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MITIGATING DISASTER: A COMMUNITARIAN RESPONSE*

*Robert M. Ackerman***

In this essay, I present a communitarian view as to how we might best respond to disaster, and in particular, to losses suffered by the direct victims of disaster. My focus will be on financial compensation to disaster victims, which admittedly occupies only a small part of the spectrum of disaster response. Emergency “first responder” activities are matters about which I have no expertise; volunteering at my local food bank hardly qualifies me to advise FEMA or the Red Cross. The blunders for which these organizations have recently been responsible are apparent, and so are some of their causes, but the engineering of more effective responses is a matter on which I would be foolish to opine.¹ My background in tort law, conflict resolution, and administrative law does provide a modicum of expertise on compensation systems, so it is in that area that I will offer some communitarian principles and suggest some practical considerations.

SOME COMMUNITARIAN PRINCIPLES

Central to communitarianism is the proposition that we do not exist on this planet as isolated, individual units, but as interdependent beings, in a web of relationships. While “proponents of modern communitarianism do not represent a single uniform position,”² we would generally agree that the “self cannot exist in

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¹ Elsewhere, I have suggested the response to Hurricane Katrina as a prototype of underperformance by government. See generally Robert M. Ackerman, *Taking Responsibility*, 4 TENN. J. L. & POL. (forthcoming 2008).

² Aderson Bellegarde Francois, *Only Connect: The Right to Community and the Due Process Liberty Interest in State-Sponsored Racial Integration*, 113 PENN ST. L. REV. (forthcoming 2008).

physical and metaphorical isolation.”³ We are very much our brothers’ and sisters’ keepers. And so when disaster strikes, be it at the World Trade Center, in a field in western Pennsylvania, on the shores of Southeast Asia, or on the Gulf Coast, we have a natural human inclination to reach out and to engage in *Tikkun Olam* (healing the world).⁴ We do not pause to question; we do not ask “who is worthy” or “who brought this upon him/herself;” we help first, and ask questions later.

Some are better organized for such efforts than others. In the aftermath of Hurricane Katrina, the Mormon Church, a religious enterprise known for its high degree of organization and the commitment of its adherents to philanthropy,⁵ proved more proficient at disaster relief than the Federal Emergency Management Administration (FEMA), a government agency ostensibly established for just such a mission. Neither size nor officialdom is synonymous with efficiency or compassion. In the United States in particular, a strong civil society tradition should remind us that government is not the exclusive source of assistance in time of need; sometimes, it is not the best source of such assistance. Communitarians value the role of civil society – the tapestry of voluntary associations such as civic clubs, neighborhood organizations, corporations, labor unions, religious institutions, charitable organizations, educational institutions, and even Robert Putnam’s bowling leagues – in stepping forward to meet various needs in time of disaster.⁶ Almost two centuries ago, Alexis de Tocqueville noted that the relatively weak,

³ BEAU BRESLIN, *THE COMMUNITARIAN CONSTITUTION* 31 (2004).

⁴ See INTERFAITH FAMILY, GLOSSARY OF TERMS, http://www.interfaithfamily.com/common/glossary/gl_233.shtml (last visited Apr. 8, 2008).

⁵ See GENEROUS GIVING, <http://www.generousgiving.org/page.asp?sec=28&page=242> (last visited Apr. 8, 2008) (noting that “Mormons believe that giving is an important way of imitating the compassion of their god The Mormon church clearly addresses a huge scope of concerns, and it is not uncommon for Mormons to give fifteen percent of their incomes to their church.”); *The Mormons, Humanitarian Programs*, <http://www.pbs.org/mormons/themes/humanitarian.html> (“In the Hurricane Katrina of 2005 we know that once again [our] trucks were there before the National Guard was even allowing relief through. So the response is incredibly fast, incredibly efficient.”) (last visited Apr. 8, 2008); *The Mormons: Hurricane Katrina*, <http://www.youtube.com/watch?v=UVJRxZO9910> (a short documentary on the work of the Mormon Church in response to Hurricane Katrina) (last visited Apr. 8, 2008); see also *THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, Newsroom*, <http://newsroom.lds.org/ldsnewsroom/v/index.jsp?vgnextoid=7792111cf2793110VgnVCM100000176f620aRCRD&vgnnextchannel=9ae411154963d010VgnVCM1000004e94610aRCRD> (last visited Apr. 8, 2008) (noting the amount of supplies provided by the Church to clean up the wreckage of Hurricanes Katrina and Rita).

⁶ See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

unengaged, and unobtrusive government of the United States was supplemented by a strong civil society.⁷ Americans were joiners, de Tocqueville observed, and the churches, civic societies, guilds, fraternal organizations and other institutions they formed and joined often served as helping organizations, by design or by necessity.⁸

Today, American government is stronger, more engaged, and more intrusive. But it is not almighty. Private associations can sometimes intervene more effectively than a cumbersome and, as appeared to be the case in the wake of Katrina, uncaring government. And even when government intervenes generously and efficiently, as with the September 11th Victim Compensation Fund [the “Fund” or “September 11th Fund”], such intervention cannot alone provide a complete healing for the direct victims of disaster. A web of support systems, some more intimate than government (even government at a local level), is necessary for *Tikkun Olam*.

A third and subordinate communitarian principle is that when we *do* look to government for assistance, we should, as a general proposition, impose responsibility on the smallest political units capable of dealing with the problem.⁹ This is rooted less in the political and constitutional concept of federalism than in common sense. Smaller geographic units are closest to the people and the problem; more often than not, they are best attuned to the problem and can respond most efficiently and directly. Local knowledge is valuable in assessing needs, finding ready solutions, and speaking the language of those in need of assistance.¹⁰ But some problems are of a scale that requires the mobilization of larger political units; indeed, some require the deployment of armies uniquely suited to meet a substantial logistic challenge. The September 11th tragedy and Hurricane Katrina are good examples of such phenomena. When your basement is flooded, it may be enough to call on your immediate neighbors to help mop you out. But sometimes your neigh-

⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, VOL. I, *passim* (Gerald Bevan, trans., Penguin Books Ltd. 2003) (1835).

⁸ More recently, political scientist Robert Putnam has lamented the diminishing participation of Americans in voluntary associations such as civic clubs, improvement associations, charities, and even bowling leagues. *See generally* PUTNAM, *supra* note 6.

⁹ The Communitarian Platform states, in pertinent part, that “[g]enerally, no social task should be assigned to an institution that is larger than necessary to do the job. . . . What can be done at the local level should not be passed on to the state or federal level, and so on.” AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 260 (1993).

¹⁰ *See* Mel Rubin, *Setting Up a Statewide ADR Post Disaster Program: Unanticipated Consequences*, 9 CARDOZO J. CONFLICT RESOL. 351 (2008).

bors are themselves overwhelmed by the deluge, and you must look further afield for help. At the end of 2004, victims of a tsunami in Southeast Asia were gratified to learn that their “neighbors” came from all over the world, and that help from them was at hand. Sometimes it takes a global village to raise a populace from disaster.

But communitarians also put stock in personal responsibility.¹¹ While our instincts are charitable, upon close examination we may be disinclined to reward people for failing to look after themselves. And we may be inclined to draw a distinction between compassion for people in genuine need and subsidies for activities in which people have assumed a risk.¹² For example, we might stop short of subsidizing protection from mudslides for communities on the California coast, leaving individuals to decide for themselves whether they are willing to pay the price of living in a dangerous environment (and look to private markets to insure against loss), while enjoying the benefits of an ocean view. The Katrina disaster, in my mind, stands in sharp contrast. Granted, residents of the Gulf Coast had taken it upon themselves to live at or below sea level, but they did so in justifiable reliance on a system of levees, canals, navigation and transportation engineered, built, and maintained primarily by government. Indeed, only government could have constructed and maintained a system of such scale. And so it is only appropriate for government to respond to a disaster that it might have averted through more effective conduct, conduct upon which the citizenry had relied.¹³

We might part company with those proponents of Katrina relief who claim a vested “right” for victims to return to neighborhoods that remain vulnerable to flooding. Certainly the ties of neighborhood, family and church are important to communitarians. People are not fungible commodities capable of thriving as easily in one place as the next. Wholesale removal of populations has serious human rights implications; these implications are all the more cause for concern when the displaced group is composed

¹¹ ETZIONI, *supra* note 9, at 9–10.

¹² See Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 672–75 (1995).

¹³ Crime victim compensation schemes have been justified on the theory that “the government has an absolute duty to protect its citizens from crime.” Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TULANE L. REV. 167, 212 (2004). Whether or not one accepts such an extended version of government duty, the connection in the case of Katrina is far more direct. See Ackerman, *supra* note 1.

predominantly of a racial or ethnic minority.¹⁴ But communitarians hesitate at the minting of new “rights,” such as the “right” to live permanently in a flood-threatened area, requiring millions of dollars in government subsidies for protection against the persistence of nature.¹⁵ We prefer, in instances such as these, to weigh the interests in property and neighborhood against the public expenditures necessary to ensure safety against the ongoing threat of hurricane and flood. It is bad economics and bad policy to subsidize life in areas not meant for human habitation. Better to reserve some low-lying areas for water catchment or open space, and rebuild our homes on higher ground.¹⁶

These principles must necessarily be considered in the context of budgetary limitations and practical politics. The public expresses a great deal of sympathy and compassion for victims of crime, for example, but the financial support the government provides to crime victims falls far short of the need. Victim compensation funds have been established in every state to provide relief to crime victims.¹⁷ These funds have been supplemented by federal support under the Victims of Crime Act (VOCA).¹⁸ These programs are chronically underfunded; in fact, they are supported primarily not by tax revenues, but by fines and penalties collected from criminal miscreants.¹⁹ They are also subject to a number of restrictions.²⁰ The big disasters attract the most attention and, consequently, the greatest public funding. The September 11th Fund is instructive in that regard. The loss of life in the September 11th

¹⁴ Even well-intentioned programs, such as the Ujamaa program in 1970's Tanzania (in which people were first encouraged, then forced, to move into larger communities), have their ill effects. KWAME NANTAMBU, *TANZANIA'S SOCIALIST REVOLUTION: WHAT WENT WRONG?* (Jan. 18, 2007), available at <http://www.trinicenter.com/kwame/2007/1801.htm> (examining President Nyerere's implementation of Ujamaa). In contrast, the Chernobyl nuclear disaster in 1986 required that a large population be removed from the affected area: this forced evacuation, while unpleasant, was a necessity. See NEA COMMITTEE ON RADIATION AND PUBLIC HEALTH, *CHERNOBYL TEN YEARS ON RADIOLOGICAL AND HEALTH IMPACT* 18, 27–28 (1995), available at <http://www.nea.fr/html/rp/chernobyl/vrml/chernobyl.html>.

¹⁵ See ETZIONI, *supra* note 9, at 5–9.

¹⁶ Care should be taken, however, not to affect a racial or ethnic gerrymander that interrupts the continuity of a community and thereby distorts its character. For a brief history of the displacement of impoverished African-Americans in New Orleans, see Alecia P. Long, *Poverty Is the New Prostitution: Race, Poverty, and Public Housing in Post-Katrina New Orleans*, 94 J. AM. HIST. 795 (2007).

¹⁷ See Goldscheid, *supra* note 13, at 167–68.

¹⁸ Victims of Crime Act of 1984, Pub. L. No 98-473, 98 Stat. 2170 (codified as amended at 42 U.S.C. §§ 10601–10605 (2000)).

¹⁹ Goldscheid, *supra* note 13, at 187–89.

²⁰ *Id.* at 189–94.

attacks was on a scale that begged for intervention on a national level.²¹ The attacks were a shared national trauma, seen by millions of people on television, and the American people came to believe that the direct victims of the September 11th attacks had suffered on behalf of the entire nation.²² No doubt, the Fund reflected the genuine compassion of the American people. But it came about largely as an afterthought, as a *quid pro quo* for protection of the troubled airline industry, tacked onto legislation initially designed to forestall suits against the airlines.²³ The legislation establishing the Fund precluded its beneficiaries from suing the airlines or any of the other potential defendants whose negligence arguably enabled the attacks.²⁴ As a consequence, the September 11th tragedy produced federally-funded victim assistance distinguishable in scale and type from responses to natural disasters, the Oklahoma City bombing, or the 1993 bombing of the World Trade Center, none of which threatened an essential industry.

THE COMPENSATION GAP

In principle, it is difficult to distinguish mass disasters such as September 11th and Katrina from more individualized tragedies, at least insofar as justification for recovery for individual losses is concerned. Every murder, fatal automobile accident, drowning, electrocution, and other accidental death is a disaster to the individuals who have experienced it and to their immediate families. It is hard to tell the family of a murder victim or an individual who has drowned in an unexpected flood why he or she is any less entitled to compensation than a victim of the September 11th terrorist hijackings or the Katrina flooding. The mass disasters attract our attention. Certainly they are more newsworthy, more notorious,

²¹ Generous payments from the September 11th Victim Compensation Fund were nevertheless supplemented by substantial contributions from state, local and private sources. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 153–54, n. 79 (2005).

²² *Id.* at 158–59.

²³ *Id.* at 159. The original Republican proposal imposed caps on recovery against two major airlines facing the prospect of a multitude of suits as a consequence of the September 11th tragedy. A federally-funded compensation scheme for victims was added at the insistence of Congressional Democrats and the Association of Trial Lawyers of America. *Id.* at 143.

²⁴ Air Transportation Safety and System Stabilization Act, IV, Pub. L. No. 107-42, 115 Stat. 230, § 405(c)(3)(B) (2001) (codified at 49 U.S.C.A. § 40101 (West 2003))[hereinafter ATSSSA]. Suits against the al Qaeda terrorists were not precluded by the legislation. *Id.*

than their individual counterparts, but are their victims any more worthy of public largess? Why does government, and especially the federal government, rush into mass disasters, not only with emergency assistance, but with long-term compensation, however uneven, however inefficient in its delivery? Why do we not recognize a similar need, albeit on a lesser scale, when an individual loses his or her life in a violent manner?

The simple answer is a political one. Those disasters that attract the most public notice also receive our attention in terms of public largess. Graphic portraits of human suffering are brought into our homes through the mass media; the press, charitable organizations, the public, and ultimately government are mobilized; the clarion call is made for all good citizens to come to the aid of the latest cause. In the aftermath of September 11th, a major industry was threatened, and few concerns are more likely to attract the attention of policymakers in Washington (especially Republican policymakers) than a threat to a major business enterprise. There is, however, a justification of greater substance: Some tragedies are of a scale such that they can be addressed only through the kind of large-scale mobilization for which only the largest and best-equipped institutions – the Federal Government, the Red Cross, Oprah Winfrey, the Mormon Church – can respond.²⁵ For smaller, more personal tragedies, there remain (we hope) more localized responders – local religious congregations, charitable organizations, and the most intimate of helping institutions, the family. But certainly any number of victims falls into a vast and yawning compensation gap.

Another, even larger compensation gap is produced by the traditional system of tort recovery. The tort system is a scheme of corrective, not distributive, justice. It transfers the loss from victim

²⁵ For example, the American Red Cross gave significant grants “to more than 100 established non-profit organizations throughout the U.S. that deliver community-based services to address the needs of people who were directly affected by 9/11.” AMERICAN RED CROSS, SEPTEMBER ASSISTANCE, http://www.redcross.org/general/0,1082,0_152_1392,00.html (last visited Apr. 9, 2008); see Press Release, FEMA, Hurricane Katrina Mississippi Recovery Update: March 2008, Release No. 1604-639 (Mar. 31, 2008) <http://www.fema.gov/news/newsrelease.fema?id=43091> (last visited Apr. 9, 2008) (noting that FEMA has given over \$1.2 billion dollars to individuals and families affected by Hurricane Katrina). I had intended the reference to Oprah Winfrey as a joke, until I learned that Ms. Winfrey’s net worth was \$2.5 billion and that she had given \$2 million for Hurricane Katrina and Indian Ocean Tsunami relief. See Nancy Franklin, *Oprah’s World*, NEW YORKER, March 24, 2008, at 76; see also Roger Friedman, *Oprah Winfrey’s Charities Worth More Than \$200 Million*, FOX NEWS, Jan. 5, 2007, <http://www.foxnews.com/story/0,2933,241782,00.html> (last visited Apr. 9, 2008). See *supra* note 5 for discussion of the Mormon Church’s commitment to disaster relief.

to wrongdoer only if the latter is found to have been at fault (i.e., liable for an intentional tort or negligence) or to have engaged in one of a discrete number of activities to which the law attaches strict liability. Accident victims are entitled to compensation only if they can show fault or a basis for strict liability. Others, who suffer injuries every bit as severe, but who cannot make this showing, are left to their own devices. The same lot falls to those victims who were unfortunate in their “selection” of tortfeasor. Those who have been injured by the insolvent and uninsured are unlikely to enjoy any recovery; in fact, most such victims are advised by counsel (usually dependent on a contingent fee) not to sue. These unfortunates include the victims of some of the most violent and brutal crimes, whose perpetrators, if found, rarely have had the good graces to accumulate significant assets or obtain insurance.

While the tort plaintiff’s entitlement to compensation is dependent on the character of the defendant’s conduct, the *amount* of compensation the defendant is required to pay is less dependent on the reprehensibility of her conduct than on the circumstances of the plaintiff, such as her potential earnings, life expectancy, and susceptibility to injury.²⁶ That is because compensation, like liability, is based on notions of corrective justice, in that a defendant, once found liable, is supposed to pay damages sufficient to place the plaintiff in the position she would have been in but for the defendant’s tortious conduct. Meanwhile a large, cumbersome, and expensive machine – staffed by judges, other court employees, plaintiffs’ and defendants’ lawyers, insurance adjusters, mediators, and medical and other scientific experts – is employed to process claims and make determinations of fault and damages. The system *may* work as an incentive for care, to reinforce the type of individual and corporate responsibility valued by communitarians (although some of that incentive may be diluted by insurance). But it by no means assures all accident victims, injured through no fault of their own, full compensation for injury.

The unfairness inherent in the compensation gaps described above could be alleviated, to some extent, through the provision of universal national health insurance. Often, the most pressing need of victims of disaster – personal or national – is medical assistance, and the availability of health care for all would alleviate not only the immediate need, but the financial dislocation and worry that

²⁶ The reprehensibility of the defendant’s conduct may play a role in the assessment of punitive damages, but these come into play in only a very small percentage of cases. DAN B. DOBBS, *THE LAW OF TORTS* 1062 (2000).

imposes intolerable burdens on too many families of limited means.²⁷ The gap between those eligible for tort damages or disaster relief and those who are not could be expanded to include others suffering from poor health that is not attributable to any crime, accident, or disaster. The lottery of life casts some people as more susceptible to ill health than others; many such people are less able to occupy jobs through which they can obtain comprehensive health insurance. Our communitarian compassion calls for us to spread their health-related costs as well.

Unemployment and disability benefits would be the next logical layer of economic assistance. The first source of compensation in this regard should probably be privately obtained insurance benefits, available to many people through their employers. State compensation funds, backed by sufficient public resources, should be available to pick up the slack. State-administered victims' compensation funds typically require that beneficiaries exhaust other sources first; the victims' compensation fund becomes payer of last resort.²⁸ This is probably as it should be. Even the legislation establishing the very generous September 11th Victim Compensation Fund required a reduction of benefits for funds obtained from collateral sources.²⁹ This feature is at odds with the collateral source rule found in traditional tort law, but for good reason.³⁰ The collateral source rule is based on the premise that plaintiffs should not be penalized in their damage awards for their foresight in obtaining

²⁷ Ironically, this did not appear to be the case with respect to one very recent and prominent disaster. Most of the immediate victims of the September 11th attacks were killed within hours of when the four jets crashed into the World Trade Center, the Pentagon, and a field near Shanksville, Pennsylvania. But the September 11th attacks did leave several hundred victims – some of them rescue workers – who suffered from the long-term medical consequences of inhaling toxic particles in the vicinity of the collapsed towers. See Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1849 (2002); Ackerman, *supra* note 21, at 160–61. These largely forgotten victims, ineligible for compensation from the Fund, would have benefited greatly from a health care system offering universal benefits. Others, already covered by health insurance, would have appreciated more generous disability and unemployment compensation.

²⁸ Goldscheid, *supra* note 13, at 190.

²⁹ ATSSSA, *supra* note 24, at § 405(b)(6). An administrative regulation promulgated by the Special Master excluded charitable gifts and tax benefits from collateral sources subject to the statutory offset. 28 C.F.R. § 104.47 (2002). “Had charitable gifts been included in the definition of collateral sources, then millions of dollars that Americans had donated to the many charities established to help the September 11th victims would have become, in effect, contributions to the U.S. Treasury.” Ackerman, *supra* note 21, at 151 n.68.

³⁰ The collateral source rule precludes the reduction of a tort plaintiff's damages for payments received from sources other than the defendant, such as the plaintiff's first-party health or disability insurance. Because first-party insurers are usually entitled to subrogation, the plaintiff rarely receives a double recovery. DOBBS, *supra* note 26, at 1060.

first-party insurance (such as health and disability insurance), for which they have, of course, paid.³¹ This rule again reflects the *corrective* justice orientation of the tort system. The tortfeasor is required to *correct* the wrong for which she is responsible. Government-financed compensation systems have a more communitarian goal, that of *distributive* justice.³² The object is not to *shift* the loss to the one who occasioned it; rather it is to *spread* the loss among the citizenry, so that one individual or family need not bear it disproportionately. Government assistance should fill the most egregious gaps, but it need not restore the more affluent victims to their previous favored status.

The goal of a government-financed system should not be to make anyone rich, or even to compensate them for the non-economic losses recognized by the tort system. Rather, the goal of a system financed primarily by taxpayers should be to give victims of disaster – large-scale or personal – the wherewithal to get on with their lives. Many American families live without the margin of security enjoyed by those in the upper economic strata. These Americans live from paycheck to paycheck, with incomes barely sufficient to make ends meet.³³ While flood, fire, and premature death are tragedies for any of us, they can have long-term catastrophic consequences for families living on the edge. The death or disability of a breadwinner in such families can send them on a downward spiral into poverty that can endure for a generation or

³¹ Whether health, auto and disability insurance premiums have been paid directly by the victim or by her employer should be of no consequence; in the latter case, the premiums have been earned by the victim.

³² This was a theoretical flaw in the September 11th Victim Compensation Fund, which retained the tort formula for compensating victims from taxpayer-generated funds. This formula, more appropriate to a corrective justice system, was probably retained (a) due to a lack of imagination during a legislative drafting frenzy or (b) because the Fund was being offered as an alternative to a conventional tort action, and its creators wanted victims and their families to choose the former over the latter. See Ackerman, *supra* note 21, at 162–64.

³³ There is every indication that the percentage of Americans in these circumstances is increasing, as evidenced by the growing number of working-class families in which there is more than one income-earner. Beth Potier, *Middle-Class Income Doesn't Buy Middle-Class Lifestyle*, HARV. U. GAZETTE, Oct. 30, 2003, available at <http://www.news.harvard.edu/gazette/2003/10.30/19-bankruptcy.html>; Marilyn Gardner, *Two Incomes, More Debt?*, CHRISTIAN SCI. MONITOR, Sept. 17, 2003, at 12; Jane Bryant Quinn, *Escaping the Trap*, NEWSWEEK, Sept. 15, 2003, at 63; Christopher Shea, *Two Incomes, One Bankruptcy*, BOSTON GLOBE, Sept. 14, 2003, at D1; *All Things Considered: Two-Income Families at Risk of Financial Crisis* (NPR radio broadcast Sept. 9, 2003); Jeff Madrick, *The No-Frills Middle Class*, N.Y. TIMES, Sept. 4, 2003, at C2; James Surowiecki, *Leave No Parent Behind*, NEW YORKER, Aug. 18, 2003, at 48; Maryanne Murray Buechner, *Parent Trap*, TIME, Sept. 15, 2003, at A20.

more³⁴. Sustenance that allows such families to get past the immediate crisis can provide for a more stable future, allow these families to become productive once again, and add, rather than detract, from the nation's wealth. An effective system of personal disaster relief is thereby likely, in the long run, to reduce what Professor (now Judge) Guido Calabresi has called "secondary costs," i.e., the public costs of accidents.³⁵

FEDERAL COMPENSATION FOR DISASTER: A PROGRAM THAT WORKED

Despite the many objections to the September 11th Victim Compensation Fund, it worked remarkably well. A no fault, administrative remedy provided over \$7 billion in assistance to victims and families, without resort to the time-consuming, expensive process inherent in the tort system. The Fund was administered by neither government bureaucrats nor politicians, but by a dispute resolution professional, Kenneth Feinberg, working without compensation and assisted by other professionals recruited specifically for this mission.³⁶ But the September 11th Fund was expensive, more expensive than we can afford on a regular basis. The circumstances that gave rise to the Fund are unique in history, and, we hope, never to be duplicated. As a consequence, the September 11th Fund is regarded as *sui generis*.³⁷ The Fund, a product of a late night drafting session without voting by any congressional committee,³⁸ demonstrates the flaws of ad hoc, emergency measures: By their very nature, they are hastily conceived, based on emotional responses as much as practical need, are uneven in ap-

³⁴ See DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 905 (5th ed. 2005):

Injury that causes economic loss . . . has radiating effects that impose losses on others – family members, employers, and society as a whole. The effects are not necessarily only economic in nature, and society also has an interest in seeing to it that uncompensated economic harm to a worker, for example, does not lead to a spiraling disintegration of the family structure itself. This view might result in the feeling that some minimal compensation would be more important than a careful determination of fault.

Id.

³⁵ GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 40 (1970).

³⁶ See Ackerman, *supra* note 21, at 197; see also Elizabeth Kolbert, *The Calculator, How Kenneth Feinberg Determines the Value of Three Thousand Lives*, *NEW YORKER*, NOV. 25, 2002, at 42.

³⁷ See Ackerman, *supra* note 21, at 205.

³⁸ *Id.* at 143.

plication and therefore unfair.³⁹ We might therefore consider what kind of *advance* provision should be made to compensate disaster victims, beyond the underfunded state victim compensation programs that mete out negligible amounts to crime victims.

A COMPREHENSIVE SCHEME FOR COMPENSATION OF DISASTER VICTIMS: SOME THRESHOLD ISSUES

During the live symposium upon which this essay is based, I suggested some threshold issues to be considered in connection with federal disaster relief, so as to avoid the problems inherent in ad hoc remedies. One of these issues involved the criteria to be employed to determine whether federal intervention was appropriate. The most obvious criterion is that of scale. Some disasters are simply too large to expect a single city, county, or even state to fully address them. The economic impact of a disaster like Hurricane Katrina is too great for relatively small and economically disadvantaged states like Louisiana and Mississippi to bear. In cases such as these, the Federal Government should serve as a reinsurer, assuming burdens in excess of a predetermined, quantifiable amount; justified, ideally, by objective criteria, rather than political influence.

A second criterion had more to do with the inherent nature of the disaster. Politically motivated attacks against the people of the United States merit a national response. The September 11th attacks were launched not just against the cities of New York and Arlington, Virginia (much less an open field in rural Pennsylvania); instead, they were attacks upon the entire nation. To expect a purely local response would have been akin to asking the Territory of Hawaii to respond to the Pearl Harbor attack on its own. Under this criterion, the Oklahoma City bombing would qualify for federal relief. While perpetrated by Americans, its immediate target was a federal building filled with American employees; its avowed purpose was to protest federal government policies. This differentiates the attack from other despicable but localized events, such as the Virginia Tech shootings (Blacksburg, Virginia, 2007),⁴⁰ the

³⁹ Some of the flaws in the September 11th Fund legislation were ameliorated through administrative regulation. *See id.* at 148–56.

⁴⁰ John M. Broder, *32 Shot Dead in Virginia; Worst U.S. Gun Rampage*, N.Y. TIMES, April 17, 2007, at A1.

“Son of Sam” shootings (New York City, circa 1977),⁴¹ or any number of street crimes that plague Americans. The collapse of the Twin Towers was an event with national resonance; David Berkowitz’ killing spree in the same city twenty-four years earlier was a purely local matter.

Another issue I thought worthy of consideration was how federal relief would dovetail with other forms of assistance, from state and local governments or private sources. Of course, duplication is to be avoided, as are significant gaps in responsibilities. A further issue was whether we could craft an administrative remedy that would serve as a sufficient substitute for common-law tort remedies, so as to overcome due process challenges. The September 11th Victim Compensation Fund survived such challenges because: (1) the generous awards provided came close to replicating traditional tort remedies and (2) victims (or families) were entitled to opt out of the Fund and pursue a common law tort action (albeit with limitations).⁴² My initial response was that less generous compensation schemes would be more likely to survive due process challenges if they were established in advance of any claim, rather than after the claim arose (as with September 11th). But the need to establish a government compensation scheme as a *substitute* remedy is necessary only if there is a desire to protect a potential defendant from liability. Such was the case with the airline industry in the wake of the September 11th tragedy.⁴³ While we might conjure up other such instances, they are likely to be quite rare. There is no national interest in protecting the McVeighs and bin Ladens from liability. As to natural disasters, God is not amenable to service of process, as Job sadly discovered.

Another question I posed during the symposium was whether the political will existed, particularly on a national level, to enact and fund such measures in the absence of a perceived *crisis du jour* or threat to a vital industry. My tentative answer is *no and yes*.

The *no* part stems from the current debate over national health insurance. I have suggested previously in this essay a single-payer national health insurance program that would provide comprehensive medical coverage for all Americans. There is reason to believe that the administrative savings of a single-payer system

⁴¹ Article, *A Year Later ‘Son of Sam’ Still On Loose*, N.Y. TIMES, July 3, 1977, at 98.

⁴² ATSSSA, *supra* note 24, at § 408.

⁴³ Not all potential defendants were protected by the September 11th legislation. Al Qaeda remained liable to those who could execute a judgment against Osama Bin Laden and his henchmen. *Id.* at § 405(c)(3)(B).

would go a long way toward financing coverage for those who are presently uninsured.⁴⁴ And as I've previously suggested, such a system could provide a critical layer of support to disaster victims as well as victims of crime and poor health, thereby alleviating the problem of unequal treatment. But even as the Republican Party has come into disfavor, its fearsome warnings of "creeping socialism" continue to haunt political discourse and stunt the prospects for comprehensive health insurance coverage.⁴⁵ And even among Democrats (as evidenced by the plans set forth by several presidential candidates), the proposals for federal intervention to provide health care are quite timid. The plans proposed by the leading candidates call not for a single-payer, universal health care system; rather, they adopt a piecemeal approach, in which the government provides health insurance only for those least able to pay.⁴⁶ The result, at best, is likely to be an underfunded, inefficient patchwork remedy.

But here is the *yes* part as to the existence of political will: A statutory framework for effective federal disaster relief already exists, and it employs criteria similar to those suggested throughout this essay. The Robert T. Stafford Disaster Relief Act of 1974, as amended,⁴⁷ [the "Stafford Act" or "Act"] provides for comprehensive federal assistance to states, local governments, private agencies, and individuals in the event of major disaster. A "major disaster" is defined under the Stafford Act as:

[A]ny natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage *of sufficient severity and magnitude* to warrant major disaster assistance . . . to supplement the efforts and available resources of States, local govern-

⁴⁴ See Nicholas D. Kristof, *A Short American Life*, N.Y. TIMES, May 21, 2007, at A19; KAO-PING CHUA, SINGLE PAYER 101 (2006) available at <http://www.amsa.org/uhc/SinglePayer101.pdf>; but see David Hogberg, *Single-Payer Silliness*, NATIONAL REVIEW ONLINE, May 12, 2005, <http://www.nationalreview.com/comment/hogberg200505120809.asp>.

⁴⁵ See 2004 REP. PARTY PLATFORM 64 (Sept. 1, 2004) (reaffirming the party's "firm rejection of any measure aimed at making health care a government-run enterprise").

⁴⁶ The candidates' own websites probably provide the best insights as to the health plans they think will survive electoral scrutiny. See Hillary for President American Health Choices Plan, <http://www.hillaryclinton.com/feature/healthcareplan/summary.aspx> (last visited Jan. 4, 2008); Obama '08 Healthcare, <http://www.barackobama.com/issues/healthcare> (last visited Jan. 4, 2008). Congressman Dennis Kucinich (who has terminated his candidacy) stood alone among the major-party presidential candidates in calling for a comprehensive, single-payer plan. KUCINICH FOR PRESIDENT, A HEALTHY NATION, <http://www.dennis4president.com/go/issues/a-healthy-nation> (last visited Jan. 4, 2008).

⁴⁷ 42 U.S.C. §§ 5121–5206 (2007).

ments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.⁴⁸

The italicized language employs the *scale* criterion for federal intervention suggested above. The Stafford Act provides for technical assistance⁴⁹, emergency support teams⁵⁰, emergency assistance to state and local agencies⁵¹ and use and coordination of relief organizations⁵². It acknowledges the involvement of civil society, repeatedly invoking the American National Red Cross, the Salvation Army, and the Mennonite Disaster Service by name (but not to the exclusion of other organizations), and the need to coordinate efforts among governments and organizations.⁵³

Furthermore, the Act provides for temporary housing assistance,⁵⁴ unemployment assistance (for up to twenty-six weeks),⁵⁵ cash assistance to individuals and households up to \$25,000,⁵⁶ and food stamps.⁵⁷ Other provisions allow for emergency mass feeding,⁵⁸ relocation assistance,⁵⁹ legal services⁶⁰ and professional counseling services.⁶¹ Granted, the \$25,000 limitation on cash assistance appears paltry compared to the awards from the September 11th Fund.⁶² But the amount provided is in addition to a number of in-kind services, and we must again remember that we are dealing with *distributive* justice to save people from personal catastrophe, not corrective justice to right all wrongs.

⁴⁸ 42 U.S.C. § 5122(2) (2007) (emphasis added).

⁴⁹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5131-5132, 5165, 5204b (2008).

⁵⁰ *Id.* § 5144.

⁵¹ *Id.* §§ 5191-5193.

⁵² *Id.* § 5152.

⁵³ 42 U.S.C. §§ 5152, 5170(b) (2007).

⁵⁴ 42 U.S.C. § 5174(b) (2007) provides, *inter alia*, that “[t]he President may provide financial or other assistance . . . to individuals and households to respond to disaster-related housing needs . . .” Such assistance may last for no more than eighteen months, unless “the President determines that due to extraordinary circumstances an extension would be in the public interest.” *Id.* at § 5174(c).

⁵⁵ 42 U.S.C. § 5177 (2007).

⁵⁶ 42 U.S.C. § 5174(e)-(h) (2007). This assistance was previously capped at an inflation-adjusted \$10,000.

⁵⁷ 42 U.S.C. § 5179 (2007).

⁵⁸ 42 U.S.C. § 5180(a) (2007).

⁵⁹ 42 U.S.C. § 5181 (2007); *see also* 42 U.S.C. §§ 4601 *et seq.*

⁶⁰ 42 U.S.C. § 5182 (2007).

⁶¹ 42 U.S.C. § 5183 (2007).

⁶² Awards to families of deceased victims ranged from \$250,000 to \$7.1 million, with a median award of \$1,677,633. Personal injury awards ranged from \$500 to \$8.6 million. *See Ackerman, supra* note 21, at 181.

Several provisions of the Stafford Act incorporate the communitarian values discussed earlier in this essay. Section 5149(a)⁶³ encourages utilization of services and facilities provided by state and local governments, in accordance with the communitarian principle that the smallest governmental units are often best-equipped to perform certain functions. Likewise, § 5150⁶⁴ establishes a preference for the use of local firms and individuals. The Act provides for coordination of federal, state, and municipal relief efforts,⁶⁵ and prohibits duplication of benefits.⁶⁶ The Act also prohibits discrimination in the provision of disaster assistance.⁶⁷

Provisions of the Stafford Act pertaining to insurance reflect the communitarian principle of personal responsibility. Section 5154(a)⁶⁸ requires an applicant for assistance in the repair, restoration, or replacement of damaged facilities to comply with regulations requiring that adequate insurance be obtained to protect against future loss to such property. Section 5154(b)⁶⁹ renders a person who has previously received assistance under the Act ineligible for further assistance unless all insurance required under § 5154(a)⁷⁰ has been maintained. Section 5154(a)⁷¹ imposes similar requirements regarding required flood insurance.

The Stafford Act is a communitarian measure allowing the national community, as represented by the federal government, to come to the aid of citizens in times of acute disaster. It allows for compassion for citizens in need, leavened by a measure of responsibility. It recognizes the complementary roles of national, state and local governments, along with that of civil society. If federal disaster relief was a failure in the aftermath of Hurricane Katrina, it would appear to have been a failure in execution, not in conception. No statute can command an administration to display more competence or compassion than we saw during Katrina's aftermath; a statutory mandate *requiring* the president to consistently employ *all* of the remedies in the Stafford Act would be too mech-

⁶³ 42 U.S.C. § 5149(a) (2007).

⁶⁴ 42 U.S.C. § 5150 (2007).

⁶⁵ 42 U.S.C. § 5152 (2007).

⁶⁶ 42 U.S.C. § 5155 (2007). This provision is also consistent with notions of distributive justice. The Stafford Act is designed to provide relief, not to place victims in precisely the same position they would have been in but for the disaster.

⁶⁷ 42 U.S.C. § 5151 (2007).

⁶⁸ 42 U.S.C. § 5154(a) (2007).

⁶⁹ 42 U.S.C. § 5154(b) (2007).

⁷⁰ 42 U.S.C. § 5154(a) (2007).

⁷¹ *Id.*

anistic, preventing a response tailored to the disaster at hand. Better to trust to the political process to provide correction to lapses in administrative judgment and competence.

MONEY CAN'T BUY ME LOVE

We should hasten to point out that material assistance of the type provided under the Stafford Act, or even through the September 11th Victim Compensation Fund, is an incomplete remedy for the human suffering that accompanies both natural and man-made disaster. Many of the scars of disaster are not immediately visible. While housing, health care and income replacement can address material needs, victims of major disaster as well as small-scale tragedy often require emotional support and counseling. This type of assistance is usually best provided not by government, but by the types of institutions mentioned previously in our discussion of civil society – churches, fraternal organizations, civic groups, professional associations – as well as that most intimate of institutions, the family. Government can lend material support to such institutions, and can channel victims to providers, but thereafter, it might be best for government to step away. Different people have different needs in this regard: some might find solace in a religious institution, others through professional counseling services, still others through the kindness of friends and family. These differential, fine-tuned individual needs suggest a variety of responses for which government bureaucracies are not especially well-equipped.

Traditional tort damages are generally divided between two types: Economic (or “pecuniary”) damages and non-economic (or “general”) damages. Economic damages represent money needed to purchase services, such as medical care, or to replace tangibles, such as income lost due to personal injury. Non-economic damages are more abstract; they are considered a substitute for things that cannot be reclaimed, like good health or peace of mind. In most cases, money damages, however generous, are a poor substitute for these priceless assets.⁷² The ministrations of civil society and the support of friends, family and community may, in some

⁷² Some of my friends in the plaintiffs’ trial bar will disagree, and will say that emotional support and the ministrations of civil society are poor substitutes for cold, hard cash. Of course, it is difficult to calculate a thirty-three percent contingent fee on the ministrations of civil society or the support of friends and family.

instances, be a superior remedy. Our legal nostrums have limited reach. Money alone does not bring about *Tikkun Olam*.

Bernard Mayer has explained that human responses to conflict come in cognitive, emotional, and behavioral dimensions.⁷³ The stress that accompanies personal tragedy is a similar phenomenon. Mayer reminds us that no single device or remedy can fully satisfy the need for resolution in each dimension, and that “closure does not often happen in a neat, orderly, synchronized manner.”⁷⁴ Some wounds strike so deep that they never heal. But time, patience, and community can provide the type of solace that government mechanisms cannot. Law is not always the answer.

⁷³ BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION* 98–108 (2000).

⁷⁴ *Id.* at 108.