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Doing Justice in the Face of a Disaster

John C.P. Goldberg

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DOING JUSTICE IN THE FACE OF A DISASTER

*John C. P. Goldberg**

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I. INTRODUCTION

The Panel invites us to contemplate what “complete justice” would look like in the face of a disaster. Because justice has many dimensions, the exercise is a difficult one. When one thinks of justice being done in the aftermath of a catastrophe such as the Deepwater Horizon oil spill, the natural focus is on *compensatory justice*. But compensatory justice is itself complex. What it takes to achieve compensatory justice depends in part on whether one thinks about compensation in terms of *distributive justice* or *responsibility-based justice*. Moreover, schemes of compensatory justice must also be assessed against criteria of *procedural justice*. And standing apart from, but on par with, compensatory justice are at least two other conceptions of justice: what I will call *justice as accountability* and *comparative justice*.

In light of the many facets of justice, the ideal of “complete justice”—i.e., the doing of justice along each of its dimensions—may be unattainable. I don’t mean this to be a strongly skeptical conclusion. Justice can and should be done. Instead, my point is that, in the wake of a disaster, the doing of justice may require compromises among competing metrics of justice.

* Professor, Harvard Law School. What follows is an edited version of comments given at the panel of the AALS Section on Remedies at the AALS annual meeting in January, 2011. I am grateful to the Section for inviting me to participate. By way of disclosure, I note that I served as a consultant to the Gulf Coast Claims Facility and in that capacity prepared a report on liability for economic loss under federal and state law. See John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, 30 MISS. COLL. L. REV. 335 app. (2011).

II. COMPENSATORY JUSTICE

The core idea of compensatory justice is simple enough. Justice for disaster victims means, among other things, that they should receive compensation for their disaster-related losses. But lurking within this idea are several questions: (1) *to whom* is compensation owed?; (2) *how much* compensation is owed?; (3) *from whom* is compensation owing?; (4) *how much* compensation is owing?

As to the first question, it seems unlikely that any conception of compensatory justice requires compensation for everyone who suffers a loss because of a disaster, no matter how remote or haphazard the connection. Imagine (plausibly, in my view) a person who experiences insomnia because he is haunted by constant exposure to “spillcam” images of oil gushing from the Deepwater Horizon well.¹ As a result, he repeatedly nods off at work and is fired. As a matter of justice, is he owed compensation? What about a yacht club that loses dues when, in response to BP chief executive Tony Hayward’s public relations gaffes,² BP executives are instructed by management not to renew their club memberships?

One’s answer to the “to whom” question—and the other questions noted above—will depend in part on whether one is addressing compensatory justice as an issue of distributive justice or responsibility-based justice.³ From the perspective of distributive justice, the questions might be answered roughly as follows. Compensation is owed to anyone who has suffered dislocation because of a disaster beyond some baseline level of dislocation that people are expected to endure as part of life’s ordinary vicissitudes. Compensation should be provided in amounts sufficient to get victims back on their feet.⁴ (The notion of “making whole” does not sit comfortably with distributive justice. I suspect that few would suppose that disaster relief should fully compensate victims for their pain and suffering.) Compensation is

1. See Hank Stuever, *BP’s Oil Spillcam: A Horror Movie About the Gulf That’s Deeply Compelling*, WASHINGTON POST, May 26, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/25/AR2010052505047.html> (last visited Apr. 9, 2012).

2. Liz Robbins, *BP Chief Draws Outrage for Attending Yacht Race*, N.Y. TIMES, June 19, 2010, at A20.

3. See John C. P. Goldberg, Comment, *Misconduct, Misfortune and Just Compensation*, 97 COLUM. L. REV. 2034, 2042-44 (1997) (contrasting disaster relief provided in the name of distributive justice with compensation provided as corrective justice).

4. See *id.* at 2057-59; Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases: A Comment*, 80 CORNELL L. REV. 1037, 1041 (1995) (arguing that, in the face of limited resources, when tragedy occurs, compensation should be limited to what is needed for “survival and rehabilitation”).

owing from all fellow citizens who can afford to make a contribution.⁵ (Some might even say that the obligation to contribute to relief efforts is owing from all those in the world who are better off materially than the victims.) Individuals' contributions should be modest, with each contributor paying a small amount to help spread the losses experienced in a concentrated form by disaster victims.

Now, look at the question of compensatory justice from a responsibility-based perspective. To whom is compensation owed? It is owed to all those who can point to another person or entity and say, roughly, "my misfortune is not just a misfortune, it is a victimization—it is the result of your having breached a duty that you owed me." Notice that, depending on the source and scope of the alleged duty, the class of persons to whom compensation is owed as a matter of responsibility might be much narrower than the class that is owed compensation as a matter of distributive justice. A person can be the victim of a disaster without having to establish that she was wronged by another person. On a responsibility-based conception of compensatory justice, how much compensation is owed? American lawyers tend to think in terms of a notion of restoration, of making whole.⁶ From whom is compensation owing? Because the focus is on responsibility, there may be only one or a few persons or entities with a justice-based obligation to compensate. How much compensation is owing? This will depend on how many parties are responsible for a given loss, and on principles of fair allocation as among them.⁷

III. PROCEDURAL JUSTICE

Ordinarily, justice doesn't just happen. Rather, justice must be done. And there is justice in how justice gets done—procedural justice. With respect to the doing of compensatory justice, procedural justice requires that those with claims to compensation have a way of asserting claims that is efficacious and not unduly burdensome.⁸ Moreover,

5. Goldberg, *supra* note 3, at 2044.

6. John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1269 n.110 (2008) (citing 4 FOWLER V. HARPER & FLEMING JAMES, JR. THE LAW OF TORTS § 25.1, at 494 (2d ed. 1986)).

7. For example, one might apportion liability among multiple responsible parties on a pro rata basis, or on the basis of percentages corresponding to each party's relative degree of fault or culpability. In addition, one would have to consider how to allocate, as among victims and responsible parties, the share of liability assigned to any responsible parties who are unreachable or judgment-proof.

8. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 237 (2004) (discussing different conceptions of procedural justice).

because there are often uncertainties that will need to be resolved to determine whether or what a claimant is owed, there must be an adequate set of procedures for dealing with open questions. In short, there is a need for procedures that allow claims to be finally and fairly resolved, whether by authoritative order or by voluntary agreement.

Some scholars, perhaps most prominently Professor Linda Mullenix, have expressed serious concerns about the compliance of institutions such as the Gulf Coast Claims Facility (“GCCF”) with the demands of procedural justice.⁹ I won’t take a stance on these issues. Rather, I want to note how some distinctions I have mentioned already are intertwined with them. In particular, it is important to emphasize that the distinct conceptions of compensatory justice I mentioned above—distributive and responsibility-based—may require different procedures. The resolution of claims for disaster relief perhaps are best achieved by a process that is cookie-cutter and fast, so those in need get at least some relief quickly. The resolution of claims for responsibility-based compensatory justice, precisely because they involve claims of wrongdoing and responsibility, will require a more fulsome process to ensure that the claimant really is a victim and that the person against whom a claim is made really is a responsible party. It might even be the case that procedural justice requires a two-track or hybrid procedural system that is responsive to both the distributive and responsibility-based aspects of compensatory justice. In other words, to achieve procedural justice, we may need a system that allows victims prompt access to emergency need-based payments so that (in conjunction with litigation finance arrangements such as contingent fees) their efforts to pursue responsibility-based claims for compensation are not undermined by financial desperation.¹⁰

What counts as procedural justice will also depend in part on the availability of options for claimants. It surely matters to any assessment of the GCCF that it was set up to operate, and did operate, parallel to court proceedings. Although claimants who accepted final payments from the GCCF agreed not to pursue claims against BP and other potentially liable parties, they were permitted simultaneously to assert

9. See generally Linda Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819 (2011).

10. The GCCF’s two-track system of emergency and final payments was perhaps adopted in part out of recognition of the need for a hybrid payment scheme of this sort.

legal claims against BP and other defendants.¹¹ Of course, there are times when an apparent choice is merely notional, and it is possible that certain classes of claimants, practically speaking, had no choice but to accept what the GCCF was prepared to offer. However, now that a tentative settlement of the consolidated litigation has been reached,¹² it seems that many victims really did have a choice, and this fact is highly relevant to any assessment of whether the litigation system and the GCCF operated in a manner consonant with the requirements of procedural justice.

IV. JUSTICE AS ACCOUNTABILITY

When a disaster occurs, the attainment of justice may not only require compensation but may also call for accountability. The doing of justice, in other words, may include calling to account those responsible for a disaster.

Accountability is a relational concept: one person or entity is held accountable to another.¹³ As such, it can take different forms. Criminal prosecutions and regulatory proceedings are ways of holding a person or entity accountable to the public. To the extent BP faces criminal fines, for example, it is being punished on behalf of the citizens of the United States for its violation of certain prohibitions against causing environmental degradation.¹⁴

Civil proceedings can be about accountability of a different sort—accountability to particular victims. When accountability takes this form, it blends together with notions of compensatory justice and procedural justice, even though it is distinct from both of them. A civil lawsuit can be a way of holding a wrongdoer accountable to a victim and a way of seeing to it that compensatory justice is done. But the two ideas often come apart. Indeed, just to be annoying, I would suggest that whether they come apart will depend in part on issues of procedural justice. It is conceivable, for example, that our procedures for enabling

11. GULF COAST CLAIMS FACILITY FINAL RULES GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY (Feb. 18, 2010), http://www.gulfcoastclaimsfacility.com/FINAL_RULES.pdf.

12. Daniel Fisher, *BP Settles With Plaintiff Lawyers, Pegs Cost at \$7.8 Billion*, FORBES, Mar. 3, 2012.

13. Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & SOC'Y 38, 40 (2000) (accountability is a relational concept that imposes a "duty to give account for one's actions to some other person or body").

14. See David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413 (2011).

victims of a disaster to pursue claims against responsible parties will allow for a responsibility-based notion of compensatory justice to be done, yet not give victims a basis for feeling satisfied that the person or entity paying the compensation has been held accountable to them. Indeed, this is a familiar feature of, and complaint about, ordinary civil litigation that results in quick settlements where there is little process, no admission of fault, and the like. In such cases, claimants are sometimes left feeling that the process has failed them precisely by denying them an opportunity to have defendants held accountable to them.

Notice also that accountability can take different forms and can be addressed to different actors with different sorts of connections to a disaster. When it comes to accountability for a catastrophic oil spill, we will naturally and correctly focus on an entity such as BP. But we might also suppose that, in justice, there should be some form of governmental accountability.¹⁵ This might be true, for example, if there is evidence of lax regulation or an inadequate response to a disaster. In principle, justice as accountability might even call for the imposition of liability on governments for some portion of victims' losses. It might also, or in the alternative, call for political accountability at the ballot box.

One might even suppose that there must be accountability for persons who were only indirectly involved in the disaster. It might be argued, for example, that every competent adult American is weakly complicit in the Deepwater Horizon spill by virtue of our intemperate energy consumption habits and, on this basis, should be held accountable for it. Of course, it does not follow that each of us should be criminally punished or held liable to victims of the spill. Instead, justice might require a different form of accountability. It might require us actively to support policies designed to curb our consumption of fossil fuels, or that promote the restoration of natural resources in afflicted areas.¹⁶

IV. COMPARATIVE JUSTICE

One of the most interesting and difficult aspects of justice has to do with how to frame our inquiries into justice. As Ken Feinberg has often noted, to think about justice in connection the Deepwater Horizon Spill invites comparisons with the treatment of those injured in the 9/11

15. See Goldberg, *supra* note 3, at 2041, 2043-46.

16. Cf. Iris Marion Young, *Responsibility and Global Labor Justice*, 12 J. POL. PHIL. 365, 377-80 (2004) (outlining a notion of "political responsibility" by which persons who participate in systems that perpetuate certain structural injustices have reason to take steps to ameliorate those injustices).

attacks, those injured by Hurricane Katrina, and those injured in the Oklahoma City bombing.¹⁷ Suppose we conclude that the 9/11 Fund did right by eligible claimants as a matter of compensatory and procedural justice. Did it thereby do wrong as to the victims of the Oklahoma City bombing? Does the creation of the GCCF, given the very different sort of response to Katrina, create an injustice as to the victims of Katrina? Some of the most difficult issues of justice raised by disasters are in the end questions about the consistency with which we respond to them. Insofar as this sort of inconsistency is itself an injustice, it may call for more uniform protocols of response. To be sure, some such protocols are already in place (though whether they are adequate is a different question). They include the provision of disaster relief through agencies such as Federal Emergency Management Agency (“FEMA”),¹⁸ and the availability, in principle, of the tort system to all person with colorable claims against allegedly responsible wrongdoers. It is at least conceivable, however, that comparative justice requires the establishment of a set of national compensation protocols for disaster victims.

17. 1 KENNETH R. FEINBERG ET AL., DEP’T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 78 (2004).

18. See 42 U.S.C. § 5121-5207 (1988).