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# UNCONVENTIONAL RESPONSES TO UNIQUE CATASTROPHES: TAILORING THE LAW TO MEET THE CHALLENGES

*Kenneth R. Feinberg\**

I want to thank the Dean at the outset. He says I know a lot about opera and baseball. I guess it was obstruction when he slid into third base. I mean, it doesn't require any mens rea, so it is a strict liability offense. So if the runner is impeded, that's the end of it I guess.

Everybody seemed to think it was the right call, but I don't know who will win the World Series. But I want to thank the Dean for those kind words. I want to thank Roe Green for her philanthropy, for so much that she does to validate the memory of her father, and I hope that in some small way my work and what I do exemplifies what Ben stood for as a judge and as a man.

And I am honored actually to be here today to deliver the endowed Ben Green lecture. I didn't realize until the Dean introduced me that I am laboring under some real stress since it is the last lecture of the Ben Green endowed series.

So it better be good, and I better be on my "A" game today during the next half hour to forty minutes. So I will do my best to vindicate the judge and you and the law school.

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Now, when the Dean introduced me just now, he neglected to mention my most recent book: *Who Gets What? Fair Compensation in Times of National Tragedy*, Public Affairs Press, 2012.<sup>1</sup> Now, you may have trouble finding this book these days on Amazon or a local bookstore if there was one. You may have trouble finding it.

Don't worry. My personal supply of that book is virtually inexhaustible.

So if anybody has trouble finding the book, let the Dean know, and we will manage to do something about it.

Now, he mentioned my work: 9/11, BP oil spill, the pay czar. The pay czar; that was an interesting assignment. That was the job I had determining the salary, the compensation of certain corporate officials who received top money, taxpayer money, so that the company would stay afloat: AIG, GM, Bank of America, Citigroup. They called me the pay czar.

Now, that's a term—I mean, my grandmother would be very confused by “pay czar.” She wouldn't know what to make of that title. But it was an interesting assignment.

Now, in all of these assignments, a few basic principles are important when we talk about unconventional responses to unique tragedy, tailoring the law to fit the challenge, to meet the challenge.

We are in a law school, so let's get a few basic principles out of the way so that everybody is on the same page when we talk about some of my work.

You will note that the 9/11 tragedy resulted in Congress passing a law eleven days after 9/11, and the law simply said anybody who would rather take compensation from a fund funded entirely by the taxpayer—not airline money, not World Trade Center money, not Massport, Port Authority money—this is public money, 100 percent of it, anybody who would rather accept a check from the United States people, taxpayers, rather than go to court, if you don't want to sue the airlines and the World Trade Center and all these other private entities, whether they are responsible for the tragedy or not—that's beside the point—if you don't want to sue, you can come into a very generous program funded entirely by the taxpayer.<sup>2</sup> You don't have to. You can go file a lawsuit in New York City, but if you would rather take the money, you can do so. In return, you waive your right to sue.<sup>3</sup> You can't sue anybody. You give up your right,

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1. KENNETH R. FEINBERG, *WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL* (2012).
  2. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (codified as amended at 49 U.S.C. § 40101 note (2001)).
  3. *Id.* at 239–40.

and in return, you get a check, and Feinberg will design and administer that program.

Well, in over thirty-three months, we distributed about \$7 billion to 5,300 people who either lost loved ones or were physically injured.<sup>4</sup> The average award was a tax-free \$2 million for a death claim, \$400,000 for a physical injury claim, and in return, you waive your right—only 94 people decided to sue rather than come into the fund.<sup>5</sup>

The fund was a tremendous success. It did exactly what Congress wanted. It diverted 97 percent of all of the families that lost a loved one out of the tort system into a special program,<sup>6</sup> and that's how it worked.

Only ninety-four people decided to sue, and they all settled their cases five years later. There was never a trial over who was negligent or responsible for 9/11. That was it. It worked.

But notice in that case you waive your right to sue if you take the taxpayer's money. Now, BP, the same thing. After the BP oil spill, BP went into the White House to see President Obama, came out and said "anybody who voluntarily wants to take money from a special fund not funded by the taxpayer, funded by BP, we will front \$20 billion." \$20 billion.<sup>7</sup>

And if that's not enough, we will give more. And in return, we will pay all eligible claims arising out of the oil spill in the Gulf of Mexico.<sup>8</sup> You don't have to. You can litigate if you want. And we agree with the President, Ken Feinberg will design and administer that program.

Well, in 16 months, we paid out about \$6.5 billion and received 220,000 releases from businesses and individuals promising not to sue; it was a trade.<sup>9</sup> The program worked. Now, I must say BP, we

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4. See Susanna Kim, *9/11 Families, Except One, Receive over \$7 Billion*, ABC NEWS (Sept. 12, 2011), <http://abcnews.go.com/Business/september-11-victims-family-seeks-justice/story?id=14364251>.

5. *Id.*

6. *See id.*

7. *Compensating the People and Communities Affected*, BP, <http://preprod-www-navitas.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response/compensating-the-people-and-communities-affected.html> (last visited Dec. 30, 2014).

8. *Id.*

9. Joe Nocera, Op-Ed., *Justice, Louisiana Style*, N.Y. TIMES (July 8, 2013), <http://www.nytimes.com/2013/07/09/opinion/nocera-justice-louisiana-style.html>.

received 1.2 million claims from 50 states.<sup>10</sup> I got about 250 claims from Ohio. I didn't know the oil got this far to Ohio.

We got about 250 claims against the BP Oil Company from Ohio. Most of them weren't eligible. Some were, but for the most part, they weren't, but we got claims from Alaska, 400 from Massachusetts, and 35 foreign companies.

You build and announce a program like this, they will come. They will come in force, and they did. Most of the claims were denied, but 220,000 people waived their right to sue and took the money paid for by BP tax-free.

Now, those programs—9/11, BP—are very, very different from the other programs we read about in the newspaper. The Boston Marathon: after the Boston Marathon bombing, \$60 million were privately donated by over 100,000 individuals and business donors from all over the country.<sup>11</sup>

After Newtown, Connecticut, the Sandy Hook shootings of the little first graders, \$11.5 million;<sup>12</sup> Virginia Tech, the deranged student gunman who killed 32 people, \$7 million;<sup>13</sup> Aurora, Colorado, the movie shootings, *The Dark Knight*, where the gunman comes in and sprays the movie theater patrons, \$5 million.<sup>14</sup>

All of these programs are private donations. People watch on CNN, and they send in money. The money that is distributed in those programs is not part of the tort system. It is not an alternative to the tort system. You can take that money if you want. It is a gift. You can turn around and hire a lawyer and sue if you want to do that.

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10. See Sept. 11, *BP Oil Spill Fund-Master Kenneth Feinberg: Compensation Fills Need in Wake of Mass Catastrophes*, UNIV. OF VA. (Apr. 15, 2014), [http://www.law.virginia.edu/html/news/2014\\_spr/feinberg\\_jefferson\\_medal.htm](http://www.law.virginia.edu/html/news/2014_spr/feinberg_jefferson_medal.htm).
  11. Hannah Fingerhut, *One Fund Administrator Ken Feinberg Praises Boston's Generosity at BBJ Event*, BOSTON BUS. J., <http://www.bizjournals.com/boston/news/2013/07/31/feinberg-praises-boston-at-bbj-event.html?page=all> (last updated Aug. 4, 2013).
  12. See Pat Eaton-Robb, AP, *Newtown-Sandy Hook Community Foundation to Begin Distribution to Victims' Families*, HUFFINGTON POST (June 3, 2013), [http://www.huffingtonpost.com/2013/06/03/newtown-fund-distribution\\_n\\_3379873.html](http://www.huffingtonpost.com/2013/06/03/newtown-fund-distribution_n_3379873.html).
  13. Lawrence Hincker, *Hokie Spirit Memorial Fund Has Many Uses; Virginia Tech Endows 32 Memorial Scholarships*, VA. TECH NEWS (June 7, 2007), <http://www.vtnews.vt.edu/articles/2007/06/2007-332.html>.
  14. 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/> (stating the Aurora Victim Relief Fund contains "\$5,338,360.32 collected from donors . . .").

In Virginia Tech, a few families did. A few families did sue, and they won against Virginia Tech.<sup>15</sup> But make sure you keep them separate. The 9/11 fund and the BP oil spill, those programs are alternatives to the tort system, to lawsuits. If you take that money, you waive your right to sue.

All these other programs that you read about like Boston Marathon, that's a gift. That's found money. You don't owe any obligation other than to accept it and do what you want with it. And it has nothing to do with the tort system.

Now, why do I make that distinction? In some respects, the distinction is irrelevant. When it comes time to trying to decide who gets what, whether it is a tort alternative or a gift, you run into the same compensation problems, but there are very important distinctions, you see.

I doubt very much that you will ever again see a 9/11 Victim Compensation Fund. I mean, I think it was the right thing to do at the time, and I think it served a very valuable public service, and it demonstrated our nation's empathy for the victims of the horrible terrorist attacks. I am constantly defending that program as sound public policy. It worked. Don't ever do it again. Don't ever do that program again.

The idea that the American people will pay compensation to certain innocent victims while everybody else spends for themselves—I have great difficulty with that.

You should have read some of the e-mails I received when I was administering the 9/11 fund.

“Dear Mr. Feinberg: My son died in Oklahoma City. Where is my check?”

“Dear Mr. Feinberg: I don't get it. My daughter died in the basement of the World Trade Center in the original 1993 attacks committed by the very same people. Why aren't I eligible?”

And it didn't stop with terrorism, you see.

“Dear Mr. Feinberg: Explain something to me. Last year my wife saved three little girls from drowning in the Mississippi River, and then she drowned a heroine. Where is my check?”

You better be careful when you carve out for very generous public compensation only these people. Everybody else—sorry. Fend for yourself. It is not sound public policy in a society, which frowns on

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15. See Jenna Johnson, *Report: Virginia Tech Massacre Cost \$48.2 Million*, WASH. POST (Apr. 13, 2012, 9:19 AM), [http://www.washingtonpost.com/blogs/campus-overload/post/report-virginia-tech-massacre-cost-482-million/2012/04/13/gIQAdDmxET\\_blog.html](http://www.washingtonpost.com/blogs/campus-overload/post/report-virginia-tech-massacre-cost-482-million/2012/04/13/gIQAdDmxET_blog.html) (“The state government and university negotiated a \$11.1 million settlement with the families of many of the victims.”).

elitism, believes in equal protection of the law, is very egalitarian, and yet, only these people get tax-free compensation.

I don't think it is sound public policy, but I think it was the right thing to do as a one-off program, as a very unconventional response to a unique catastrophe in America, rivaled only by the American Civil War, Pearl Harbor, and the assassination of President Kennedy. That's it. And I think the program was the right thing to do. It's just that it is a precedent for nothing.

There was no 9/11 fund for Katrina. A thousand people died. There was not even the slightest interest in Congress having a 9/11 fund for Katrina or Sandy victims or tornadoes or hurricanes or terrorist attacks. There was no 9/11 fund.

I don't think you will ever see the BP oil spill fund again. Now, why do I say that? It is not taxpayer. Yeah, it is not, but you show me a company that is going to front \$20 billion before there is even a trial and say we will pay all legitimate claims, we want to get the money out, we will pay the claims, and we will worry later about liability, about collecting contribution from co-defendants like Halliburton or Transocean. Right now we want to pay the claims.

I don't think you are going to see that again. You haven't seen it before or since. I mean, \$20 billion, that's not chump change. We paid \$6.5 billion in sixteen months with a claims program. Then they paid \$2 billion more for cleanup and state government claims.<sup>16</sup> The whole thing came to about over \$10 billion, and now they are still litigating down there with others after the fund is long gone.<sup>17</sup>

The program worked exactly as the President wanted; I think it is a wonderful idea. I just don't think you will see it again. Maybe you will. Maybe there will be a Fortune 500 oil company. But even in BP—again—I get these e-mails:

“Mr. Feinberg: I have been waiting twenty-two years to get my claim paid by Exxon Valdez. How come I can't come into a BP fund and get my oil money? I have been waiting and waiting and waiting. I still haven't been paid for Alaska.”

“Sorry. This is just for the BP victims.”

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16. Jonathan Stempel, Reuters, *Proposes Gulf Spill Accord Terms, Trial Delay*, CHICAGO TRIBUNE (Apr. 18, 2012), [http://articles.chicagotribune.com/2012-04-18/news/sns-rt-bpoilspill-update-2l2e8f6re-20120418\\_1\\_bp-cost-drilling-partners-deepwater-horizon](http://articles.chicagotribune.com/2012-04-18/news/sns-rt-bpoilspill-update-2l2e8f6re-20120418_1_bp-cost-drilling-partners-deepwater-horizon) (“Prior to the settlement, lawyer Kenneth Feinberg had paid out \$6.1 billion to spill victims who submitted claims under BP's \$20 billion Gulf Coast Claims Facility.”).
17. See Bloomberg, *BP Spill Settlement Approval Upheld As Payment Fight Continues*, DAILY NEWS (Jan. 11, 2014), <http://www.nydailynews.com/news/national/bp-settlement-agreement-upheld-article-1.1576653>.

So you see there are some very real public policy issues. Now, forget tragedy for a minute or at least that type of physical injury and death. The pay czar.

You will never see that program again. Never. Congress bailed out those seven companies so they wouldn't go belly up: AIG in the meltdown in 2009, Bank of America, Citigroup, GM, GMAC, Chrysler, and Chrysler Financial.

Congress says, here is taxpayer money. You will stay. You are too big to fail, and then a week later they pass a law and the law says populist revenge. Populist revenge. We bailed out all of those big Wall Street companies. We now own you. We loaned you taxpayer money to survive. Well, we loaned you, so now, the taxpayer is a creditor, and therefore we are going to set your pay.

All of you corporate officials of these seven companies and the Treasury Department will decide what you are going to make. Secretary of the Treasury Tim Geithner called me up:

"I am not doing this. You do it."

"Okay. I'll do it."

So I set their pay. The government shouldn't be setting private corporate pay. It shouldn't. Every company is different. Everybody has a different culture. But populist revenge—Congress. We bailed them out. We want to get a pound of flesh.

So until they pay back every nickel with interest, we, the Treasury, delegating to Ken Feinberg, will determine what the CEO, the CFO, and the key corporate officials are going to make. Well, that was sort of a sideshow. It is only 175 people I am doing this with.

First of all, Bank of America and Citigroup, I did it once for 2009. They borrowed money to pay back the taxpayer. They didn't want me setting their pay, so they borrowed money and got out. Which is okay. That was the law, and then for everybody else, the other five companies, then four companies. I set their pay, like I determined compensation in BP and 9/11. And now the pay czar.

You would meet these people, these corporate officials, and you would say to them by law, I have got to set your pay.

And then they would say, "Well, okay. But I just want you to know I am essential. I am an irreplaceable official. If you don't pay me and I leave, the company is going to go belly up, and the taxpayers' money is lost. I am irreplaceable."

Well, first, you say to each of them in a nice way, the graveyards are filled with irreplaceable people, right?

Then they say, if you don't give me what I want, I am going to go not to a competitor across the street; I am going to get a big job in China. Everybody is going to China to work. Everybody said they are going to China.

Well, we set their pay. That was very, very difficult to set corporate pay, and I will tell you why. People think when you pick up

a newspaper that corporate pay is all about material gain. I want this money because I want a third car or a fourth. I want a summer home on Long Island. I want to send my kids to private school at Andover and St. Paul and Exeter. That would be easy.

If it was all about material gain, it would be easy, but that's not the mindset of these people. I learned a lesson. The mindset of these corporate officials is money as a barometer of self-worth. Wow, that gets very emotional you see.

"Well, sir, what about your wonderful family as a barometer of self-worth?"

"No."

"What about your work in the community as a barometer of self-worth?"

"Nope. Money. When I look in the mirror in the morning, I say to myself—have I achieved success?"

Dollars. And it gets very emotional. When you cut somebody's pay by 50 percent and their cash by 90 percent, you are going to get into some real arguments about self-worth—very emotional.

Just like 9/11, I gave any 9/11 victim or family that lost a loved one the opportunity to come to see me one-on-one, privately, confidentially, out of the public eye.

Nine hundred people came to see me one by one over thirty-three months. The most chilling thing in my life that I ever experienced. Nobody—emotional, you see—nobody comes to talk to you about money. That's not why people come to meet me and get a check. That's not why they come.

It is much more sophisticated than that. People come one-on-one to meet the person who is cutting the check to validate the memory of a lost loved one. That's why they come.

"Mr. Feinberg, thank you for this hearing. I lost my wife at the World Trade Center. We were married for twenty-five years, and I would like to start this hearing by showing you a video of our marriage twenty-five years ago."

"Well, Mr. Jones, you don't have to show that video. It won't have any bearing on compensation, and—"

"I want you to see what those murderers did to my angel."

"Okay. Go ahead."

And there's the video twenty-five years ago of their marriage. "See, see how beautiful she looked that day?"

"Mr. Feinberg, I lost my son. He was at the Pentagon. He died. He was twenty-six years old, but I would like to show you a video of his Bar Mitzvah when he was thirteen. There it is. Look how great he looked. I want you to see it."

No one comes to talk about money. They want to validate a memory, and woe be unto you if you in any way question that memory or question their thinking when they turn to you and say,

“You are denigrating the memory of my lost loved one. You don’t even know.”

I will tell you a story. Here is a law school; we are at law school here today. 9/11, a lady comes to see me. She says, “Mr. Feinberg, I lost my daughter. She was a second-year associate at a law firm in the World Trade Center, and she died that day.”

“Now, you are going to calculate compensation for her, but when you calculate your compensation, don’t you dare use her second-year law associate salary because she was going to be a partner in that firm six years later. And, in fact, in the eighth year, she was going to have her name on the letterhead of the firm. They were going to change the name of the firm.”

This is a mother talking to me.

“Well, Mrs. Jones, you know, these law associates, they don’t usually stay at a law firm that long, and they certainly don’t usually change the name of the firm—”

“Did you ever meet my daughter?”

“No, I didn’t.”

“Well, don’t tell me what I know. You never even met my daughter. She was going to be—Jones & Jones was going to become Jones, Jones, & Smith in eight years. So when you calculate the compensation, make sure it is as a named partner. That is the economic loss quotient of the calculation because she was going to be a partner.”

People say to me. Does it help to have a law degree? A law degree in this type of business is a wash; better a divinity degree or a degree in psychiatry.

Steve Hoffman everyday—he has a divinity degree and a degree in psychiatry in his work. Believe me, he knows, he gets it. That’s what happens. You are dealing very emotionally.

Now, that was a problem in 9/11. A twenty-four-year-old woman comes to see me, a hearing.

“Mr. Feinberg I lost my husband. He was a fireman at the World Trade Center. He left me with my two children, six and four.” Now, you are going to give me \$2.3 million tax-free? I want it in thirty days.”

“Well, thirty days, why? I have to run this through the hoops here with the Treasury Department and verification to get you the money. It may take more than thirty days.”

“No. Thirty days.”

“Why? Why?”

“I will tell you why. I have terminal cancer. I have ten weeks to live. My husband was going to survive me, and take care of our two children. Now they are going to be orphans. I have got to get that money, Mr. Feinberg, and I have to set up a trust fund as fast as I can.”

Well, we accelerated the money. Eight weeks later we went to her funeral. You can't make these stories up. You can't make them up. That's the tough part of what I do, you see. It is the empathy, the interaction with humans—not about numbers and law and proximate cause and duty and negligence; it is about helping individuals and what it means.

Now, let me give you one more example, and then we will move on, but I want you to get one more because this is a pretty sophisticated crowd. What would you do with this one in 9/11?

A lady comes to see me, sobbing. I thought she was going to collapse in my office.

"Mr. Feinberg, I lost my husband. He was a fireman. He left me with our three kids, six, four, and two. He was Mr. Mom. Every day that he wasn't at the firehouse, he was home teaching the six-year-old how to play baseball, teaching the four-year-old how to read, reading a bedtime story to the two-year-old. And what a cook. He cooked all our meals. He was the gardener around the house. He was Mr. Mom. Mr. Feinberg, the only reason I haven't jumped out a window and joined him is our three children, but my life is over. It is empty. Without Mr. Mom, I will never be the same. I am finished."

Sobbing, she leaves. The next day I get a telephone call from a lawyer in Queens.

"Mr. Feinberg, did you meet yesterday with a woman?"

"Yeah."

"And the three kids, six, four, and two with Mr. Mom?"

"Yeah."

"Now, look, Mr. Feinberg, you have got a tough job. I don't envy you, but I got to tell you, she doesn't know that Mr. Mom has two other kids by his girlfriend in Queens, five and three, and I am telling you this because I represent the girlfriend. And when you cut your check from the 9/11 fund, there are not three surviving children; there are five surviving children, but I am sure you will do the right thing."

Click, he hangs up.

Do you tell her? Do you tell her? That's what keeps you up at 3:00 a.m. Do you tell her, "Mrs. Jones, there is this other family here"?

Well, we didn't tell her. We cut one check to her as the surviving spouse with the three kids, and then unbeknownst to her, we cut a second check to the girlfriend as guardian of the two kids, paternity and everything. That was it. That's what we did. I don't know if that was right. We were divided. The staff, we were going back and forth on that. Those are the problems you see. Unconventional responses to tragedy lead to unconventional challenges.

BP, 1.2 million claims. The problem at BP was volume and no proof. People are filing claims with no proof.<sup>18</sup>

“Mr. Feinberg, I lost \$100,000. We couldn’t fish.”

“Okay. Show me that you lost \$100,000.”

“Oh, we do things with a handshake down here.”

“Well, I am not paying \$100,000 on a handshake. What have you got? You got tax returns?”

“No.”

“Okay. What have you got? Got a checkbook?”

“Yeah, here.”

“Corporate profit and loss statements?”

“Here.”

“Okay. Trip tickets that you went fishing?”

“Here.”

“Okay. I am going to cut you a check from the Gulf Coast Claims Facility, BP, for \$100,000, and you will get it in about two weeks. Now, with it, you are going to get a 1099 from the IRS.”

He looks at me, he says, “I waive it.”

You can’t waive a 1099.

“I am going to send you the 1099.”

“You are going to send me a 1099? I am withdrawing my claim.”

“Why? You mean you are going to give up \$100,000 because you are going to get—”

“Rip it up. If you are sending me a 1099.”

Probably never paid taxes in his life. People say, you know, that must be the way things are down in the Gulf.

I mean, I got to tell you, you get a little bit cynical in this business. I am not sure it is anywhere else when it comes to money and a tax return and corroboration.

So the problem we had with BP was proof. People didn’t have things to back up their claims. The other problem is this. In all of these programs, you talk about a common problem in every compensation fund, whether it is an alternative to tort or it is a gift. There are two problems in every one of these cases I have done, every one.

First, how much money do you pay somebody for death tragedy injury? In absolute dollars, what’s the right number?

Boston Marathon—terrible, terrible injuries. Limbs, amputations.

“Mr. Jones, I am here to tell you that you are going to get \$2 million tax-free for your double amputation.”

“Two million? Well, for a double amputation, you are giving me \$2 million? I got two answers for that: One, keep the money. Give me

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18. See Mark Schleifstein, *BP Reserves Right to Appeal Ruling Allowing Business Claims Without Proof of Oil Spill Losses*, NOLA.COM (Dec. 26, 2013, 9:08 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/12/bp\\_reserves\\_right\\_to\\_appeal\\_ru.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/12/bp_reserves_right_to_appeal_ru.html).

my legs back, Mr. Feinberg. How is that? Why don't you give me my legs back? You can keep the money. I want my legs back."

"Mr. Jones, I don't have that power. I wish I did."

"\$2 million? Put a zero next to it. I have no limbs. \$20 million maybe—maybe."

So problem number one, in all of these cases, what is a life worth? What are injuries worth? It is Solomon, it is Solomonic. I don't think there is any formula. But that's only the first problem, you see.

In every one of these cases, you have a second problem. Everybody counts other people's money. It is not just what am I getting.

"Why are you denigrating the memory of my wife who died, when the next door neighbor you are giving an extra million? You never even met my wife. What do you have against her?"

"Mr. Feinberg, I work in a New Orleans restaurant, and I lost all sorts of tips and wages because of the oil spill. Now, you are sending me a check for \$12,000, but you are sending my next-door neighbor, who is a waiter in the very same restaurant, \$20,000. What did I say wrong? What do you have against me?"

"Mr. Jones, you filed a tax return that said you lost \$12,000. He filed a tax return that proves he lost \$20,000. You know, you can't have it both ways. You filed a different income statement than he did."

"That's the reason? We both had the exact same job. So what if one fudges? I mean, come on. What do you got against me?"

That's America. That's the problem you run into. It is not only about absolute dollars, but everybody counts other people's money, and that makes it even tougher, you see.

So after you get through all of the vagaries, the differences, BP versus 9/11 versus the marathon versus Newtown, Connecticut—at the end of the day you have the same checklist of questions, right? And you all know every time I do one of these, here are the issues. Here is the summary. Here is the agenda.

One, how much money do you have? That drives a lot of us.

Do you have \$20 billion? \$60 million or \$5 million? Makes a difference. You only have so much to distribute. That drives everything. How much money do you have?

Two, who is eligible? In 9/11, Congress said under no conditions can you pay people suffering only mental trauma. Said it right in the statute. There has got to be a physical injury.

In Virginia Tech, we paid mental trauma only for those students who were in the classroom where the carnage took place. One student came to me and said, "Mr. Feinberg, my friend to my left got his head blown off. My friend to my right got her head blown off. As the murderer pointed the gun, click, Russian roulette. No more bullets. While he was reloading, I jumped out a window. I can't get out of bed now. No injury, but I am shaking."

We paid mental trauma for students in the classroom, but we didn't pay mental trauma for students across the street watching all of this unfold at a dorm. There wasn't enough money. Who is eligible? What's the methodology for calculating damages, you see?

Now, that's a law school system. If you are teaching torts, then you know BP and 9/11 are alternatives to the tort system. If you are trying to keep people out of the tort system, you have to pay them according to the tort system, economic loss and noneconomic loss. Everybody gets a different amount of money.

In these other funds that aren't tied to the tort system, no release, you can do what you want with the money. You can have a much more egalitarian formula. Anybody who lost a limb gets X. Anybody who lost a loved one gets Y. Anybody who lost one limb gets Z. Anybody in the hospital, how long were you in the hospital?

If you were in the hospital over a month, you got X. If you were there three weeks, you got Y. If you are there two weeks, you got Z. You do it that way. Much easier, much less divisive among people, very emotional people. But that's the methodology you have got to decide.

Next issue: What do you have to prove to get your money?

Next, due process. Are you going to give everybody a hearing? I did in 9/11. We did in Virginia Tech and Boston Marathon, but not BP. A million and 200,000 claims, who can have hearings? Much more difficult without hearings, due process.

And then, finally, the consideration for getting a check as we talked about. BP and 9/11, you give up your right to sue. All these other funds you don't. Now, that's how it works.

Now, a few concluding points, and then time for questions:

What I do is not rocket science. People in this room can do exactly what I do. You don't need a degree in astrophysics, and you don't need a law degree. You need a degree in human nature. You need a degree in understanding people. You need a degree in empathy, in listening, in trying to relate and be prepared to make mistakes. Every time I do one of these I do something wrong.

"Mr. Feinberg, I am seventy-one years old. I lost my son at the Pentagon. He died. He escaped when the plane hit, but he thought that his sister was trapped, so he went back into the Pentagon to look for her. She had escaped through a side door. She was fine. He died inside looking for her. Mr. Feinberg, I am seventy-one, and I am a parent burying a son. It is not supposed to be that way."

I looked at him. I said to him, "Mr. Jones, terrible, terrible. I know how you feel."

Big mistake. Guy looks at me, tears.

"Mr. Feinberg, you got a tough job. I got some advice for you. Don't ever tell people like me that you know how I feel. You have no idea how I feel. And some friendly advice, don't say that to people."

I will never say that again. I will never say that again.

Then I was down in the Gulf of Mexico. Anybody here from Louisiana? Plaquemines Parish, back far from New Orleans? There are 300 fishermen in a gymnasium listening to me explain how they can get paid. So the president of the parish introduces me as a model public servant.

He said, "Mr. Feinberg is down here. He is a model public servant."

So I get up, and I start my spiel, and I say, "I want to thank the President, and I am trying to be a model in getting money out. So I am trying to be a model."

Some fisherman grabs a mike from the back row, 300 people. He says, "Mr. Feinberg, stop, stop."

"Mr. Feinberg, we have read all about you and your model. You really are. You know what a model is Feinberg? A small replica of the real thing."

That was the end of that meeting. It got out of hand after that. You have to be careful. You got to be on your guard, and when you take one of these assignments, brace yourself. Brace yourself because it is harrowing, and if you think that anything you have done before can get you to reinforce what you are going to hear and expect, it doesn't work that way.

But if you are asked to do this by President Bush, 9/11; President Obama, BP; Mayor Menino, Boston Marathon; the President of Virginia Tech; Governor Hickenlooper of Colorado, the Dark Knight shootings; you do it. I do it because you would do it. We are all American citizens. If a policymaker decides to call on you and asks you to do something, you do it. You do it. And that's the way it is. You don't go looking for these things, and that's the last point to make here today.

I don't decide whether or not it is a good idea to compensate people. Policymakers make that decision. The American people often make that decision. I get involved because a decision has already been made to set up a compensation program, and now somebody has got to design it, implement it, and administer it. I don't call the President. The President calls me and the mayor and the governor of Massachusetts. If they called you, you would do it.

That's part of being an American citizen, and I think that gets us back, finally, to Ben Green. Ben Green was appointed to the federal bench by a fair-haired son of Massachusetts, President Kennedy. I grew up as a teenager when president Kennedy was elected. Government and government service and the public interest and helping your fellow Americans meant an altogether different thing at that time, you see. President Kennedy instilled not only in Ben Green, but in thousands and thousands of Americans, the urge to serve, to give something back to the community. You don't see it enough today.

So when I am asked to deliver the Ben Green lecture, I would like to think that maybe, at least, the distinguished jurist Ben Green and myself, maybe we do have something in common. We owe a debt of gratitude to President Kennedy and what he stood for on this next month, the 50th anniversary of his death.

So there we are, we still have about ten minutes. The powers that be at Case Western, they run a tight ship, I will tell you, and we have left about ten minutes for questions, and then there will be a reception. So who has questions?

AUDIENCE MEMBER: I don't know if you heard about this case right here in Cleveland in May, these three girls that were kidnapped and held captive for ten years or whatever. So a couple weeks later I noticed all around the city on these billboards and a website with this fund that was started for these people.

In fact, I work for a big law firm here in town, and they gave us a free dress down day if we contributed to this charity. So when you look closer at the thing in really fine print, they had these girls' names, Michelle, Gina, Amanda, and then at the very bottom it said profits or money go to agencies to help these kinds of cases. So, talk about a money grab—what do you think of something like that?

MR. FEINBERG: I don't know anything about it. The Attorney General of the State of Ohio ought to look into it and see if it is a legitimate fund or not. Is it a 501(c)(3)? Did the IRS give them a 501(c)(3) status?

I don't know anything about it, but it happens all the time. It happens all the time. You know, help Johnny, help Mary. I don't know if it is legit.

AUDIENCE MEMBER: No, I understand.

MR. FEINBERG: But the State AG ought to be looking at that.

AUDIENCE MEMBER: Mr. Feinberg, you mentioned that—or one of your key points is that you think that these funds will almost never exist again.

MR. FEINBERG: 9/11.

AUDIENCE MEMBER: Well, right, something like that, and in the public level, I understand that—September 11th was such an unusual and outside event that perhaps we are dealing with this fund. You also indicated BP, something like that may almost never happen again, but with BP, we are finding—and maybe this is the picayune nature of the legal system, that there are now, as I am sure you are aware, many torts claims that I am sure your fund denied, and now they are going back and suing.

And BP is sort of banging its head against a wall and saying, “I thought we were protected from this. What happened?”

So going with that, seeing as BP doesn’t want to litigate any of these, do you think that maybe perhaps there would be more funds in a mass tort situation like that, or if not, why not in a corporate setting, whether it is BP or anything like that?

MR. FEINBERG: First of all, when you say will there be no more BP funds, there are two reasons I doubt it: I think it would be a great idea by the way. I think mass aggregate of litigation, the approach that we have taken in BP or 9/11 is a better way for mass aggregate litigation.

There are two problems with it: One, maybe you can find a company like BP that has \$20 billion to put up. That’s a lot of money to put upfront without any finding of liability. So I don’t think you will see that.

Secondly, I must say, BP seems to have buyer’s remorse. They put up this money, the program worked. I got out, done. Now, there are all sorts of new lawsuits being filed. BP claims they are ineligible, they are bogus. They shouldn’t be paid, and now they are fighting that.

So you have to question whether the next time will BP front \$20 billion or will it say Exxon Valdez is the way to go. They have only paid in 22 years \$6 billion or \$4 billion.<sup>19</sup> We have already paid \$6 and-a-half billion and are still in court. So I mean, there are all sorts of challenges to these approaches.

AUDIENCE MEMBER: You started by saying that these programs, a couple of them were alternatives to the tort system. I handle plaintiffs’ class actions, and it is a very poor way of determining these disputes. It is like making victim compensation depend on the outcome of a contact sport.

But what would be an alternative, aside from one of these unusual events, with an act of Congress to resolving these disputes?

MR. FEINBERG: I think what you do is the alternative if it is done right. I don’t know about you, but I am very troubled at the trends in the law over the last twenty years that undercut efforts in aggregate litigation. I think the Rule 23 class action or various state classes, ways to aggregate, overseen by a neutral judge, I think that’s far preferable under the rule of law to setting up special programs just for you, just for you, just for you, and nobody else.

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19. *See Exxon Valdez Case Still Twisting Through Courts*, PUGET SOUND BUS. J. (Nov. 5, 2000), <http://www.bizjournals.com/seattle/stories/2000/11/06/newscolumn3.html?t=printable>.

So my solution to all of this remains, I am a big believer in the benefits of the efficiency and speed benefits of real class action law that isn't hampered by efforts to undercut, deny certification, and deny claims—that's the problem.

And the reason that the 9/11 fund and I think the BP fund is attractive to people is that it is an alternative to attempting to aggregate in a much more efficient quick way rather than you banging your head against the wall trying to get the courts and the judiciary and the defendant to agree that an aggregative certification makes sense. That's the way I would go if I had my druthers as a policymaker.

AUDIENCE MEMBER: It is my understanding that in addition to the—and this is the first I knew that the federal government put up money for the 9/11 victims fund—weren't there a lot of other public donations, and what happened with those monies?

MR. FEINBERG: There were a lot of other private charitable donations, about another \$2.5 billion that's separate. That had nothing to do with me. In fact, you could make an argument that the statute required me to offset that money that went to a fireman's widow, \$5 million, before I even cut the check.

The trouble with that is, I went to see those charities. And I said, "You know, under the law, I may have to deduct what you give the firemen."

Well, the charity said, "You are going to do that? We are going to hold back all of our money until you cut your check because we are not subsidizing the taxpayer."

Well, I blinked. I am going to be responsible for holding back billions of dollars of charitable money?

I said, "Yeah, you are right. All right. I am not going to deduct it."

So a fireman's widow got on average \$2 million tax-free from me and another \$3 million from a private charity, which was separate and wholly apart from what I was doing.

AUDIENCE MEMBER: Just to follow up on that, the private litigants in that case—

MR. FEINBERG: In which case?

AUDIENCE MEMBER: The 9/11. Did you track any of the private litigations to see if your numbers were more or less in line with what happened?

MR. FEINBERG: It is all confidential, the ninety-four that settled, but I think probably some people might have got more. Some people got less. Don't forget, though, you are giving 25 percent to your lawyer. Then there are costs and fees, and above all, there are five

years of litigation with a constant reminder of the horror of that day and the lost loved one. I think it is a no brainer.

AUDIENCE MEMBER: For defendants in those cases, did they enlist the airlines, everybody?

MR. FEINBERG: Yeah, everybody—American Airlines, World Trade Center, Boeing—for not putting a cockpit door that was firm.

AUDIENCE MEMBER: So there were a thousand lawyers on the other side?

MR. FEINBERG: Yeah. They all settled eventually. By the way, you talk about human nature, if somebody decided to sue rather than take the 9/11 money, fine, that's the statute that gives you that right. That didn't bother me at all.

What bothered me to this day—there were two people who did nothing. They never came into the 9/11 fund, and they never filed a lawsuit. I met them both. One was a priest who lost a brother.

“Father, you are going to get about \$2.3 million for the death of your brother. Why haven't you filed?”

“I don't think it is right.”

“Father, have you lost your mind? There are \$2.3 million. Give it to Catholic Charities in your brother's name.”

“Not appropriate.”

“What?”

He didn't take the money.

Then I went, and I visited in Brooklyn with a seventy-five-year-old woman who lost her son.

“Mrs. Jones, the statute runs out in two more weeks. I am here with an application. I will help you fill it out, you sign it, you are going to get about \$2.8 million tax-free.”

“No. I lost my son. You are here to offer me money? My son is gone.”

“Mrs. Jones, listen to me, take the money. Memorialize your son. Set up an endowment. Set up a charity in your son's name.”

“Mr. Feinberg, I can't even get out of bed, and you want me to sign? Leave the application on the kitchen table. You can go now.” She never filled it out.

You learn that grief can paralyze people. Paralyze them. So that you can't fathom how—this lady, I think if I remember, I think I went and saw her other son or her brother. “For God's sake, get the lady to sign the document. I will get her the check.”

“She won't listen to us.”

Those really hurt. The others, if they decided to sue; that was their business.

I want to thank this great law school for the honor of being here today. I got to thank Roe on behalf of her father, who was obviously

a great public servant and a friend of the law school and for all of you who came here today, this is the last lecture. Roe may think that over again; I don't know. But all: thank you very much for participating.