

Disaster Law and Inequality

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Introduction

Having been a member of the faculty committee that selected the first editorial board of the *Journal of Law and Inequality*, I am particularly pleased at the opportunity to participate in this Symposium, which commemorates the Journal's twenty-fifth anniversary. I want to use the occasion to explore a new frontier for the study of law and inequality: natural disasters.

We often think of disasters as "acts of God" falling like rain on the rich and poor alike. In terms of property damage, the rich have much more at stake in natural disasters, though they may benefit from having less vulnerable buildings and better disaster response than the less affluent. But in terms of the death, injury, and physical dislocation, the most vulnerable segments of society are the ones that suffer the most.

Earthquakes and hurricanes are not, of course, the products of inequality, yet their impacts can fall very unevenly on different members of society.¹ This was brought home vividly to anyone who watched the news during Hurricane Katrina. Consider the Superdome, which offered shelter of last resort: "The Dome was a brewing public health disaster. . . . The number of people inside had doubled in twenty-four hours, becoming a virtual city of twenty-thousand, overwhelmingly poor and African American."² For days it was "clear to anyone watching television that the

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1. For background on this problem, see DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* 109-60 (2006). As the National Research Council ("NRC") observes, some "population segments are more likely to experience casualties, property damage, psychological impacts, demographic impacts, economic impacts or political impacts—as direct, indirect, or informational effects." NAT'L RESEARCH COUNCIL, *COMM. ON DISASTER RESEARCH IN THE SOC. SCIS., FACING HAZARDS AND DISASTERS: UNDERSTANDING HUMAN DIMENSIONS* 73 (2006). The NRC refers to this phenomenon as "social vulnerability." *Id.*

2. JOHN MCQUAID & MARK SCHLEIFSTEIN, *PATH OF DESTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS* 235 (2006). The authors are two Times Picayune reporters who covered the disaster firsthand.

majority of people trapped in New Orleans were African Americans, most from the low end of the income spectrum.”³ This is because “much of New Orleans’ white population had departed before the storm hit, while the remainder lived in areas closer to dry land and found it easier to escape.”⁴ Ultimately, the Congressional Research Service found that approximately 272,000 African Americans were displaced by flooding or damage, compromising seventy-three percent of the people affected by the storm in Orleans parish.⁵

Similar patterns exist for other disasters. A tsunami on December 26, 2004, killed roughly a quarter of a million people and displaced another million, primarily in and around Indonesia. The burden did not fall evenly on all segments of the population. The poor were the most heavily impacted—often, the most vulnerable groups have experienced prior discrimination that has left them living in high risk areas.⁶

As the tsunami shows, the relationship between social disadvantage and disaster risk is not limited to the United States;⁷ however, this Article will focus on the domestic aspects of this relationship. Part I reviews some incidents of discrimination involving disasters in the past century of American history. Part II assembles evidence of the disproportionate impact of disasters based on race, gender, and age. In Part III, several possible legal responses to this disproportionate impact are explored, centering on an analogy to environmental justice remedies. Part IV suggests that this disproportionate impact may best be regarded as a wake-up call about less dramatic but more deeply entrenched social needs, and Part V offers a brief conclusion.

I. Disaster Inequality in American History

In the early twentieth century, disasters and racial issues

3. MCQUAID & SCHLEIFSTEIN, *supra* note 2, at 300. Outside the city, in St. Bernard parish, Whites were more heavily impacted and many died. *Id.*

4. *Id.*

5. THOMAS GABE, GENE FALK & MAGGIE MCCARTY, CRS REPORT FOR CONGRESS: HURRICANE KATRINA: SOCIAL-DEMOGRAPHIC CHARACTERISTICS OF IMPACTED AREAS 14, 16-17 (2005).

6. FARBER & CHEN, *supra* note 1, at 115-16.

7. Although not the focus of this Article, poverty is an independent risk factor. For example, an international survey found that mortality rates from natural disasters were closely tied to both a society’s general level of economic welfare and its degree of income inequality. See Matthew E. Kahn, *The Death Toll From Natural Disasters: The Role of Income, Geography, and Institutions*, 87 REV. OF ECON. & STAT. 271 (2005).

often were intertwined. For example, after the 1906 San Francisco earthquake, Whites singled out Japanese and Chinese groups for negative treatment.⁸ Not only did Whites loot Chinatown after the residents had evacuated,⁹ but they also attempted to move Chinatown to the least desirable area of the city. They were foiled by the concerted resistance of the Chinese community.¹⁰ Repressive actions toward Japanese people, including school segregation, at one point threatened to start a war between the United States and Japan.¹¹ Similarly, after Galveston, Texas was destroyed by a flood in September of 1900, reports indicated that an unknown number of African Americans and foreigners were shot. "White fears of blacks—fed by racial stereotypes—surfaced and shaped the post-storm recovery."¹²

The Mississippi flood of 1927 provides a classic example of how disaster and race interact.¹³ The area hit hardest by the flood was the Mississippi Delta, which had a heavily Black population. On April 21, there was a major break in the levees.¹⁴ Even before the break, nearby Greenville had begun to prepare by putting hundreds of Black men to work on reinforcing the city's protective levee. After the break, the effort was doubled: "All that day police rounded up hundreds more black men and carried them to the protection levee" to work.¹⁵ On April 25, plans were made to evacuate Greenville.¹⁶ "White women and children massed around gangplanks waiting to board the steamboats; the barges would carry Negroes and terrified livestock."¹⁷ But plans to evacuate Blacks were cancelled by planters afraid of losing their

8. See PHILIP L. FRADKIN, *THE GREAT EARTHQUAKE AND FIRESTORMS OF 1906*, 289-304 (2005).

9. *Id.* at 292-93.

10. *Id.* at 295.

11. *Id.* at 301.

12. *Id.* at 20.

13. The flood is the subject of John M. Barry's classic book, *RIISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* (1998). For a useful timeline of the flood, see Public Broadcasting Service, *Fatal Flood: Timeline*, <http://www.pbs.org/wgbh/amex/flood/timeline/timeline2.html> (last visited Feb. 15, 2007).

14. BARRY, *supra* note 13, at 201.

15. *Id.* at 206.

16. Princella W. Nowell, *The Flood of 1927 and Its Impact in Greenville, Mississippi*, in MISSISSIPPI HISTORICAL SOCIETY, *MISSISSIPPI HISTORY NOW*, http://mshistory.k12.ms.us/features/feature72/MS_Flood.htm (last visited Feb. 15, 2007) (discussing the effects of the flood on Greenville).

17. BARRY, *supra* note 13, at 308.

workforce.¹⁸

Blacks and Whites remaining in Greenville lived very different lives. About 4,000 Whites remained living on second floors, in offices, and in hotels.¹⁹ In the meantime, about 5,000 Blacks were jammed into warehouses, oil mills, and stores.²⁰ Over 10,000 more lived on top of the levees in tents, with thousands of livestock.²¹ The "disparity between life for black and white seemed greater than in normal life."²² Blacks "felt betrayed."²³ A form of slavery had been reinstated.²⁴ "The National Guard patrolled the perimeter of the levee camp with rifles and fixed bayonets. To enter or leave, one needed a pass."²⁵ This was true throughout Mississippi.²⁶ In the Greenville camp, brutality was commonplace, and Blacks said they were "treated like dogs."²⁷

As flooding continued, over 300,000 people, mostly Black, were relocated to camps for up to four months.²⁸ During the cleanup, loading supplies and cleaning was considered work only

18. *Id.* at 310.

19. *Id.* at 311.

20. *Id.* at 312.

21. *Id.*

22. *Id.*

23. *Id.*

24. The description on the website of the Mississippi Historical Society is more circumspect:

African-American families were instructed by some community leaders to stay on the levee to work in flood control and, later, recovery efforts. The men feared that if they allowed this labor force to leave they might not return. This decision to not let African-Americans evacuate and to work them without pay would soon bring an eruption of racial tensions.

...
The laborers were not paid and resented being threatened that if they did not participate in the levee repair, or other work such as unloading the food sent on barges by the Red Cross, that they would not be allowed to have the food that the Red Cross was handing out. Thus, the people struggling to live on a sliver of ground above water, became aggravated about their circumstances. Their squalid living conditions and work requirements were first reported through the Associated Negro Press and by the end of May had spread to the white press.

Nowell, *supra* note 16. On the other hand, Public Broadcasting Service describes the situation more starkly in its description of events in April 1927: "Only African Americans wearing tags around their necks marked 'laborer' receive rations. National Guard is called in to patrol the refugee camps in Greenville. Word filters out of the camps that guardsmen are robbing, assaulting, raping and even murdering African Americans held on the levee." Public Broadcasting Service, *supra* note 13.

25. BARRY, *supra* note 13, at 313.

26. *Id.*

27. *Id.* at 315.

28. *Id.* at 286.

appropriate for Blacks, who the police conscripted into work gangs.²⁹ Leading members of the national Black community were persuaded to cover up the abuses, in return for promises that the federal government would help Blacks buy farms later. These promises were abandoned as soon as Herbert Hoover no longer needed black support to get the Republican presidential nomination.³⁰ Ultimately, as a direct result of the flood experience, tens of thousands of Blacks left the Delta for Chicago and other northern cities.³¹

A year later, in 1928, a major hurricane hit Florida, devastating residents near the Everglades. "As the storm barreled into Lake Okeechobee, some whites managed to scramble into the region's sturdier homes, packing houses, and hotels, but most blacks had to ride it out in their unprotected shanties in the low-lying fields."³² The hurricane killed 2,500 people, "mostly poor blacks who drowned in the vegetable fields of the Everglades."³³ As in the Mississippi flood, officials conscripted Blacks into the cleanup effort at gunpoint.³⁴ Discrimination did not end with death: "Coffins were reserved for whites, and the soils of the Everglades were far too saturated for burials, so 674 black victims were stacked like cordwood on flatbed trucks and hauled to a mass grave in West Palm Beach."³⁵

These incidents may be dismissed as ancient history by some. Although these graphic forms of discrimination have been largely eliminated, factors such as race and poverty unfortunately continue to matter in terms of disaster vulnerability. Disaster may rain down on all, but it only sprinkles on some, while pouring on others.

29. *Id.* at 328.

30. *Id.* at 382-85. Again, the Mississippi Historical Society website's description is more diplomatic:

As word spread about the mistreatment of blacks in the levee camps, Secretary of Commerce Herbert Hoover, who served as chairman of a special committee to coordinate all flood relief efforts, created the Colored Advisory Committee to look into the allegations and named Robert Moton from the Tuskegee Institute to head it. After investigations, the committee presented a harsh report to Hoover, but he failed to take any action.

Nowell, *supra* note 16.

31. BARRY, *supra* note 13, at 417.

32. MICHAEL GRUNWALD, *THE SWAMP: THE EVERGLADES, FLORIDA, AND THE POLITICS OF PARADISE* 192 (2006).

33. *Id.* at 193.

34. *Id.* at 194.

35. *Id.*

II. Disasters and Vulnerable Groups

The relationship between disasters and societal disadvantage deserves further study from social scientists. Current research on the subject is sparse, but what we know at this point is enough to indicate clearly that race and poverty, along with age and gender, make a significant difference. Those who already suffer from societal disadvantage are more likely to be in harm's way, and they are less likely to be able to take defensive action or to reconstruct their lives after a disaster.

A. Race and Ethnicity

As we have seen, racial minorities often have been disproportionately victimized in disasters, as further evidenced by Hurricane Katrina.³⁶ The reasons are closely connected to the general social disadvantages suffered by minority groups.³⁷ As a report issued soon after Katrina explained, the disproportionate impact of the disaster was no coincidence:

Twenty-eight percent of people in New Orleans live in poverty. Of these, 84 percent are African-American. Twenty-three percent of people five years and older living in New Orleans are disabled. An estimated 15,000 to 17,000 men, women, and children in the New Orleans area are homeless. The lowest lying areas of New Orleans tend to be populated by those without economic or political resources. The city's Lower Ninth Ward, for example, which was especially hard hit and completely inundated by water, is among its poorest and lowest lying areas. Ninety-eight percent of its residents are African-American . . . [A]n expert on New Orleans' vulnerable topography explains: "[I]n New Orleans, water flows away from money. Those with resources who control where the drainage goes have always chosen to live on the high ground. So the people in the low areas were the hardest hit."

Of the households living in poverty, many have no access to a car: 21,787 of these households without a car are black; 2,606 are white. This lack of access became crucial, given an evacuation plan premised on the ability of people to get in their cars and drive out of New Orleans.³⁸

36. MEMBER SCHOLARS OF THE CENTER FOR PROGRESSIVE REFORM, CTR. FOR PROGRESSIVE REFORM, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 35 (2005), available at http://www.progressiveregulation.org/articles/Unnatural_Disaster_512.pdf.

37. *Id.*

38. *Id.* The Center for Progressive Reform also argued that this should have been foreseen. It contends that warnings from "[c]ommunity groups and environmental justice scholars" help demonstrate not only that "government

More than a third of black New Orleans households lacked cars, including almost sixty percent of all black households below poverty level.³⁹

There was also at least one incident suggestive of more intentional discrimination. In the aftermath of Katrina, a mostly Black crowd of New Orleans residents attempted to escape across the bridge to Gretna, Louisiana.⁴⁰ They were turned back by armed police because the City of Gretna refused to give them shelter or help them evacuate.⁴¹ Litigation is now under way that may determine whether this shocking response to the plight of desperate people was racially motivated.⁴²

The connection of race and poverty with evacuation rates was not unique to Katrina. As the NRC found:

[R]esearch has shown that different racial, ethnic, income, and special needs groups respond in different ways to warning information and evacuation orders For example, members of some minority groups tend to have large extended families, making contacting family members and deliberating on alternative courses of action a more complicated process. Lower-income groups, inner-city residents, and elderly persons are more likely to have to rely on public transportation, rather than personal vehicles, in order to evacuate. Lower-income and minority populations, who tend to have larger families, may also be reluctant to impose on friends and relatives for shelter. Lack of financial resources may leave less-well-off segments of the population less able to take time off from work when disasters threaten, to travel long distances to avoid danger, or to pay for emergency lodging.⁴³

In addition, the NRC found members of minority groups may distrust emergency information provided by the White majority, and those who rely on non-English speaking media sources may find it more difficult to obtain warnings.⁴⁴

decision makers should have known just who would be left to suffer the harms of protections foregone, but that they did know [T]he disproportionate impacts experienced by the poor and black communities from Katrina is part of a pattern of environmental disasters in which low-income communities and communities of color are overlooked in the preparations before such disasters occur and receive less rapid assistance afterwards." *Id.* at 35-36.

39. See ARLOC SHERMAN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, ESSENTIAL FACTS ABOUT THE VICTIMS OF HURRICANE KATRINA 2 (2005), available at <http://www.cbpp.org/9-19-05pov.htm>.

40. PHILIP CLARK, BRIDGE TO NOWHERE 5 (2006), available at <http://www.law.berkeley.edu/library/disasters/Clark.pdf> (last visited Apr. 28, 2006).

41. *Id.*

42. *Id.* at 4-5.

43. NRC, *supra* note 1, at 129-30.

44. *Id.* at 130.

As with other American disasters, immigrants also suffered disproportionately in the aftermath of Katrina. Undocumented aliens are eligible for immediate post-emergency services but not for any long-term shelter or food assistance.⁴⁵ They may avoid obtaining even short-term assistance because of well-founded fears that they will be detained and deported.⁴⁶ Of further concern, some immigrants who were lawfully in the United States were ineligible for certain assistance.⁴⁷ This category included individuals on temporary work, student or tourist visas, and also (ironically) certain refugees from Central American disasters who had been admitted to the United States for humanitarian reasons.⁴⁸

The relationship between race, poverty, and disaster risk can be complex. Demonstrably, in 1995 over 700 Chicago residents died in a week-long heat wave.⁴⁹ African Americans were the group most at risk, being one and a half times more likely to die than Whites.⁵⁰ But Hispanics were the least likely of any group to be victims.⁵¹ Although their "overall level of poverty placed them at a heightened risk of mortality, [they] experienced a surprisingly low death rate."⁵² The reason for the contrast between the African American and Hispanic risk levels may be related to the social ecology of the neighborhoods where they live, with Hispanic neighborhoods being more likely to encourage the elderly to get out and connect with others.⁵³ Along with age, social isolation is a critical risk factor in heat waves.⁵⁴ A sociologist who studied the heat wave explains why African Americans had the highest death rate:

They are the only group in the city segregated and ghettoized in community areas with high levels of abandoned housing

45. BERKELEY INT'L HUMAN RIGHTS LAW CLINIC, WHEN DISASTER STRIKES: A HUMAN RIGHTS ANALYSIS OF THE 2005 GULF COAST HURRICANES 25-26 (2006), available at http://www.law.berkeley.edu/clinics/ihrhc/pdf/disaster_strikes_version2.pdf.

46. *Id.* at 26-27.

47. *Id.* at 28.

48. *Id.*

49. ERIC KLINENBERG, HEAT WAVE: A SOCIAL AUTOPSY OF DISASTER IN CHICAGO 9 (2002).

50. *Id.* at 18.

51. *Id.* at 19.

52. *Id.*

53. *Id.* at 117 ("The commercial life is particularly important to local seniors, for it not only draws them out when they need goods or services but also gives them an excuse to leave home when they are feeling lonely or bored.")

54. *Id.* at 45-46.

stock, empty lots, depleted commercial infrastructure, population decline, degraded sidewalks, parks, and streets, and impoverished institutions. Violent crime and active street-level drug markets, which are facilitated by these ecological conditions, exacerbate the difficulties of using public space and organizing effective support networks in such areas.⁵⁵

More generally, lack of social capital (in the form of a rich network of community relationships) greatly increases vulnerability to risk.⁵⁶ The degree of social capital in a community may be related in complex ways to demographic characteristics, resulting in uneven and sometimes unexpected correlations between demography and disaster risk.⁵⁷

Race also emerges as a factor during the reconstruction period following disasters. Minority and poor individuals are less likely to have insurance that might aid them during reconstruction.⁵⁸ They are less likely to be homeowners and therefore less likely to benefit from the special assistance available to owners of residential property. Having faced a shortage of affordable housing even before a disaster, they may be especially hard-pressed in the aftermath.⁵⁹

B. Gender and Age

The disproportionate suffering of women demonstrates another disturbing pattern in big disasters.⁶⁰ As noted by disaster researchers, women are more likely to be the front-line caregivers, thus performing more of the emotional work involved in disaster recovery.⁶¹ Some researchers maintain that women are "particularly subject to environmental risks through urban displacement and migration, environmental degradation, migration, poverty and other limits to choice."⁶² The NRC recognizes that being female is a risk factor for experiencing post-

55. *Id.* at 127.

56. See NRC, *supra* note 1, at 231-33.

57. See KLINENBERG, *supra* note 49, at 19.

58. See FARBER & CHEN, *supra* note 1, at 129.

59. *Id.* at 129-30.

60. See ELAINE ENARSON, GENDER ISSUES IN NATURAL DISASTERS: TALKING POINTS AND RESEARCH NEEDS 2-3 (2000), <http://www.gdnonline.org/resources/ilo-talking.doc> (discussing the impact of disasters on women).

61. LEE CLARKE, WORST CASES: TERROR AND CATASTROPHE IN POPULAR IMAGINATION 134 (2006) (citation omitted).

62. *Id.*

disaster psychological trauma.⁶³ There are also reports that disasters exacerbate the difficulties of domestic violence.⁶⁴ As one sociologist observed:

The finely balanced networks of support poor women develop to survive in our economy, piecing together cash from odd jobs, boyfriends, government, family and kin, were ripped apart by this storm. Low wage women employed at the lowest rungs of the tourist industry and as beauticians, child care workers, home health aides, servers and temporary office workers will not be helped back on their feet by economic recovery plans geared to major employers in the formal sector Community-wide economic recovery is impossible without the female labor force, but barriers of all kinds arise in rebuilding child care systems, especially the family-based care upon which most American infants and youngsters depend. Without functioning households and the social infrastructure of transit systems, schools, stores, health clinics and child care, women's return to employment is delayed. Women supporting households single-handedly are, of course, most at risk.⁶⁵

According to one study by an advocacy group, only one-third of families headed by women have returned to New Orleans. Women's incomes have dropped in the city while men's have risen, and only a handful of federally subsidized daycare centers have reopened.⁶⁶

The relationship between gender and disaster vulnerability is more complex. In the Chicago heat wave, the majority of the victims were men.⁶⁷ Within the same age group, men were more than twice as likely to die as women.⁶⁸ Apparently, elderly men are more likely to be socially isolated than women of the same age, and hence they are more likely to fall victim to heat waves.⁶⁹

63. NRC, *supra* note 1, at 155. Being a member of a minority group or being poor are also risk factors. *Id.* at 154.

64. See ELAINE ENARSON, FREDA CENTRE FOR RESEARCH ON VIOLENCE AGAINST WOMEN AND CHILDREN, SURVIVING DOMESTIC VIOLENCE AND DISASTERS 1-6 (1998), available at <http://www.harbour.sfu.ca/freda/reports/dviol.htm>.

65. Elaine Enarson, WOMEN AND GIRLS LAST? AVERTING THE SECOND POST-KATRINA DISASTER 2 (2005), <http://understandingkatrina.ssrc.org/Enarson/>.

66. See Press Release, Women's Funding Network, Study Shows that Women, Disproportionately Affected by Katrina, Also Hold Keys to Rebuilding (Aug. 27, 2006), available at http://www.wfnet.org/documents/press_releases/WFN_MFW_Katrina_release_aug_27.pdf (noting that men's median annual income rose to \$43,055, women's fell to \$28,932, and only ten childcare centers have reopened).

67. See KLINENBERG, *supra* note 49, at 19-20 ("Fifty-five percent of the heat-related deaths were men . . .").

68. *Id.* at 20.

69. *Id.* at 74-75.

Age is also an important factor in disaster vulnerability, as children suffer from special vulnerabilities.⁷⁰ As one disaster expert observes, if “children are not recognized as a special population and planned for accordingly, they can be at grave and disproportionately higher risk in major disasters.”⁷¹ Children also may suffer special forms of injury, such as separation from parents or interruptions in education. About a fourth of the population in areas impacted by Katrina were children—183,000 children were displaced by the storm.⁷² Thirty percent of the children in these areas lived in poverty.⁷³ Furthermore, children may be at special risk of exploitation during disasters.⁷⁴

The elderly also are exposed to heightened risks. In the 1995 Chicago heat wave, almost three quarters of the victims were over sixty-five.⁷⁵ The elderly are at higher risk from hurricanes:

Jefferson Parish President Aaron Broussard’s story of a Kenner City employee’s elderly mother calling her son from a nursing home in the first four days and eventually succumbing to the rising water was played out repeatedly in other nursing homes where the oldest old remained due to frailty and poor health. During the evacuation for Hurricane Ivan in 2004 most deaths occurred among the elderly who were unable to bear the heat and stress of getting caught in the day-long traffic jams arising from a poorly planned evacuation strategy. During Hurricane Katrina the elderly and disabled died in the Convention Center and in their homes throughout the city of the symptoms of diseases such as asthma, diabetes, and high blood pressure that are easily managed under normal conditions but that become lethal when access to medicine and treatment is cut off.⁷⁶

Nearly half of the elderly living in the Katrina impact zone

70. See IRWIN REDLENER, *AMERICANS AT RISK: WHY WE ARE NOT PREPARED FOR MEGADISASTERS AND WHAT WE CAN DO NOW* 103-27 (2006) (noting some factors why children face particular challenges, such as size, maturity, ability to comprehend the gravity of the situation, and noting that children have been mentioned as specific targets of terror attacks).

71. *Id.* at 105. Dr. Redlener is the director of the National Center for Disaster Preparedness at Columbia University. *Id.* at 275.

72. See GABE, FALK & MCCARTY, *supra* note 6, at 18.

73. FARBER & CHEN, *supra* note 2, at 139.

74. See STEPHANIE DELANEY, ECPAT INTERNATIONAL, *PROTECTING CHILDREN FROM SEXUAL EXPLOITATION & SEXUAL VIOLENCE IN DISASTER & EMERGENCY SITUATIONS* 21-22 (2006), available at http://www.ecpat.net/eng/pdf/Protecting_Children_from_CSEC_in_Disaster.pdf.

75. KLINENBERG, *supra* note 50, at 18-19 (seventy-three percent).

76. ELIZABETH FUSSELL, *LEAVING NEW ORLEANS: SOCIAL STRATIFICATION, NETWORKS, AND HURRICANE EVACUATION*, June 11, 2006, <http://understandingkatrina.ssrc.org/Fussell/>.

reported having at least one disability, and a quarter reported that their disability impaired their ability to leave their dwellings unassisted.⁷⁷ Not surprisingly, over forty percent of the dead were identified as over seventy years old.⁷⁸

Given the unequal impact of disaster, disaster law has a significant intersection with discrimination law. Moreover, the *form* of discriminatory impact involved in disasters poses special challenges in terms of legal remedies. I consider these issues in the next section.

III. Potential Legal Responses to Disaster Inequality

In considering possible legal remedies for disaster inequality, there are two of models that might provide guidance. The first derives from the efforts of the environmental justice movement to identify remedies for environmental harms (mostly exposure to toxic chemicals) that fall particularly on minority and poor communities. The second model focuses on the issue of compensation for victims of natural disasters such as Hurricane Katrina. A potential blueprint for the latter model is the fund established to compensate victims of the 9/11 terrorist attacks, while the former is similar to the continuing effort to obtain reparations for slavery and racial discrimination. Apart from the 9/11 fund, these models have not met with much success, but they do provide some analogies that may be helpful in seeking remedies for disaster inequality.

A. Environmental Justice as a Model

Disaster inequality has much in common with the issue of environmental justice. Indeed, it could be considered a special form of environmental injustice. It has proved difficult to find appropriate legal tools for addressing environmental justice issues, and disaster inequality poses similar challenges. Participation by members of minority groups in decisions affecting disaster planning has been limited in the same way as their participation in environmental decisions. As one leading environmental law scholar has explained:

Minority interests have traditionally had little voice in the various points of influence that strike the distributional balances necessary to get environmental protection laws

77. FARBER & CHEN, *supra* note 2, at 139.

78. National Public Radio, *Katrina Took Deadly Toll on Elderly* (Mar. 5, 2006).

enacted, regulations promulgated, and enforcement actions initiated. The interest groups historically active in the environmental protection area include a variety of mainstream environmental organizations representing a spectrum of interests (conservation, recreation, hunting, wildlife protection, resource protection, human health), as well as a variety of commercial and industrial concerns. Until very recently, if at all, the implications for racial minorities of environmental protection laws have not been a focal point of concern for any of these organizations.⁷⁹

In this section, I consider several possibilities for improved legal remedies in the context of disaster law. Environmental justice provides an instructive model—unfortunately, this is especially true in terms of approaches that have proved unproductive and should not be followed.

1. Liability

Existing law presents significant barriers to recovering from government actions that result in disproportionate harm to vulnerable populations from natural disasters. Environmental justice advocates have hit something of a dead end in their efforts to find a legal remedy for similar kinds of harm resulting from exposure to toxic substances.⁸⁰ They saw Title VI of the 1964 Civil Rights Act as one of their most promising weapons.⁸¹ Title VI prohibits discrimination by recipients of federal funds. The regulations under Title VI cover both intentional discrimination and actions having a disparate impact on minority groups;⁸² however, viability of private actions to enforce the Title VI regulations currently is unclear.⁸³ In *Alexander v. Sandoval*,⁸⁴ the Court held that the Title VI regulations do not create a private

79. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 812 (1993).

80. See Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 6-12 (1999) (describing the weaknesses of the Equal Protection Clause and the common law as legal tools to address environmental inequities).

81. See *id.* at 12 (noting that advocates have turned from Equal Protection Clause arguments to Title VI due to the availability of an unjustified disparate impact claim).

82. See *id.*

83. See *id.* at 4 ("[I]t is unclear whether these agency regulations, based on Section 602 of Title VI, create a private right of action allowing plaintiffs to sue in federal courts.").

84. 532 U.S. 275 (2001).

cause of action.⁸⁵ In dissent, Justice Stevens skeptically suggested that the decision had limited practical effect:

[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.⁸⁶

Soon afterwards, however, a federal appeals court rejected this theory.⁸⁷

Another potential source of remedy for discriminatory disaster relief might be section 311 of the Stafford Act, which provides as follows:

(a) The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.

(b) As a condition of participation in the distribution of assistance or supplies under this Act or of receiving assistance under this Act, governmental bodies and other organizations shall be required to comply with regulations relating to nondiscrimination promulgated by the President, and such other regulations applicable to activities within an area affected by a major disaster or emergency as he deems necessary for the effective coordination of relief efforts.⁸⁸

For this provision to become an effective remedy, a court would have to find that it gives rise to an implied cause of action or that violations of section 311 are actionable under 42 U.S.C. §

85. See *id.* at 293 ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such private right exists.").

86. *Id.* at 299-300 (Stevens, J., dissenting).

87. See *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 274 F.3d 771, 778-79 (3d Cir. 2001) (holding that Supreme Court precedent regarding Section 1983 would not permit the route Justice Stevens suggests); see also *Save Our Valley v. Sound Transit*, 335 F.3d 932, 935-36 (9th Cir. 2003) ("[B]ecause of controlling Supreme Court precedent, we hold that an agency regulation cannot create individual rights enforceable through § 1983.").

88. Robert T. Stafford Disaster Relief and Emergency Assistance Act (Disaster Relief Act of 1974), Pub. L. No. 93-288, § 311, 88 Stat. 143 (codified as amended at 42 U.S.C. § 5151 (2006)).

1983. The barriers encountered in enforcing non-intentional violations of Title VI seem to be equally problematic here, but the matter certainly deserves further exploration. In any event, the civil rights community should exert pressure on the President for an expansive definition of discrimination under the implementing regulations of section 311.

Constitutional causes of action also face formidable barriers.⁸⁹ Disparate impact on minorities or women is not enough to state an equal protection claim; there must be evidence that the government intended to target these groups.⁹⁰ Moreover, other vulnerable groups, such as children, the elderly, and the disabled, receive little constitutional protection even from intentional government discrimination.⁹¹ Further, the Eighth Amendment's ban on cruel and unusual punishment applies only to situations in which the government intends to impose punishment.⁹² Lastly, claims for deprivation of life, liberty, or property without due process are blocked because the government has no constitutional duty to prevent disasters or to provide disaster assistance.⁹³ Thus, the chances for successful constitutional litigation appear slim under current law.

2. Requirements for Administrative Consideration

Efforts also have been made to inject environmental justice into the administrative process. In 1994, President Clinton signed Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.⁹⁴ The order provided that each federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately

89. For a more detailed discussion, see FARBER & CHEN, *supra* note 1, at 123-24.

90. See *Washington v. Davis*, 426 U.S. 229 (1976) (upholding a law in spite of its racially disproportionate impact due to a lack of racially discriminatory purpose).

91. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (applying only rational basis review to strike down a law requiring a special use permit for a group home for mentally retarded persons).

92. *Ingraham v. Wright*, 430 U.S. 651 (1977) (describing the Cruel and Unusual Punishment Clause as primarily limiting the method and proportionality of punishment, and only rarely limiting what may be criminalized).

93. See *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989) (noting that the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that [interests in life, liberty and property] do not come to harm through other means").

94. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions."⁹⁵ The Administrator of the United States Environmental Protection Agency ("EPA") was directed to convene an interagency Federal Working Group on Environmental Justice to assist each agency in developing an agency-wide environmental justice strategy.⁹⁶

In 1995, the EPA issued its environmental justice strategy:

[The strategy] is based on the principle that communities affected by decisions with environmental impacts should be actively involved in the decisionmaking process. To achieve this objective, the strategy calls for EPA to increase coordination with affected communities, state, tribal, and local governments, business, and various nongovernmental organizations To develop local knowledge bases necessary for effective participation in complex decisionmaking, EPA will promote technical assistance programs and grants for minority and low-income areas.

Under the strategy, EPA will focus enforcement activities on minority and low-income areas suffering disproportionate environmental and health impacts.⁹⁷

Pursuant to Executive Order 12,898 and Title VI, the EPA has begun to include environmental justice as a factor in its review of state permits under federally delegated programs pursuant to the Clean Air and Clean Water Acts and the Resource Conservation and Recovery Act.⁹⁸ Further, environmental justice advocates aim to provide opportunities for disadvantaged groups to participate in the decisionmaking process in a meaningful way.⁹⁹

In any event, the EPA so far has not pursued environmental justice issues with much enthusiasm. According to a 2003 survey, of the 143 Title VI complaints received by EPA since 1993, 82 were

95. *Id.*

96. *Id.*

97. *Id.*

98. For further information about the EPA's response to the executive order, see Denis Binder, et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898 on Environmental Justice*, 31 ENVTL. L. REP. 11133 (2001).

99. Some possible approaches are discussed in Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3 (2005); Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459 (2002).

rejected without investigation, 26 were accepted for investigation, and the remaining 29 were still pending as of November 21, 2003.¹⁰⁰ Although the recourse through EPA's Title VI authority has "yielded collateral benefits," the complaints filed with the EPA have been "uniformly unsuccessful."¹⁰¹

In terms of potential disaster, simple disclosure requirements might be easy to implement and effective in highlighting inequality issues. When hazard maps such as FEMA flood maps (showing 100-year flood zones) are published, they should be accompanied by maps showing demographics within the risk area. In federal projects with disaster implications, such as levee construction, environmental impact statements should make similar information available.

After disasters, collection of statistics about victims on the basis of race, gender, income, and age should be required, and the statistics should be made immediately available. After all, cable television news may not make these events as obvious in every disaster as in Katrina. It is important to go beyond the immediate body count of the disaster and include mortality and illness among the affected population in the aftermath.

Where legal remedies are ineffective, civil rights groups and congressional overseers should take it upon themselves to monitor administrative compliance with Title VI and with section 311 of the Stafford Act. Moreover, local communities also should see disaster risks as relevant to them. Though disaster risks usually are not as immediate and pressing as other problems of low-income communities, in the end they may be even deadlier.¹⁰² Disasters additionally have the potential to create coalitions with less disadvantaged communities that also may be at risk.¹⁰³ Although disasters hit disadvantaged groups particularly hard, they cause serious damage to other groups¹⁰⁴—thus, there is common ground for action that cuts across various segments of society.

B. Reparations and Compensation Models

The environmental justice movement has not met with

100. Michael B. Gerrard, *EPA Dismissal of Civil Rights Complaints*, N.Y. L.J., Nov. 28, 2003, at 3.

101. *Id.*

102. FARBER & CHEN, *supra* note 1, at 109-17.

103. *Id.* at 273-88.

104. *Id.* at 109-12.

particular legal success.¹⁰⁵ Similarly, as we will see, efforts to obtain reparations for African Americans have been stymied to a large extent.¹⁰⁶ The lesson may be that the unequal impact of disasters should not be directly tied to the remedy but instead should be used as an argument for compensating all victims of catastrophes such as Katrina. The 9/11 victims' compensation fund shows that, at least under some circumstances, compensation may have enough political traction to prompt legislation.¹⁰⁷

1. Legislative Reparations

The debate over reparations offers another perspective on disaster inequality. Reparations can take the form of an administrative compensation scheme of the kind discussed above.¹⁰⁸ But legislative reparations also can take the form of a lump-sum payment to the injured group or of remedial measures attempting to redress the effects of disadvantage.¹⁰⁹ For instance, in lieu of payments to individuals, Congress might make a special investment to improve housing and employment in minority areas of New Orleans.

The topic of reparations has been discussed extensively in the context of claims for by the descendants of American slaves. The reparations issue has given rise to vigorous scholarly debate.¹¹⁰ Some of the debate concerns the application of private law theories of liability in this setting;¹¹¹ however, more attention has been given to broader policy issues. The argument for reparations is at heart a simple one. We recognize today that slavery was one of the great crimes of history, followed by a long and shameful legacy of legalized discrimination. These wrongs have never been fully acknowledged—not even in the form of an explicit apology—nor has recompense been made. This legacy, reparations advocates say, must be confronted and overcome if the current problems of

105. See *supra* Part III.A.

106. See *infra* Part III.B.1.

107. See *infra* Part III.B.2.

108. See *supra* Part III.A.2.

109. Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1198-1201 (2004).

110. For a sampling of viewpoints, see *id.*; Hanoch Dagan et al., *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004).

111. Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177 (2004); Michelle E. Lyons, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT'L L. 1235 (2002); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157 (2004).

African Americans are to be addressed seriously.¹¹²

Opponents of reparations do not question the injustice of slavery and Jim Crow laws, only whether reparations are a sensible response. They see reparations as deeply divisive, increasing rather than healing racial divisions.¹¹³ Opponents also fear that the quest for reparations will discourage Blacks from assuming responsibility for their own futures.¹¹⁴ Critics further raise a host of questions about how to calculate the damages for this past misconduct and to distribute those damages to current generations of African Americans.¹¹⁵

Reparations have not yet gained widespread support, which may not be a promising sign for disaster compensation. As Saul Levmore puts it, "African American reparations are unlikely to materialize, and are perhaps as unlikely as a renegotiation with current American Indians regarding the purchase of Manhattan Island long ago or as a recovery from present Southerners for the firing on Fort Sumter."¹¹⁶ Indeed, public opinion polls show that only four percent of Whites support compensation for slavery in contrast to the sixty-seven percent of Blacks who support such payments.¹¹⁷

Nevertheless, there are some promising precedents for reparations. For instance, Florida paid survivors of the 1923 Rosewood massacre \$150,000 each, and the State made substantial payments to the descendants of other victims.¹¹⁸ Also, as early as 1946, the United States paid roughly \$800 million to Native Americans for wrongfully seized land and, more recently, \$1.65 billion to wrongfully interned Japanese Americans.¹¹⁹ The

112. Some of the key arguments for reparations are made in ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 119-63 (2004); Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959 (2000); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003).

113. See Epstein, *supra* note 111, at 1192; Massey, *supra* note 111, at 169.

114. See Massey, *supra* note 111, at 170-71.

115. See Brophy, *supra* note 109, at 1201-11; Epstein, *supra* note 111, at 1185-86; Massey, *supra* note 111, at 161-62.

116. Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291, 1292 (2004).

117. Brophy, *supra* note 109, at 1184. Another poll shows the level of white support to be somewhat higher at eleven percent. See Levmore, *supra* note 116, at 1293 n.10.

118. Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 603-604 (2003).

119. Levmore, *supra* note 116, at 1303 n.50 (citing Eric A. Posner & Adrian

federal government paid \$9 million to African Americans who were denied treatment for syphilis as part of the infamous Tuskegee experiments.¹²⁰ In another gesture of political support, California passed a statute requiring insurance companies to submit records of slaveholder insurance policies to a central registry.¹²¹ More recently, J.P. Morgan Chase apologized for its predecessors' acceptance of slaves as collateral and in some cases as payment for debt. The apology was accompanied by a \$5 million pledge for black college students from Louisiana.¹²² Thus, at least a glimmer of hope may exist for public support of some kind of slavery reparations program.¹²³

The case for compensating Katrina victims should be much less controversial than the case for compensating descendants of slaves. There is a powerful argument for providing reparations to the families of those killed in New Orleans during Katrina. Unlike slavery, the New Orleans disaster is recent history. We do not need to worry about tracing the descendants of a generation long-gone, nor do we need to worry about whether the harm has been attenuated from the passage of time and occurrence of intervening events. Moreover, much of the responsibility for the deaths rests on the federal government for defective design of the levee system and a botched rescue effort.¹²⁴ If they were able to circumvent the federal government's broad immunity to suit for flood damage, the survivors would have a plausible negligence action against the government. Regardless of legal immunity, the federal government has a moral responsibility to provide compensation.

If this compensation is not provided in the form of a 9/11-like victims' compensation fund,¹²⁵ alternative models for

Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 696-98 (2003)).

120. *Id.* ("African Americans . . . were denied treatment for syphilis as part of a government-sponsored experiment begun in 1930's.").

121. Lyons, *supra* note 111, at 1264.

122. See Moushumi Anand & Robert Mentzer, *Federal Judges Hear Arguments in Reparations Case*, CHI. DEFENDER, Sept. 28, 2006.

123. See, e.g., Ogletree, *supra* note 112, at 280-81 (citing an Oklahoma statute and a Chicago city ordinance). Moreover, Congress waived the statute of limitations for suits involving discrimination by the Department of Agriculture against black farmers in the South. See *id.* at 303.

124. See U.S. S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. Docs. No.'s 1-1 & 2-1 (2006) reprinted in FARBER & CHEN, *supra* note 1, at 5-17 (hereafter "COMM. ON HOMELAND SECURITY & GOV'T AFFAIRS").

125. See *infra* Part III.B.2.

compensation should be considered. For example, the families of these victims might be given extra assistance in reconstruction or relocation. Their children might be given special educational assistance. Alternatively, the reparation rationale might help justify expanded assistance to the affected communities as a whole. At the very least it would seem the United States government owes the families of these victims the courtesy of an official apology. Surely that is the very least our government can do when it promises protection to its citizens and fails indefensibly to deliver on that promise.

2. The 9/11 Compensation Fund as a Model

As was proved in the aftermath of our country's worst terrorist event, compensation need not take place through litigation. After the September 11, 2001, terrorist attack, Congress established a special victims' compensation fund.¹²⁶ Compensation is limited to individuals who were present at the crash site and who suffered physical injury or death.¹²⁷ The statute covers economic losses "to the extent recovery for such loss is allowed under applicable State law" including medical expenses, loss of earnings, and "loss of business or employment opportunities."¹²⁸ It also covers non-economic recovery for physical and emotional pain.¹²⁹ As an alternative to the fund, victims can utilize the tort system; however, tort recoveries are limited by the insurance coverage of the airline defendants.¹³⁰

To administer the fund, a special master was appointed.¹³¹ The special master issued regulations to govern claims, and in some instances the regulations seem to go beyond the statutory language.¹³² The regulations include the following: reducing the

126. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001) (codified as 49 U.S.C. § 40101). For an overview of the scheme, see Robert L. Rabin and Suzanne A. Bratis, *Financial Compensation for Catastrophic Loss in the United States*, in FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: A COMPARATIVE APPROACH 303 (Michael Faure & Ton Hartlief eds., 2006). See Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006), for criticism of the 9/11 compensation scheme.

127. § 405(c)(2)(A).

128. § 402(5).

129. § 402(7).

130. § 408(a).

131. § 404(a).

132. See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg.

offset for life insurance and pension benefits to the extent of the individuals' policy payments or pension contributions;¹³³ setting an approximate \$250,000 floor on recoveries;¹³⁴ establishing a presumptive schedule covering economic loss based on age, family size, and recent earnings;¹³⁵ and creating a schedule for non-economic losses, with \$250,000 to each victim and \$100,000 each to close relatives.¹³⁶ Apparently, the special master's strategy was to "closely enough approximate the range of tort compensation to make no-fault benefits under the Fund an offer that could not be refused by most eligible parties."¹³⁷ As it turned out, ninety-seven percent of the victims' families applied to the fund.¹³⁸

So far there has been little political support for a similar compensation scheme for Katrina victims although the 2006 shift in control of Congress may make a difference. Many people perished as a direct result of inadequate levee design or construction by the federal government and this was compounded by FEMA's shockingly disorganized response to the flooding.¹³⁹ One argument against compensation might be that individuals were partly responsible for their fates because they failed to evacuate.¹⁴⁰ Given the evacuation barriers facing many victims, the assignment of blame to individuals is problematic. In some cases victims were disabled or unable to evacuate for other reasons. It is best to consider the issue on an individualized basis. Even if some fault was assigned to the victims, a comparative fault scheme such as that used in tort law should be used to adjust recoveries.

Other factors also may be responsible for the lack of political interest in a compensation fund scheme. First, the families of 9/11 victims were in a much better position to seek redress as many were well-educated, affluent, and capable of mustering political

11,233 (Mar. 13, 2002) (codified as 28 C.F.R. pt. 104).

133. *Id.* at 11,239.

134. *Id.* at 11,235.

135. *Id.* at 11,237 ("It will be very rare that a claimant will receive less than \$250,000 . . .").

136. *Id.* at 11,239.

137. Rabin & Bratis, *supra* note 126, at 341.

138. KENNETH R. FEINBERG, DEPT OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 80, available at http://www.usdoj.gov/final_report.pdf.

139. See COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, *supra* note 124, at 5-17.

140. See e.g., Steve Esack, *Lafayette College Symposium Faults Leadership After Katrina; But Experts Also Blame People of New Orleans for Not Evacuating*, ALLENTOWN MORNING CALL (Pa.) Nov. 20, 2005, at B2.

clout.¹⁴¹ Second, perhaps there was a sense that the 9/11 victims, having suffered due to a foreign attack, were in some sense killed because of their citizenship. This reasoning presents the victims as representatives of the broader public, similar to soldiers. Third, the 9/11 victims had a reasonable prospect of collecting massive tort damages against the airline industry, giving them political leverage, whereas the culprits in Katrina seemingly were immunized by federal law. In any event, the absence of compensation to Katrina victims seems particularly unjust especially when considering both the federal government's role in causing the flooding and botching the recovery, as well as the greater disadvantaged status of Katrina victims as compared with many of those who died in 9/11.¹⁴²

IV. The Exceptional as a Lens for the Ordinary

The disadvantaged suffer the most during natural disasters. The reason is not necessarily deliberate or even subconscious discrimination during the disaster itself, although these may be factors. More fundamentally, ordinary disadvantages can become dramatic threats to life and well-being during disasters.

Consider the elderly who died during the Chicago heat wave.¹⁴³ They were predominantly poor and socially isolated.¹⁴⁴ Even on normal days, their apartments often were sweltering, and they were afraid or unable to leave due to disabilities.¹⁴⁵ They lived vicariously through their televisions, with little contact with other human beings. These were often lives of misery that apparently did not concern society in the least. Only when a heat wave converted miserable lives into miserable deaths did society take notice.¹⁴⁶ Should we not begin to worry about the lives of these fellow citizens *before* they fall prey to unusual weather events?

In the same vein, consider the poor, minority citizens of New Orleans who fell victim to Katrina.¹⁴⁷ Seeing their faces on CNN elicited an immediate response, as did the spectacle of their bodies

141. See Feinberg, *supra* note 138, at 52-56.

142. See *id.*; COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, *supra* note 124, at 5-17.

143. See KLINENBERG, *supra* note 49, at 18-19.

144. See *id.*

145. See *id.*

146. See *id.*

147. CENTER FOR PROGRESSIVE REFORM, *supra* note 36, at 34-35.

propped by buildings or floating in the streets. But before the media attention, society seemed unconcerned about the poverty, crime, unemployment, and poor health care to which these same citizens were exposed.

Social disadvantage can kill in very obvious ways during a disaster. It can kill in less obvious but probably more frequent ways on any normal day through crime, malnutrition, and poor health care. Disasters operate as a kind of lens, allowing society to perceive what was before its eyes all along. The best way to prevent social disadvantage from becoming deadly during disasters is to eliminate the disadvantage, rather than merely focusing on the disaster situation.

Thus, natural disasters can offer society a pedagogical moment by making what is normally an invisible state of deprivation suddenly visible and salient. In the aftermath of Hurricane Katrina, even President George W. Bush was moved to reflect on the nature of disadvantage in our society. He observed that the poverty of so many in the region "has roots in a history of racial discrimination, which cut off generations from the opportunity of America."¹⁴⁸ He added, "[w]e have a duty to confront this poverty with bold action."¹⁴⁹ Alas, bold actions were not forthcoming, but at the very least the President's recognition offered a moment where such change was imaginable. In a different political setting, Katrina might have sparked some genuine social change.

Conclusion

Part of what we need for dealing with the extraordinary and its impact on the disadvantaged is just ordinary good sense. It is a truism that mobile homes are storm magnets. These are not dwellings of the affluent. Often they are housing for the poor, and the regulatory standards are weak. Until 1996, for example, it was said that a "monkey could have put in your tie-downs" since Florida had no regulatory program at all.¹⁵⁰ Yet, in the 1990s, the

148. Elisabeth Bumiller, *Bush Pledges Federal Role in Rebuilding Gulf Coast*, N.Y. TIMES, Sept. 15, 2005, at A19.

149. *Id.*

150. See Mary Shanklin and Sean Holton, *Old Ties are Rusty, Loose or Missing; The Straps That Hold Down Mobile Homes are Insufficient on Almost All 1970s- and '80s-Era Models That Have Been Examined*, ORLANDO STAFF, May 31, 1998, at A16; see also TED STEINBERG, *ACTS OF GOD: THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA* 207 (2d ed. 2000).

federal oversight program was weakened.¹⁵¹ It has been known since the 1960s that mobile homes are vulnerable to wind—a report on the 1965 Hurricane Betsy found that sixty-mile per hour winds were enough to destroy them.¹⁵² In Florida, mobile homes remain “wildly popular” among the poor and elderly.¹⁵³ It is only a matter of time until some major metropolitan area in Florida takes a direct hit from a category four or five hurricane. A little common sense is all that seems to be required: stringent tie-down regulations and rigorous enforcement are necessary.

Also as a matter of common sense, many disaster prevention and response measures benefit everyone in society—disadvantaged or not. Even though Hurricane Katrina had a disproportionate impact on people who were Black, elderly, or poor, being young, White, or affluent certainly was no magic shield. The same levees that protect the affluent and politically powerful can also protect the poor and politically weak. The disproportionate harm suffered by those already disadvantaged provides special reasons for concern about their plight in disasters.

There are several possible responses that the legal system could choose to address this disproportionate impact, including administrative disclosure requirements, liability for actions having disproportionate impact, administrative compensation funds, and reparations legislation. Perhaps the first fundamental lesson of disasters is that the social disadvantages our society treats as ordinary and unremarkable become deadly in dramatic ways during the course of a disaster. We ought to try to prevent the conversion of these social disadvantages into post-disaster mortality figures. The second primary lesson we should take is that ordinary social disadvantages create their own forms of long-term, low-visibility disasters. Natural disasters may turn lives of quiet desperation into very visible deaths. We should not wait for natural disasters to take place before we address the social disasters that they expose.

151. STEINBERG, *supra* note 151, at 107.

152. *Id.* at 90-91.

153. *Id.* at 92.

