”56 The enactment of the Federal Tort claims Act in 1949 allowed the United States government to waive its immunity to tort claims “under certain circumstances.”57 This waiver came along with “what is commonly known as the discretionary function exception” in which government actions or decisions of a discretionary nature will retain immunity.58 The difficultly delineable notion of governmental discretion created a “quagmire of amorphous distinctions” stemming from the first case that involved the exception.59 Courts trudged through this quagmire, attempting to “clarify the exception’s scope,”60 until ultimately a two prong test was provided by the Supreme Court in Berkovitz v. United States that developed guidelines by which courts could better assess government actions:
First a court must consider if the governmental action in question involved an element of judgment or choice on the art of a government actor. The exception cannot apply if a relevant federal statute, policy, or regulation outlines specific course of action for the actor to follow. Second, if the challenged conduct does include an element of judgment, that judgment must be of the type of the discretionary function exception was designed to shield.\textsuperscript{61}

The first prong seeks to protect discretionary or judgmental governmental actions from liability, excluding those actions which result from following a directive of some sort. The reasoning here is that there is little if any discretion or judgment involved in following certain directives that mandate specific courses of actions or methods of execution. The second prong, further limits the scope of the first, and has become to be understood to protect those “[judgments] . . . based on considerations of public policy.”\textsuperscript{62} Both prongs obliviously show evidence of a desire for government being able to make important and swift decisions without the threat of being liable. The decisions made by the government in anticipation of, and in reaction to, Hurricane Katrina were the result of judgment involving considerations of public policy, albeit problematic judgment, but judgment nonetheless. It appears that these decisions would satisfy both prongs, so Hurricane Katrina claimants would have a difficult task arguing otherwise.

2. Flood Control Act

In addition to the imposing obstacle of sovereign immunity claimants must also deal with the Flood Control Act of 1928 which “prevents recovery where liability would otherwise the imposed on the federal government . . . for negligence linked to federal flood control projects.”\textsuperscript{63}
3. Act of God Defense

Claimants are also faced with act of God defense, which protects against governmental liability if an act of nature occurs “with such significant force that it [constitutes] an intervening force or superseding cause, thus breaking the chain of causation linking the original wrongdoer to the injury.” In general there are two requirements for the bringing up of this defense: “[1] the unforeseeability [of the event] by reasonable human intelligence, and [2] the absence of a human causing the alleged damage.”

4. Stafford Relief Act

Lastly, claimants may have to deal with The Stafford Act, which was enacted to “increase the ability” of the federal government to assist state and local governments in providing assistance in the aftermath of major disasters. It was specifically intended to increase effective response “and to expedite long-range recovery operations.” Similarly to the Federal Tort Claims act, the Stafford Act contains within it a discretionary function exception. And similarly to the Federal Tort Claims act, the beginnings of the Stafford Act’s discretionary function developed through an adjudicative quagmire that ended with the adoption of the “two part test promulgated in Berkovitz.”
III
THE IMPLICATIONS OF CREATING A 9/11 FUND FOR HURRICANE KATRINA VICTIMS

Looking at the number of immunities providing the government protection from Hurricane Katrina claimants, it appears that victims will not have viable claims against the government for the most part. As illustrated before, under enterprise liability, enterprises bear an obligation to those within their scope of responsibility, regardless of the level of their involvement in victims’ injuries. And this is exemplified by the government during 9/11, who donned an obligation to compensate victims, because of the domestic tranquility and common defense constitutional charges. But does the government have such an obligatory moral responsibility towards the victims of Hurricane Katrina, a natural disaster? “The government did not engage in any affirmative action that directly caused damages to its citizens; [yet] it failed to protect and aid Americans in the face of Mother Nature’s actions.”67 Is this enough to bestow obligation on the government? The following passage may provide an answer to the question:

Every war this nation has ever fought reflects a duty to protect Americans. Every governmental response to every major fire, earthquake, flood, or hurricane in this nations’ history recognizes a duty to aid on local, state, and federal levels. When the Corps constructed the levees in New Orleans, it did so in order to protect citizens. Governmental rescue operations following Katrina, albeit inadequate, were actions taken in fulfillment of an obligation to aid citizens. By looking at our country’s history, it is clear that the government has always, and will hopefully always continue to, act in a manner that requires it to protect and aid its citizens in the face of danger.68 (A44)
Just as the government’s actions during war times has demonstrated its obligations towards its citizens, the government’s actions during times of natural disaster have also demonstrated this obligation to those within its scope of accountability—in this case, Hurricane Katrina victims. And as we have seen under enterprise liability, the enterprise, if under an obligation bears the responsibility of effectuating compensation for those within its scope of accountability. It is in the best position to bear the loss, as claimants are in many times in precarious positions when utilizing the tools available to them under traditional tort law. The government during 9/11, under obligation to its victims, bore this responsibility to compensate them, knowing the quasi-futility of bringing claims against the airline companies. Similarly, the government during Hurricane Katrina, is under an obligation towards its victims, and must have known the likelihood of success of any claims brought against it. At this point an argument can be made for the governmental compensation of Hurricane Katrina victims, especially considering that the government during Hurricane Katrina had more of a role in victims’ injuries than during 9/11. So the 9/11 fund should be expanded to include Hurricane Katrina victims then? No, or at least not just yet.

At this point we have only established that a governmental obligation to compensate Hurricane Katrina victims exists. The 9/11 fund is a unique combination of the precepts of enterprise liability and corrective justice; any argument for the expansion of the 9/11 fund has to be cognizant of the fund’s dynamic. The argument can be made to expand the 9/11 fund to include Hurricane Katrina victims, but it cannot be ignored that the two tragedies are not the same. Attempting to do so will certainly have important ramifications and implications. The following passages illustrate two reasons why undertaking such endeavor may not be possible:
First unlike the World Trade Center attacks of September 11th, a hurricane striking the Gulf Coast region was not unprecedented . . . [and] there is the question of the precedent a Hurricane Katrina victim compensation fund would set of future natural disasters. Continuing a VCF model in the future would increase costs of disaster relief and disregard the traditional principle that liability does not attend to “acts of God.” On the other hand, if the Hurricane Katrina Fund was a one-time-only response, we risk violating the principle of similar treatment should the government respond inadequately to some future disaster.”

[Secondly,] although Hurricane Katrina’s magnitude distinguished it from average storms witness during hurricane season, it did not engender the reaction that characterized the days and weeks immediately following September 11th. There was certainly an outpouring of support to Hurricane Katrina victims, but there was not the sense, as existed following September 11th, that all Americans had suffered losses. This might be traced in part to the relative unforeseeability of the September 11th attacks and in part to the distinction between man-made disasters and natural disasters.”

The first passage, in its articulations about precedent and unprecedented behavior is speaking about frequency. An unprecedented event is not frequent at all, but rare, extremely rare. The classification of 9/11 as an unprecedented event was important to the viability of the 9/11 fund. This may need further elaboration. It is easy to focus on the fact that, crudely put, the 9/11 fund provided societal pacification and governmental catharsis with the substantial compensation of victims that did not have access to legal compensation. But it is crucial however, not to miss the point that the fund was practicable because of 9/11’s classification as an unprecedented act of war—because of the rarity of acts of war committed on American soil. The government is aware that the granting of awards in excess of conventional amounts typically granted under enterprise liability—as was done through the 9/11 fund—could be sustained only if the frequency of dispensation of the fund was low. And the government is aware that even if by creating this
fund it has incurred a duty to similarly compensate victims of comparable acts of war, it knows that the frequency of such events—at least on American soil—is low and sustainable. If the 9/11 fund were to suddenly include any intentional act that harms a mass of people, the Treasury obviously would not be able to sustain the type of awards granted through the 9/11 fund.

And so this rarity/frequency dynamic has implications for creating a fund similar to the 9/11 fund for Hurricane Katrina victims. If creating the 9/11 fund for victims of 9/11 would also include victims of comparable acts of war, creating a similar fund for victims of Hurricane Katrina victims would also include victims of hurricanes at least comparable to Hurricane Katrina. With this new classification, one can see that the frequency of the fund’s dispensation would be comparatively much higher than it was for the unprecedented act of war of 9/11. Simply to expand the 9/11 fund dynamic to Hurricane Katrina and hurricanes like it would seriously threaten the fund’s longevity.

The second passage refers to sentiment. The tragedy of Hurricane Katrina did not evoke the level of sympathetic societal sentiment for victims as did the terrorist attacks of 9/11, which was not satisfied by typical fund awards, and desired a better restoration of victims. Whether the difference in sentiment is justified is a matter beyond the scope of this paper. For whether one believes that there should be a justifiable difference between society’s reactions to the two tragedies, it is difficult to disagree with the fact that America as a society did react differently, harboring a more ambivalent sentiment towards Hurricane Katrina. And so the impulse to aggrandize awards in order to restore Hurricane Katrina victims would be lower as well.

The frequency and sentiment argument pose serious issues for creating a 9/11-like fund for Hurricane Katrina victims. Simply replicating the 9/11 fund’s dynamic for victims of
Hurricane Katrina—and possibly for victims of comparable hurricanes—would ultimately be impracticable, as the much increased dispensation and a more ambivalent public sentiment would not allow for fund awards like 9/11’s. The fund could not sustain the increased dispensation of such large awards for hurricanes, and public sentiment would not desire such large awards to be granted for hurricanes. So it would seem arguably more ideal to find a dynamic that is more appropriate for Hurricane Katrina and the implications it would create for natural disasters.

A. INCOMMENSURABILITY

Creating a fund that combines precepts of enterprise liability and corrective justice—as the 9/11 fund has done—encompasses a problem articulated by Benjamin C. Zipursky as “incommensurability.” Zipursky framed the problem of incommensurability with the question, “if tort law involves basic rights to be made whole and damages reform involves the costliness of the system, how can they ever be rationally combined?” He elaborates on the more practical problems the notion of incommensurability poses in the following passages:

A less philosophically pristine and a more urgent type of incommensurability problem is whether a domain of secondary rights should be diminished in strength and magnitude in order to reduce both the costs of those who engage in the activities themselves or make use of the services or products in question, and the amount of litigation. The incommensurability problem is less philosophically pristine for a number of reasons. First, the trade off is also not about compensating tort plaintiffs for their injuries or about the level of their compensation. Rather, the trade-off is about a range of plaintiffs in a system receiving less so that society as a whole incurs few costs. The problem is at least in part interpersonal and society based, not wholly intrapersonal.
Second the problem is not about a trade-off in quite the same way. It is about whether we ought to move to a somewhat revised system. In the individual case, one wonders how to trade apples against oranges, pain and suffering against money. But, because tort law involves more than an individual case concerning an individual transaction or exchange, we cannot view this problem as one good in exchange for another. Instead, this problem requires a practical decision about whether to alter the system so that it is less costly in certain respects, even though that may involve sacrificing compensation for some and a de facto diminished plaintiffs’ power in certain cases. Because the evaluation of tort reform proposals fall within the many social and political decision in our system that do not even purport to be about trade-offs for individual persons, the paradigm of incommensurability does not describe the nature of the value problem well. Moreover, the trade-off does not necessarily involve sacrificing only a good. If remedies are reduced, a right-holder’s domain of rights is weakened. Therefore, the ultimate question is whether the diminution in power and rights is something that ought to be traded-off for lower costs in the system.\textsuperscript{73} (IV)(7)

The incommensurability between rights to be made whole and costliness of the system comes down to quasi-diametrically opposed notions of compensation: corrective justice with its individualistic focus and enterprise liability with its systemic focus. These two notions almost stand at both ends of the spectrum of compensation philosophy, and seem to act in exclusionary violence against each other. As we have seen, corrective justice seeks the full and unhindered compensation of the victim—the complete restoration of a void. This is the objective of corrective justice, and seems only truly achievable at the expense of the efficiency espoused by enterprise liability. Meanwhile, enterprise liability seeks the efficient and assured compensation of the totality of victims within a system. This is the objective of enterprise liability; it seeks the viability of the whole which seems only truly achievable at the expense of the individual. If both compensation theories are combined—as in the 9/11 fund—the individual cannot be made whole, and the system cannot be purely efficient. If the individual is made whole, corrective justice exists, if the system is purely efficient, enterprise liability exists—there is no hybrid in
these instances. In a true hybridization of these theories neither objective is achieved. If a hybrid fund sustains costs which then increase to unsustainable amounts—more victims coming within the scope of the system, for instance—and need to be reduced, the compensation of the individual must be reduced accordingly to appease the system. This shifts the hybrid fund’s place the on the spectrum between corrective justice and enterprise liability more towards the enterprise liability pole—toward the efficiency and cost-reduction needed to make the system viable. Ultimately, the individual is sacrificed for the whole.

This issue of incommensurability is not ignorable if one desires to create a fund like the 9/11 fund for victims of Hurricane Katrina. As we have seen, the 9/11 fund is a hybridization of principles espoused by both corrective justice and enterprise liability, and exists somewhere on the spectrum between these two theories. It is difficult to ascertain where exactly it lies on in this compensation spectrum, but we know that the fund functionally encompasses both. And as we have seen establishing a replication of the 9/11 fund for Hurricane Katrina victims would be problematic since the costs would become too high for the system of compensation to sustain itself. An important decision now has to be made. Because the viability of the system is threatened, costs will have to be reduced, shifting this new Hurricane Katrina fund on the spectrum towards enterprise liability. What this does though, is diminish the victim’s right to compensation, so that the system that compensates a much larger group of individuals can survive. Is this the right decision to make?
IV

THE ANSWER

The theoretical discussion so far may have been convoluted. So before we answer this question it may be best to provide an illustration and subsequent explication of the dynamic between enterprise liability and corrective justice in the 9/11 fund and the proposed Hurricane Katrina fund by the following table:

Table 1.1 The Dynamic Between Enterprise Liability and Corrective Justice in hybrid-funds.

<table>
<thead>
<tr>
<th>FREQUENCY OF DISPENSATION</th>
<th>SOCIETY’S MORAL SENTIMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>9-11 Sentiment</td>
</tr>
<tr>
<td>Rare</td>
<td></td>
</tr>
<tr>
<td>Moderately Rare</td>
<td></td>
</tr>
<tr>
<td>Moderately Frequent</td>
<td></td>
</tr>
<tr>
<td>Frequent</td>
<td></td>
</tr>
</tbody>
</table>

Table 1.1 needs some explanation. On the y axis is frequency of award dispensation, ranging from rare to frequent. On the x axis is societal moral sentiment. The degrees of sentiment, being more difficultly articulable than ranges of frequency, range from the sentiment evoked during 9/11 (being the most extreme level of societal sentiment in recent history), to the sentiment during Hurricane Katrina (an involved sentiment yet more tempered reaction), to ambivalence (for the most part no reactionary attachment to the injury caused).

Movement towards the lower right of the table is movement towards pure enterprise liability theory. As frequency of award dispensation increases—due to increased number of
injuries—so too does the need for efficiency and cost reduction, to maintain the viability of the system. Also, the sense of societal sympathy decreases, and as it decreases, so too does the influence of corrective justice, calling for an aggrandized award amounts to make victims whole.

Movement toward the upper left is moment towards pure corrective justice. As the societal sympathy increases, so too does the desire to correct an injustice borne by a victim, the need to restore a victim’s injury to status quo. And such desires become more achievable, since the frequency of dispensation decreases along with the need for enterprise liability’s efficiency and cost-reduction.

Now we must ascertain where the 9/11 fund’s position on the table is. Its position on the x axis is easy enough—societal sentiment was highly sympathetic, desiring to restore victims to status quo ante. Determining the fund’s position on the y axis is more difficult, but the most accurate classification of the fund’s frequency of dispensation is moderately rare. One might find quizzical the classification of 9/11 fund’s frequency of dispensation as moderately rare and not rare—seeing as though 9/11 was an unprecedented event. However, frequency of dispensation can be ascertained at a specific spatiotemporal location or within a span of locations—the y axis measures the frequency of dispensation of awards not the frequency of the event that occurs. More elaborately, a rare event may have large number of claimants, while frequent events may have a relatively low number of claimants, but the rate of award dispensation for both scenarios may be approximate. So even though the terrorist attacks of 9/11 is one event, and one unprecedented event, with such large number of victims, the rate of award dispensation cannot be in the upper quadrant as this would be too close to corrective justice.
Because the number of victims was so large, awards had to be tempered by presumptive tables and caps in order to make the system viable. If comparable acts of war are later committed on American soil, they would increase the frequency of dispensation, moving the 9/11 fund’s placement on the table closer toward increased levels of dispensation frequency, and ultimately closer toward enterprise liability. And so the need for cost reduction and efficiency increases as well, thus resulting in the diminishing the individual’s right compensation in the process to save the system.

Creating a 9/11 fund for Hurricane Katrina victims would pose the same problems. As we did with the 9/11 fund, we must first determine where this Hurricane Katrina fund would exist on the table. Society’s sentiment after Hurricane Katrina was not the same as 9/11, but was a more tempered type of sentiment. And so the sense of correcting the injustice Hurricane Katrina victims have borne is not as great as it was during 9/11, yet it does exist. In regards to frequency of dispensation, a Hurricane Katrina fund might have approximately the same frequency of dispensation as the 9/11 fund, if the fund is only applicable to the one-time event of Hurricane Katrina. However establishing a Katrina fund would most likely incorporate victims of comparable hurricanes in the future, and this increases the frequency of dispensation from moderately rare to moderately frequent and possibly even frequent depending upon nature. This means that an established Hurricane Katrina fund would be faced with the decisions of reducing costs to make the system viable and efficient. And here we again faced with same issue of whether this is the right decision to make. Normally, this question of rights vs. cost—i.e. which is more valuable, should the individual’s right to compensation be diminished, or how can you value either objectively or against each other, etc.—would be difficult to answer, maybe
impossible to answer. However, the rights vs. cost problem is less pronounced when it concerns victims like those of 9/11 and Hurricane Katrina, who have no legitimate access to compensation through traditional tort compensation. This is because in these instances, the individual is faced with partial compensation with this hybrid system or no compensation for the most part.

If a fund like the 9/11 fund were established for Hurricane Katrina victims, the ultimate decision as to its make-up would be made by the government. But how can it make such decisions, when a large number of factors can affect a fund’s placement on Table 1.1 (i.e. whether the cause of the injury was intentional acts or unintentional, foreseeable or unforeseeable, criminal or not, an act of god or an act of war, the amount of damage, the amount of claimants, etc.)? How can it make such decisions when doing so is ultimately so arbitrary and subjective, about a subject so nebulous? Well, certainly variability would be key—the ability to change a fund’s structure if it is not a one-time event. Also, as the courts did with the similarly nebulous and arbitrary discretionary function example, the government may have to trudge through the quagmire and hopefully it will arrive at a more reliable end, like the two-prong Berkovitz test developed by the Supreme Court.
CONCLUSION

The 9/11 was a brilliant amalgam of corrective justice and enterprise liability that left a vast majority of victims much better compensated that they would have been otherwise. Lack of a 9/11-type fund for Hurricane Katrina victims has caused many confusion, frustration, and vexation. But the truth is that the government can not sustain having a fund that operates like the 9/11 fund for Hurricane Katrina. Establishing a Hurricane Katrina fund would undoubtedly open the door to a hurricane fund, and hurricanes are much too frequent for such high-level awards. In order for a Hurricane Katrina fund to be viable, costs would have to be reduced by decreasing individuals’ awards—this is unavoidable. How these awards would be reduced is going to be a decision for people with expertise in such matters, such as Special Master Feinberg. Many individuals may be put off at the prospect of such cost reduction, as this ultimately means a diminishment of individualized compensation. But for many victims who have had little if any compensation, such a fund may make a great difference.

4 Hresko, Supra n. 2, at 100.
5 Diller, Supra n. 3, at 740.
6 Id.
7 Conk, supra n. 1, at 184.
8 Id. at 186.
9 Id. at 184.
10 Id.
11 Id. at 176.
13 Conk, supra n.1 at 181.
14 Id. at 191.
15 Id. at 182.
16 Diller, supra n. 3, at 719.
18 Id. at 538.
19 Id. at 537.
22 Goldberg, supra n. 17 at 539.
23 Id. at 540.
24 Nolan, supra n. 21.
25 Diller, supra n. 3, at 728.
26 Goldberg, supra n. 17 at 570.
27 Id.
28 Diller, supra n. 3, at 727.
29 Goldberg, supra n. 17 at 570.
30 Diller, supra n. 3, at 720.
32 Diller, supra n. 3, at 722.
33 Id.
34 Id. at 726
35 Conk, supra n.1 at 186.
36 Id.
38 Anada, supra n. 31 at 305.
39 Id. at 282.
40 Id. at 313.
41 Id. at 280.
42 Id. at 285.
43 Id. at 287.
44 Id. at 289.
45 Id. at 329.
46 Id. at 282.
47 Id. at 288.
48 Id. at 344.
49 Id. at 282.
50 Id. at 293-294.
51 Id. at 295.
52 Id. at 297.
53 Id. at 298.
54 Id. at 301.
55 Id.
56 Smith, Supra n. 37, at 703.
57 Anada, Supra n. 31 at 306.
58 Id. at 307.
59 Smith, Supra n. 37, at 709.
60 Id.
61 Id.
62 Anada, Supra n. 31 at 308.
63 Id.
64 Id. at 309.
65 Smith, Supra n. 37, at 714.
66 Id. at 719.
67 Anada, Supra n. 31 at 317.
68 Id. at 322.
69 Smith, Supra n. 37, at 728-729.
70 Id. at 728.
71 Benjamin C. Zipursky, Coming Down to Earth: Why Rights-Based Theories of Tort can and Must Address Cost-Based Proposals for Damages Reform, 55 DePaul L. Rev. 469, 478 (2006).
72 Id. at 479.
73 Id. at 479-480.