

Disaster Law and Inequality

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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, that of natural disasters.

Earthquakes and hurricanes are not, of course, the products of inequality. Yet their impacts can fall very unevenly on different segments of society.² This was brought vividly home to anyone who watched the news during Hurricane Katrina. Consider the Dome, which offered shelter of last resort: "The Dome was a brewing public health disaster. [T]he number of people inside had doubled in twenty-four hours, becoming a virtual city of twenty-thousand, overwhelmingly poor and African American."³ For days, it was "clear to anyone watching television that the majority of people trapped in New Orleans were African Americans, most from the low end of the income spectrum."⁴ For "much of New Orleans's white population had departed before the storm hit, while the remainder lived in areas closer to dry land and found it easier to escape."⁵ Ultimately, the Congressional Research Service found that "an estimated 272,000 black people were displaced by flooding or damage, accounting for 73% of the population affected by the storm in the parish."⁶

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² For background on this problem, see Daniel A. Farber and Jim Chen, *Disasters and the Law: Katrina and Beyond* 109-160 (2006). As the National Research Council 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." National Research Council, *Committee on Disaster Research in the Social Sciences, Facing Hazards and Disasters: Understanding Human Dimensions* 73 (2006). The NRC refers to this phenomenon as "social vulnerability." *Id.*

³ John McQuaid and Mark Schleifstein, *Path of Destruction: The Devastation of New Orleans and the Coming Age of Superstorms* 235 (2006). The authors were two Times Picayune reporters who covered the disaster firsthand.

⁴ *Id.* at 300. Outside the city, in St. Bernard parish, whites were more heavily impacted and many died. *Id.*

⁵ *Id.*

⁶ Thomas Gabe, Gene Falk & Maggie McCarty, *Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas* 14, 16-17 (Nov. 4, 2005) (Congressional Research Serv. Order Code RL33141).

Similar patterns exist for other disasters. A tsunami on December 26, 2004, killed roughly a quarter of a million people and displaced another million. 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.⁷

As the tsunami shows, the relationship between social disadvantage and disaster risk is not limited to the United States. This Essay, however, will focus on the domestic aspects of this relationship. Part I reviews some incidents of discrimination 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. Part IV considers how this disproportionate impact may best be considered a wake-up call about less dramatic but more deeply entrenched social needs, while Part V offers a brief conclusion.

I. Disaster Inequality in American History

In the early Twentieth Century, disasters and racial issues were often intertwined. For example, after the 1906 San Francisco earthquake, Japanese and Chinese groups were singled out for negative treatment.⁸ Whites looted Chinatown after the residents had evacuated.⁹ Whites attempted to move Chinatown to the least desirable area of the city, but were foiled by the concerted resistance of the Chinese community.¹⁰ Repressive actions toward Japanese, including school segregation, at one point threatened to lead to a war between the United States and Japan.¹¹ Similarly, after Galveston was destroyed by a flood the same year, 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 provided 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

⁷⁷ Farber and Chen, *supra* note , at 115-116.

⁸ See Philip L. Fradkin, *The Great Earthquake and Firestorms of 1906*, 289-304 (2005).

⁹ *Id.* at 292-293.

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, *Rising Tide: The Great Mississippi Flood of 1927 and How it Changed America* (1998).

¹⁴ *Id.* at 201.

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 redoubled: "All that day police rounded up hundred more black men and carried them to the protection levee" to work.¹⁵ On April 25, plans were made to evacuate to evacuate Greenville. "White women and children massed around gangplanks waiting to board the steamboats; the barges would carry Negroes and terrified livestock."¹⁶ But plans to evacuate blacks were cancelled by planters afraid of losing their workforce.¹⁷

Blacks and whites remaining in Greenville lived very different lives. About four thousand whites remained living on second floors, offices, or hotels.¹⁸ In the meantime, about five thousand blacks were jammed into warehouses, oil mills and stories; while over ten thousand more lived on top of the levees in tents with thousands of live stock. The "disparity between life for black and white seemed greater than in normal life"; blacks "felt betrayed."¹⁹ A form of slavery had been reinstated. "The National Guard patrolled the perimeter of the levee camp with rifles and fixed bayonets. To enter or leave, one needed a pass."²⁰ This was true everywhere in Mississippi.²¹ In the Greenville camp, brutality was commonplace, and blacks said they were "treated like dogs."²²

As flooding continued, over 300,000 people, mostly black, were relocated to campus for up to four months.²³ During the cleanup, loading supplies and cleaning was considered work only for blacks, whom the police conscripted into work gangs.²⁴ 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; but the promises were abandoned as soon as Herbert Hoover no longer needed black support to get the Republican presidential nomination.²⁵ Ultimately, as a direct

¹⁵ Id. at 206.

¹⁶ Id. at 308.

¹⁷ Id. at 310.

¹⁸ Id. at 311.

¹⁹ Id. at 312.

²⁰ Id. at 313.

²¹ Id. at 313.

²² Id. at 315.

²³ Id. at 286.

²⁴ Id. at 328.

²⁵ Id. at 382-385.

result of the flood experience, tens of thousands of blacks left the Delta for Chicago and other northern cities.²⁶

A year later, 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.”²⁷ The hurricane killed twenty-five hundred people, “mostly poor blacks who drowned in the vegetable fields of the Everglades.”²⁸ As in the Mississippi flood, officials conscripted blacks into the cleanup effort at gunpoint.²⁹ 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.”³⁰

These incidents may be dismissed as ancient history by some. Unfortunately, though these graphic forms of discrimination have been largely eliminated, factors such as race and poverty continue to matter in terms of disaster vulnerability. Disaster may rain down on all, but it rains more heavily on some than others.

II. Disasters and Vulnerable Groups

The relationship between disasters and societal disadvantage deserves further study from social scientists. Current research on the subject is patchy. 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 have often been disproportionately victimized in disasters. This continued to be true with Hurricane Katrina. The reasons are closely connected with the general social disadvantages suffered by minority groups. As a report issued soon after Katrina explained, the disproportionate impact of the disaster was no coincidence:

²⁶ Id. at 417.

²⁷ Michael Grunwald, *The Swamp: The Everglades, Florida, and the Politics of Paradise* 192 (2006).

²⁸ Id. at 193.

²⁹ Id. at 194.

³⁰ Id. at 194.

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. * * * "[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.³¹

More than a third of black New Orleans households lacked cars, and over half of all poor black households.³²

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. They were turned back by armed police because Gretna refused to give them shelter or help them evacuate further. Litigation is now under way which may determine whether this shocking response to the plight of desperate people was racially motivated.³³

The connection of race and poverty with evacuation rates was not unique to Katrina. As the National Research Council 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

³¹ Center For Progressive Reform, *An Unnatural Disaster: The Aftermath Of Hurricane Katrina* 34-35 (2005). CPR also argued that this should have been foreseen. CPR contends that warnings from "[c]ommunity groups and environmental justice scholars" help demonstrate not only that "government decision makers should have known just who would be left to suffer the harms of protections foregone, but [also] that they did know": "the 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 (2005).

³² See Arloc Sherman and Isaac Shapiro, *Essential Facts About the Victims of Hurricane Katrina* (Sept. 19, 2005)(Center on Budget and Policy Priorities), available at www.cbpp.org.

³³ See Philip Clark, *Bridge to Nowhere*, available at <http://www.law.berkeley.edu/library/disasters/Clark.pdf>.

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 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.³⁴

In addition, the NRC found, members of minority groups may distrust emergency information from the white majority, and those rely on non-English speaking media may find it more difficult to obtain warnings.³⁵

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. Undocumented aliens may avoid making use even of the short-term assistance because of well-founded fears that they may be detained and deported. Even some immigrants who were lawfully in the United States were ineligible for certain assistance. 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 U.S. for humanitarian reasons.³⁶

The relationship between race, poverty, and disaster risk can be complex. In 1995, over seven hundred Chicago residents died in a week-long heat wave.³⁷ African Americans were the group most at risk, being 1.5 times as likely to die than whites.³⁸ But Hispanics were the least likely to be victims of any group. Although their “overall level of poverty placed them at a heightened risk of mortality,” they “experienced a surprisingly low death rate.”³⁹ The reason for the contrast between the African American and Hispanic risk levels may be related to the social ecology of the neighborhoods were they live, with Hispanic neighborhoods being more likely to encourage the elderly to get out and connect with others.⁴⁰ Along with age, social isolation is a critical risk factor in heat waves.⁴¹ As a sociologist who studied the heat wave explains,

³⁴ NRC, *supra* note, at 130.

³⁵ *Id.*

³⁶ Berkeley International Human Rights Clinic, *When Disaster Strikes: A Human Rights Analysis of the 2005 Gulf Coast Hurricanes 19-22* (March 3, 2006), available at www.law.berkeley.edu/clinics/ihrhc/pdf/disaster_strikes_version2.pdf.

³⁷ See Eric Klinenberg, *Heat Wave: A Social Autopsy of Disaster in Chicago* 9 (2002).

³⁸ *Id.* at 18.

³⁹ *Id.* at 19.

⁴⁰ Klinenberg, *supra* note, at 35.

African Americans had the highest death rates because “they are the only group in the city segregated and ghettoized in community areas with high levels of abandoned housing 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.”⁴²

More generally, lack of social capital (in the form of a rich network of community relationships) greatly increases vulnerability to risk.⁴³ 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.

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. They are less likely to be homeowners and hence 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 hardpressed in the aftermath.⁴⁴

B. Gender and Age

Another pattern in big disasters is that women often suffer disproportionately. Disaster researchers refer to “front-line caregivers,” people who take care of others; women tend to do more of that than men, performing more of the emotional work involved in disaster recovery. Two researchers note that women are ‘particularly subject to environmental risks through urban displacement and migration’⁴⁵ The NRC notes that being females is a risk factor for experiencing negative post-disaster psychological trauma.⁴⁶ There are also reports that disasters accentuate the threat of domestic violence.⁴⁷

⁴¹ Id. at 45-46.

⁴² Id. at 127.

⁴³ NRC, *supra* note , at 231-232.

⁴⁴ See Farber and Chen, *supra* note , at 129-130.

⁴⁵ Lee Clarke, *Worst Cases: Terror and Catastrophe in Popular Imagination* 134 (2006).

⁴⁶ NRC, *supra* note , at 155. Being a member of a minority group or poor are also risk factors. Id. at 155-156.

⁴⁷ Elaine Enarson, *Surviving Domestic Violence and Disasters* (FREDA Centre for Research on Violence against Women and Children, Jan. 1998), available at <http://www.harbour.sfu.ca/freda/reports/dviol.htm>.

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.⁴⁸

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.⁴⁹

The relationship between gender and disaster vulnerability can be complex. In the Chicago heat wave, the majority of the victims were men. Within the same age group, men were twice as likely to die as women.⁵⁰ Apparently, elderly men are more likely to be socially isolated than women of the same age, and hence more likely to fall victim to heat waves.⁵¹

Age is also an important factor in disaster vulnerability. Children suffer from special vulnerabilities.⁵² As one disaster expert observes, if "children are not recognized as a special population and planned for accordingly, they can be at grave and

⁴⁸ Elaine Enarson, *Women and Girls Last? Averting the Second Post-Katrina Disaster*, available at <http://understandingkatrina.ssrc.org/Enarson/>

⁴⁹ Women's Funding Network, *Study Shows that Women Disproportionately Affected by Katrina*, http://www.wfnet.org/documents/press_releases/WFN_MFW_Katrina_release_aug_27.pdf

⁵⁰ Klinenberg, *supra* note, at 20.

⁵¹ *Id.* at 74-75.

⁵² See United States Government Accountability Office (GAO), *Hurricanes Katrina and Rita: Unprecedented Challenges Exposed the Individuals and Households Program to Fraud and Abuse; Actions Needed to Reduce Such Problems in Future* (Report to Congressional Committees, no. GAO-06-1013) (September 2006), <http://www.gao.gov/new.items/d061013.pdf>

disproportionately higher risk in major disasters.”⁵³ Children may also 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. Thirty percent of the children in these areas lived in poverty.⁵⁴ Children may also be at special risk of exploitation during disasters.⁵⁵

The elderly are also exposed to special risks. In the 1995 Chicago heat wave, almost three quarters of the victims were over sixty-five.⁵⁶ The elderly are also at higher risk from hurricanes:

Jefferson Parish President Aaron Broussard’s story of 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.⁵⁷

Nearly half of the elderly living in the Katrina impact zone reported having at least one disability; a quarter reported that their disability impaired their ability to leave their dwellings unassisted.⁵⁸ Not surprisingly, over forty percent of the dead were identified as over seventy.⁵⁹

⁵³ Irwin Redlener, *Americans at Risk: Why We are Not Prepared for Megadisasters and What We Can Do Now* 105 (2006). Dr. Redlener is the director of the National Center for Disaster Preparedness at Columbia University.

⁵⁴ Farber and Chen, *supra* note , at 139.

⁵⁵ See Delaney, Stephanie, ECPAT International, *Protecting Children from Sexual Exploitation & Sexual Violence in Disaster & Emergency Situations: A Guide for Local & Community Based Organizations* (March 2006), http://www.ecpat.net/eng/pdf/Protecting_Children_from_CSEC_in_Disaster.pdf.

⁵⁶ Klinenberg, *supra* note , at 18-19.

⁵⁷ Elizabeth Fussell, *Leaving New Orleans: Social Stratification, Networks, and Hurricane Evacuation*, available at <http://understandingkatrina.ssrc.org/Fussell/>.

⁵⁸ Farber and Chen, *supra* note , at 139.

⁵⁹ Audie Cornish, *Katrina Took Deadly Toll on Elderly* (Nov. 20, 2006), available at www.npr.org/templates/story/story.php?storyId=5242064.

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

III. Potential Legal Responses to Disaster Inequality

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. Minority participation in decisions affecting disaster planning has suffered in the same way as 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 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.⁶⁰

In this section, we 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.

A. Liability

Existing law presents significant barriers to recovering for government actions that result in disproportionate harm to vulnerable populations from 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. Environmental justice advocates saw Title VI of the 1964 Civil Rights Act as one of their most promising weapons. Title VI prohibits discrimination by recipients of federal funds, and the regulations under Title VI cover not only intentional discrimination but also actions having a disparate impact on minority groups.⁶¹ But the viability of private

⁶⁰ Richard J. Lazarus, *Pursuing 'Environmental Justice': The Distributional Effects of Environmental Protection*, 87 Nw.U. L. Rev. 787, -- (1993).

⁶¹ 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 (1999).

actions to enforce the Title VI regulations is currently unclear. In *Alexander v. Sandoval*,⁶² the Court held that the Title VI regulations do not create a private cause of action. In dissent, however, Justice Stevens 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.⁶³

Soon afterwards, however, a federal appeals court rejected this theory.⁶⁴

Another potential source of remedy might be section 308 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.

For this provision to become a source of an effective remedy, a court would have to find that it gives rise to an implied cause of action or that violations of section 308 are actionable under section 1983. The barriers encountered to 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 expansive definition of discrimination under the implementing regulations of section 308.

⁶² 532 U.S. 275 (2001).

⁶³ *Id.* at 1527.

⁶⁴ See *South Camden Citizens in Action v. New Jersey Dept. of Env. Protection*, 274 F.3d 771 (3d Cir. 2001). See also *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003).

Constitutional causes of action also face formidable barriers.⁶⁵ 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. Moreover, other vulnerable groups such as children, the elderly, and the disabled receive little constitutional protection even from intentional government discrimination. The Eighth Amendment's ban on cruel and unusual punishment also applies only to situations in which the government's intent is to impose punishment. 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. Thus, the chances for successful constitutional litigation appear slim under current law.

B. Requirements for Administrative Consideration

Efforts have also been made to inject environmental justice into the administrative process. In 1994, President Clinton signed Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.⁶⁶ The order provided that each federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately 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."⁶⁷ The Administrator of the U.S. EPA was directed to convene an interagency Federal Working Group on Environmental Justice, to assist each agency to develop an agency-wide environmental justice strategy.⁶⁸

In 1995, EPA issued its environmental justice strategy, based on the principle that communities affected by decisions with environmental impacts should be actively involved in the decisionmaking process. The strategy calls for EPA to increase coordination with affected communities, state, tribal, and local governments, business, and 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. The Agency also will focus enforcement activities on minority and low-income areas suffering disproportionate environmental and health impacts.⁶⁹

Pursuant to Executive Order 12898 and Title VI, EPA has begun to include environmental justice as a factor in its review of state permits under federally delegated

⁶⁵ For a more detailed discussion, see Farber & Chen, *supra* note , at 123-124,

⁶⁶ 59 Fed. Reg. 7629 (Feb. 16, 1994).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Terry Schnell & Kathleen Davis, *The Increased Significance of Environmental Justice in Facility Siting, Permitting*, 29 *Env'tl. Rptr.* 528, 529 (1998).

programs pursuant to the Clean Air and Clean Water Acts and the Resource Conservation and Recovery Act.⁷⁰ Another thrust of advocates of environmental justice is to provide opportunities for disadvantaged groups to participate in decisionmaking in a meaningful way.⁷¹

In any event, EPA so far has not pursued EJ issues with much enthusiasm. According to a 2003 survey, of the 139 Title VI complaints received by EPA since 1993, 75 were rejected without investigation; 26 were accepted for investigation, but in none was timely evidence of discrimination found. The remaining 30 are still pending.⁷²

In terms of potential disaster, simple disclosure requirements might be easy to implement and yet 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 also important to go beyond the immediate body count of the disaster and include excess 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 308 of the Stafford Act. Moreover, local communities should also see disaster risks as relevant to them. Disaster risks are not as immediate and pressing as other problems of low-income communities, but in the end they may be even deadlier. They also have the potential to create coalitions with less disadvantaged communities that may also be at risk.

C. The 9/11 Compensation Fund as a Model

⁷⁰ For further information about EPA's response to the executive order, see Denis Binder, et al., *A Survey of Federal Agency Responses to President Clinton's Executive Order No. 12898 on Environmental Justice*, 31 *Envtl. L. Rep.* 11133 (2001).

⁷¹ Some possible approaches are discussed in Alejandro Esteban Camacho, *Mastering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 *Stan. Env. L.J.* 3 (2005); Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 *Harv. Env. L. Rev.* 459 (2002).

⁷² Michael B. Gerrard, "EPA Dismissal of Civil Rights Complaints," *New York Law Journal*, November 28, 2003.

Compensation need not take place through litigation, as was proved in the aftermath of our country's worst terrorist event. After the September 11, 2001 terrorist attack, Congress established a special victim's compensation fund.⁷³ Compensation was limited to individuals who were present at the crash site and who suffered physical injury or death.⁷⁴ The statute covers medical expenses, loss of earnings, "loss of business or employment opportunities to the extent recovery for such loss is allowed under applicable state law," and non-economic loss such as physical and emotional pain.⁷⁵ Victims also had the alternative of going through the tort system, but tort recoveries were limited to the insurance coverage of the defendants.⁷⁶

A special master was appointed to administer the fund. The special master issued regulation to govern claims that in some instances seemed to go significantly beyond the statutory language.⁷⁷ Although the statute called for an offset for life insurance and pension benefits, the special master reduced the offset to the extent of the individuals' policy payments or pension contributions. The special master also set an approximate \$250,000 floor on economic recoveries. He also established a presumptive schedule covering economic loss, based on age, family size, and recent earnings, with a cap for the highest-level incomes. The special master also created a schedule for non-economic losses, with \$250,000 to each victim, and \$100,000 each to close relatives. 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."⁷⁸ As it turned out, ninety-seven percent of the surviving families applied to the fund, with only seventy families opting out.

Although the 2006 shift in control of Congress may make a difference, so far there has been little political support for a similar compensation scheme for Katrina victims. Yet, it seems clear that many people perished as a direct result of inadequate level design or construction by the federal government, compounded by FEMA's shockingly disorganized response to the flooding. One argument against compensation might be that individuals were partly responsible for their fates since they failed to evacuate. The extent to which blame can be assigned to individuals for failing to evacuate is subject to debate; given the barriers to evacuation facing many victims. But

⁷³ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 405(b)(2), 49 U.S.C. 40101. For an overview of the scheme, see Robert L. Rabin and Suzanne A. Bratis, *United States*, in *Financial Compensation for Victims of Catastrophes: A Comparative Approach* 303 (Michael Faure and Ton Hartlief eds., 2006). For criticism of the 9/11 compensation scheme, 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).

⁷⁴ Sec. 405(C)(2)(a)(II).

⁷⁵ Sec. 402 (5),(6).

⁷⁶ Secs. 408 , 201 (b)

⁷⁷ See 67 Fed. Reg. 11233, 28 CFR pt. 104.

⁷⁸ Rabin and Bratis, *supra* note 36, at 341.

even if some fault could be assigned on this basis, a comparative fault scheme such as that used in tort law could be used to adjust recoveries on this basis.

Three other factors may be responsible for the lack of political interest in this scheme. First, the families of 9/11 victims were in a much better position to seek redress, if only because many were well educated, affluent, and capable of mustering political clout. Second, perhaps there was a sense that the 9/11 victims, having suffered from foreign attack, were in some sense killed merely because they were Americans, making them in a sense representatives of the broader public in the same way as 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 were immunized by federal law. In any event, the absence of compensation to Katrina victims seems unjust.

D. Legislative Reparations

The debate over reparations offers another perspective on disaster inequality. Reparation could take the form of an administrative compensation scheme of the kind discussed above. But legislative reparations could also take the form of a lump-sum payment to the injured group or of remedial measures attempted to redress the effects of disadvantage. 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 extensively discussed in the context of claims for reparations by the descendants of American slaves. The reparations issue has given rise to vigorous scholarly debate.⁷⁹ Some of the debate concerns the application of private law theories of liability in this setting. More attention, however, 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 African Americans is to be addressed seriously.⁸⁰

⁷⁹ For a sampling of viewpoints, see Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DePaul L. Rev. 1181 (2004); Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. Rev. 1177 (2004); Hanoch Dagan et al., *Symposium: The Jurisprudence of Slavery Reparations*, 84 B.U. L. Rev. 1135 (2004); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. Third World L.J. 157 (2004); Michelle E. Lyons, Note, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 Vand. J. Transnat'l L. 1235 (2002).

⁸⁰ 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).

Opponents of reparations do not question the injustice of slavery and Jim Crow. They do question whether reparations would represent a sensible response. They see reparations as deeply divisive, increasing rather than healing racial divisions. Opponents also fear that the quest for reparations will discourage African Americans from assuming responsibility for their own futures. Critics also 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.⁸¹

Reparations have not yet gained widespread support (which may not be a promising sign for climate change compensation). As Saul Levmore's 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."⁸² Indeed, public opinion polls show that only four percent of whites would support payment of compensation for slavery (as opposed to the two-thirds of blacks who support such payments).⁸³

Nevertheless, there are some precedents for reparations. Florida paid survivors of a 1923 massacre \$150,000 each and made substantial payments to the descendants of other victims.⁸⁴ The United States paid roughly \$800 million to Native Americans for wrongfully seized land as early as 1946, as well as \$1.65 billion to wrongfully interned Japanese Americans more recently.⁸⁵ The federal government also paid \$9 million to African Americans who were denied treatment for syphilis as part of the infamous Tuskegee experiments.⁸⁶ In another gesture of political support, California passed a statute requiring insurance companies to submit records of slaveholder insurance policies to a central registry.⁸⁷ More recently, J.P. Morgan Chase apologized for the actions of its predecessors in accepting slaves as collateral (and taking possession in some cases); the apology was accompanied by a \$5 million pledge for black college students from Louisiana.⁸⁸ Thus, at least a glimmer of hope may exist for public support of some kind of slavery reparations program.⁸⁹

⁸¹ These objections are discussed in Brophy, *supra* note ; Epstein, *supra* note ; and Massey, *supra* note .

⁸² Saul Levmore, *Privatizing Reparations*, 84 B.U. L. Rev. 1291, 1292 (2004).

⁸³ Brophy, *supra* note 73, at 1184. Another poll showed the level of white support to be somewhat higher, at eleven percent. *See* Levmore, *supra* note, at 1293 n.10.

⁸⁴ *Id.* at 1243

⁸⁵ Levmore, *supra* note , at 1303 n.50.

⁸⁶ *Id.*

⁸⁷ Lyons, *supra* note , at 1264.

⁸⁸ *See* Ashley Aher, *Slave Descendants Attempt to Revive Reparations Suit*, Chicago Sun-Times, Sept. 27, 2006, available at <http://www.suntimes.com/news/metro/74304.cst-nws-rep27.article>.

⁸⁹ Charles Ogletree also cites two other examples: an Oklahoma statute and a Chicago city ordinance. *See* Ogletree, *supra* note , at 280-81. Moreover, as he points out, Congress waived the statute of limitations in a suit involving discrimination by the Department of Agriculture against black farmers in the South. *Id.* at 303.

The case for compensating Katrina victims should be much less controversial. There is a powerful case for 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 by 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. If it were not for the federal government's immunity from suit, 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 victim compensation fund, more general forms of compensation should be considered. For example, the families of these victims might be given special 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 promises.

IV. The Exceptional as a Lens on the Ordinary

The disadvantaged suffer the most during natural disasters. The reason is not necessarily deliberate or even unconscious discrimination during the disaster itself, though these may of course be factors. But more fundamentally, what are disadvantages of ordinary life become dramatic threats to life and well-being during disasters.

Consider the elderly who died during the Chicago heat wave. They were predominantly poor and socially isolated. Often, even on normal days, their apartments were sweltering and they were afraid to leave. They had only an imitation of a social life through their televisions. They may have been disabled. These were lives of miseries, which did not concern society in the least. Only when a heat wave converted miserable lives into miserable deaths did society take notice. Yet, shouldn't we begin to worry about the lives of these fellow citizens *before* they are at risk from unusual weather events?

In the same vein, consider the poor, minority citizens of New Orleans who were so often the victims of Katrina. Seeing their faces on CNN elicited an immediate response, as did the spectacle of their bodies propped by buildings or floating in the

streets. But before their moment of media attention, society seemed unconcerned about the poverty, crime, unemployment and poor health care to which they were exposed.

Social disadvantage can kill in very obvious ways during a disaster. It can kill, less obviously but probably more frequently, on any normal day, when crime, malnutrition, and poor health care take their toll. 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 teachable moment, 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.”⁹⁰ He added that: “we have a duty to confront that poverty with bold actions.”⁹¹ Alas, the bold actions were not forthcoming, but at least that moment of recognition created a possible space in which such actions became thinkable. In a different political setting, Katrina might have sparked some genuine social change.

V. Conclusion

Part of what we need to deal 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 the dwellings of the affluent; often, they are housing for the poor. Yet 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.⁹² Yet, in the 1990s, the federal oversight program was weakened.⁹³ It has been known since the 1960s that mobile homes are especially vulnerable to wind -- a report on the 1965 Hurricane Betsy found that even sixty mile per hour winds were enough to destroy them.⁹⁴ In Florida, mobile homes remain “wildly popular” among the poor and elderly.⁹⁵ It is only a matter of time until some major metropolitan area in Florida takes a direct hit from a category 4 or 5 hurricane. A little common sense is all that seems to be required here.

⁹⁰ Associated Press, *Bush Pledges Federal Role in Rebuilding Gulf Coast*, New York Times, September 15, 2005.

⁹¹ *Id.*

⁹² See Ted Steinberg, *Acts of God: The Unnatural History of Natural Disaster in America* 207 (2d ed. 2000).

⁹³ *Id.* at 209.

⁹⁴ *Id.* at 91.

⁹⁵ *Id.* at 92.

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

There are several possible responses that the legal system could make to this disproportionate impact. The possibilities include administrative disclosure requirements, liability for actions having disproportionate impact, administrative compensation funds, and reparations legislation. The more fundamental lesson of disasters, however, is that the social disadvantages that our society treats as ordinary and unremarkable become deadly in dramatic ways in the course of a disaster. We ought to try to prevent the conversion of these social disadvantages into post-disaster mortality figures. But we should also take a more fundamental lesson, that the ordinary social disadvantages create their own forms of long-term, low-visibility disasters. Natural disaster may turn lives into quiet desperation into very visible deaths, but we should wait for natural disasters to take place before we address the social disasters on which they feed.