

**BLOWN AWAY: Hurricane Katrina
and the Collapse of the Procedural Model of Anti-Poverty Law**

by David A. Super *

Disasters accelerate and accentuate otherwise glacial processes in the law. Society's response to sudden poverty after a disaster provides invaluable insights into its treatment of the chronically poor.

*Neither European-style social guarantees nor the full elimination of public anti-poverty programs are politically realistic options. The compromise that has held sway for the past several decades is inspired by *Goldberg v. Kelly's* procedural holdings. It seeks to enhance deliberation in both making and executing anti-poverty policy, assuming that widely-shared benevolent norms will advance the cause of the poor. It tolerates extreme poverty on the assumption that public or private agencies will intervene to accommodate vital unmet needs.*

Hurricane Katrina demonstrated this procedural model's bankruptcy. New Orleans officials lacked the empathy and preparation to help evacuate the city's 100,000 residents without the means to do so themselves. Diffusion of responsibility among various levels of government and charities, the lack of a clear consensus on substantive goals, and the procedural model's emphasis on time-consuming deliberations squandered the opportunity that post-Katrina public sympathy presented to make lasting changes in anti-poverty policy or even to restore the devastated low-income communities. These failures stranded tens of thousands of evacuees in deplorable conditions in strange cities, in FEMA trailer parks, or in their shattered former communities.

*An alternative basis for a moderate consensus is available based on *Goldberg's* expansion of property rights. A regime based on substantive rights, even modest and conditional ones, would more explicitly recognize low-income communities' interests and respond to tragedies such as Katrina.*

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I. Introduction

Few could ask for a more passionate call for justice than President Bush's speech from Jackson Square after Hurricane Katrina: "Poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America," he said. "We have a duty to confront this poverty with bold action . . . let us rise above the legacy of inequality."¹ Later that month, the President joined many others in calling Katrina a wake-up call for the country on poverty: "what a lot of Americans saw was a—some poverty that they had never imagined before. . . . Poverty is . . . an important issue, . . . and it needs to be addressed in a significant way."² *Business Week* declared that "[i]f U.S. political leaders continue to concentrate on shoring up the finances of the country's wealthiest citizens and shredding the poor's safety net, the poverty rate will spiral higher."³ Secretary of State Condoleezza Rice insisted "that race and poverty are a huge problem in the United States, and we've got to deal with that."⁴ Republican activists encouraged the President to "confront the issue of poverty 'with bold action' . . . to lead the party back to greatness" it had under Lincoln.⁵ As if on cue, the Census Bureau reported the fourth consecutive increase in poverty the day after Katrina hit the Gulf Coast.⁶ The nation seemed poised for action.

It was not to be. Not only did the country not take any new initiatives to address poverty generally, it largely re-abandoned the same disaster victims that had suffered so grievously from FEMA's slow response. They were scattered to unfamiliar cities, warehoused in isolated trailer camps, and often prevented from returning to their communities. Broadly bipartisan bills offering sweeping relief to disaster victims died without floor action,⁷ and a few months later President Bush signed legislation pairing tepid disaster relief with sweeping cuts in Medicaid and new conditions on cash assistance likely to cause states largely to eliminate their programs.⁸ Although much of the news media showed impressive staying power, eventually other events and controversies pushed Katrina's survivors from the headlines. Coverage of Katrina's second anniversary almost

¹41 WEEKLY COMP. PRES. DOC. 1407 (Sept. 15, 2005).

²*Id.*, at 1463 (Sept. 26, 2005).

³Christopher Farrell, *Poverty: The Crisis Katrina Revealed*, BUSINESS WEEK, Sept. 27, 2005.

⁴Rice: *Disaster Shows 'Ugly Way' Race, Poverty Collide*, CNN, Sept. 13, 2005.

⁵Sophia A. Nelson, *I'm Hoping Bush Can Finish What Lincoln Started*, WASH. POST, Oct. 23, 2005, at B3.

⁶U.S. CENSUS BUREAU, INCOME STABLE, POVERTY RATE INCREASES, PERCENTAGE OF AMERICANS WITHOUT HEALTH INSURANCE UNCHANGED (Aug. 30, 2005). To be sure, this sentiment was not unanimous: a Heritage Foundation spokesman complained "[i]t's a bit unfortunate to link the hurricane with the issue of poverty in this country." Kelley Beaucar Vlahos, *Katrina Reveals Poverty Reality*, Fox News, Sept. 11, 2005.

⁷*See, e.g.*, S. 1716, 109th Cong. (2005)(Grassley-Baucus bill providing extensive Medicaid, TANF, and unemployment compensation benefits to displaced people).

⁸Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006). The Medicaid and related cuts along were more than thirteen times larger than the disaster relief. CONG. BUDGET OFFICE COST ESTIMATE: S. 1932 DEFICIT REDUCTION ACT OF 2005 at 35 (2006).

unanimously painted a picture of governmental failure and continued hardship.

Cynics may question the sincerity of some of those that flocked to the anti-poverty banner. That explanation, however, is plainly insufficient: the public's outpouring of concern was so broad and intense that even insincere politicians would seem likely to be swept along. The absence of *any* meaningful assault on poverty in the wake of Katrina suggests a more fundamental problem.

Significant policy change requires at least two things: public sympathy and a coherent, plausible proposal.⁹ For most of the last quarter-century, beginning with President Reagan's deep cuts in programs for low-income people, the anti-poverty movement has focused on its weaknesses in the former realm.¹⁰ Hurricane Katrina's aftermath suggests that the basic structure of anti-poverty law has become so ossified that most proposals to modify it lack either plausibility or significance. Specifically, the proceduralist model, which depends on elites' anticipating the needs of low-income people and dispensing discretionary relief to meet those needs, is no longer capable, if it ever was, of protecting low-income people.

This article explores the structure of U.S. anti-poverty law through the lens of disaster preparedness, relief, and recovery. It finds that Hurricane Katrina exposed chronic, severe deficiencies in the proceduralist model, which has dominated anti-poverty law since the early 1970s. This model resembles the "reasonable accommodation" model of disability law and has many of the same shortcomings. In essence, we have made a series of extremely parsimonious choices and relied on exercises of extraordinary discretion to relieve the effects of those choices when necessary. We have valorized processes for discussing low-income people's needs over the actual delivery of relief. In the process, we have grossly overestimated the practical capabilities of decision-makers, from low-level bureaucrats to the electorate itself.

Part II sketches the two models of anti-poverty law with plausible claims of viability in this country. Each of these models relies on different facets of the Court's landmark decision in *Goldberg v. Kelly*.¹¹ This Part also shows why extreme approaches to poverty propounded from the Left and Right are not sustainable and hence should not figure prominently in deliberations about the merits of the two mainstream models. It then demonstrates that disaster relief is properly understood as an acute form of poverty law, making lessons readily transferable from one to the other.

Part III tests the proceduralist approach to poverty relief against the demands disasters pose and specifically the needs of low-income people in Katrina's path.

⁹See JOHN W. KINGDON, *AGENDAS FOR CHANGE* 187 (2d ed. 1995) (arguing that political change occurs only at the confluence of three streams of inputs, one of which is public attention).

¹⁰See David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2040 (2004)(arguing that public sentiment in fact has been far more evenly balanced than is commonly understood)[hereinafter "Super, *New Moralizers*"].

¹¹397 U.S. 254 (1970).

It finds that model too dependent on elites' empathy of the position of low-income people to function effectively in a society in which the gap between rich and poor is rapidly widening. This part also finds the proceduralist model too rigid and cumbersome to meet many dire needs that low-income people have, particularly under the time pressure of a disaster. Specifically, the failure of apparently well-intentioned, and politically motivated, city officials to empathize with those too impoverished to afford transportation stranded tens of thousands of people in Katrina's path, with tragic consequences. Continued insensitivity is leaving hundreds of thousands of evacuees trapped in dire circumstances.

The proceduralist model offers little remedy to the law's failure to take seriously the social value of low-income communities Katrina destroyed. This is allowing economic and political elites to eliminate permanently many vital low-income communities and scatter Katrina's survivors far from their families and support systems.

Hurricane Katrina's aftermath also exposes the problems with the proceduralist model's preference for decentralization. The states hardest hit by the disaster, particularly Louisiana, lack the means to relieve suffering on this scale. Less obviously, the states that welcomed Katrina evacuees are increasingly being burdened with costs that are not their fault and that are disproportionately burdening them for having acted nobly; neighbors of states experiencing future disasters surely will take note. And our country's continued preference for having private charities provide disaster relief diverted donations from charities serving other vulnerable people, in effect making them, rather than the taxpayers, bear much of the burden of relief.

Finally, the proceduralist model is utterly unable to convert these horrific experiences into meaningful knowledge that will help vulnerable people in the future. Disasters produce strong but fleeting bursts of egalitarianism that could be marshaled to make permanent policy changes; the lack of a coherent reform agenda squandered this opportunity in Katrina's wake.

Part IV explores the potential of the alternative, substantive model of anti-poverty law. It argues that a more pro-active approach to fighting poverty would strengthen low-income communities during crises and normal times alike. It suggests that maintaining a large segment of the population in the dire poverty that existed on the Gulf Coast prior to Katrina made timely evacuation a virtual impossibility. And it illustrates the substantive model's potential by describing the claims Katrina survivors could assert under a more inclusive version of property rights that values and sought to promote community ties.

II. Models of Anti-Poverty Law

Discussions of anti-poverty policy and law rarely advert explicitly to formal analytical frameworks. Indeed, much of the debate purports to be empirical. Appeals for society to do more typically emphasize the hardship being suffered or the long-term consequences of failing to act. Critiques of anti-poverty interventions minimize low-income people's hardships, insist that low-income people already have the means of improving their positions, and decry the costs of governmental programs. Yet although scrutiny of these empirical claims can be avail-

ing, the little-acknowledged normative competition about how our society should respond to poverty will prove pivotal to most important decisions: we need a basis on which to reconcile the real (if sometimes mischaracterized) hardships low-income people face with the real (if sometimes obscured or exaggerated) costs of interventions. This Part discerns the most important models of anti-poverty law in this country today, including both those designed by one side or the other almost exclusively from its preferred norms and possible consensus or compromise models integrating the most politically salient norms of each side. One test of the value of a model is its ability to respond to new public sentiments, such as those arising in favor of low-income people after Hurricane Katrina.

Section A examines the combination of public choice dynamics and public interest calculations that combine to shape anti-poverty policy. These delicate underpinnings for anti-poverty policy make a viable, sustainable model of anti-poverty policy all the more important: low-income people cannot exercise the same kind of on-going political pressure that protects other groups' interests and must instead rely upon law to memorialize society's benevolent judgments when a crisis such as Katrina causes it to attend to anti-poverty policy.

Section B analyzes the specific approaches of anti-poverty law competing for dominance in this country. It first shows why the preferences of neither the far left nor the far right can form the basis for a sustainable model. It then introduces two more plausible strategies for meeting the basic needs of very low-income people, each based on a different aspect of *Goldberg v. Kelly*.¹² One, which has dominated the scene since the 1970s, emphasizes and builds from *Goldberg*'s procedural holdings. It assumes that the political process will adopt and maintain appropriate substantive responses to poverty and that the primary danger lies in the administration of those programs. It seeks to meet that threat with procedural safeguards to prevent individual recipients from becoming lost in the shuffle. The competing model derives from *Goldberg*'s insight that treating low-income people's vital interests as property can give them some of the same security and autonomy that property rights provide to more affluent people.

Section C addresses the peculiar politics of disaster relief. In general, disasters engender increased sympathy than low-income and other vulnerable people, but they do so for only a brief period. This brief window of opportunity compels both sides to adjust their strategies. A failure to capitalize on this brief surge of sympathy to enact meaningful legislation all but ensures that the hardships will be repeated. Similarly, the middle-class electorate's attention to, and sympathy for, low-income people generally is far from continuous. A meaningful system of legal protections for low-income people will develop, if at all, because their advocates succeed in converting into permanent law the sympathy that a media exposé or a tragedy such as Katrina generates.

A. Political Sources of Anti-Poverty Law

¹²397 U.S. 254 (1970).

Despite occasional organizing campaigns, low-income people vote at relatively low rates. They also have relatively weak group identification: their votes easily may be driven by issues other than anti-poverty policy, either because they do not expect to remain poor or they blame themselves for their situation. By definition, they cannot make meaningful political contributions. Thus, legal interventions on behalf of poor people reflect a fundamentally different political dynamic than that, say, driving dairy price supports or deterring gun control. Yet although anti-poverty programs primarily reflect an altruistic vision of the public interest, they must compete for resources in the political arena. Their supporters thus are likely to face continual frustration should they eschew public choice calculations.

1. Public Interest

Anti-poverty policy at core reflects ethical or ideological concepts of the public interest.¹³ For example, some normative public choice theory postulates that ethical voters will equally value their own utility and that of others, causing them to support redistribution that benefits the typical recipient more than it decreases her or his well-being.¹⁴

Although the political process can respond to ethically-based preferences just as it can to self-interested ones, these two kinds of aims differ in important practical ways.¹⁵ Milk producers', steel workers', or gun enthusiasts' demands on the political system reflect their direct knowledge and are constantly on their minds. Middle-class supporters of anti-poverty programs, by contrast, may have little direct knowledge of either the nature or the extent of low-income people's travails and may be easily distracted by other public interest commitments or more self-serving pursuits. Support for anti-poverty programs thus tends to be quite episodic. Occasional alliances with provider groups sometimes can offer more stable backing for programs. Just as often, however, the providers start competing with the program's beneficiaries for resources – as farm interests do with nutrition programs¹⁶ and homebuilders do with housing vouchers – or warp the programs' priorities to meet their interests.

In addition, altruistic advocates of anti-poverty programs often hold visions of the public interest that make them unreliable champions. In particular, they may have a cross-cutting vision of “good government” that makes them reluctant to log-roll to advance those programs' interests.¹⁷ Their sense of “good govern-

¹³So, too, are many of the counter-weights to it: the sums lost to waste, fraud, and abuse pale relative to the cost of the programs – and certainly to the budget as a whole – yet nonetheless those losses offend principles of good governance.

¹⁴DENNIS C. MUELLER, PUBLIC CHOICE III 570 (2003).

¹⁵*Id.*, at 49-51.

¹⁶David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1383 (2004)(hereinafter “Super, *Quiet Revolution*”).

¹⁷One of the most successful anti-poverty programs, the Food Stamp Program, has advanced in part because its supporters held no such compunctions, tying their fate to that of subsidies for corporate

ment” also can make them more responsive than most to calls for shared sacrifice for fiscal rectitude. Anti-poverty programs thus bore a grossly disproportionate share of budget cuts in both Democratic and Republican balanced budget plans in the mid-1990s, with little public controversy. This increases these programs’ vulnerability to large cuts in times of deficit while providing no corresponding advantage in times of surplus.

Finally, some anti-poverty advocates are more committed to movement in a positive direction – to having society “do something” – than to any particular set of policies. They may regard poverty as an intractable problem but nonetheless feel it expressively unacceptable for society to ignore it. As a result, they may not be as demanding about the efficiency of the expenditure of the funds they secure. Indeed, some may satisfy their desire to “do something” with private charitable efforts, thus making them less dogged advocates for public anti-poverty funding. Alternatively, they may be unwilling to accept anything less than their ideal set of policies, believing that the expressive cost of a compromise exceeds the benefits that it could bring even where most groups advocating out of self-interest would see an advantageous deal and take it. In all of these ways, public interested supporters of anti-poverty programs may be less effective than many other competitors for public funds.

2. Public Choice

The basis for voters’ support for aid to low-income people can have as much influence on programs’ shape as the extent of that support. Assistance to low-income people can be seen as a public good: because everyone can be said to benefit when poverty is relieved whether or not they contributed to the effort, free-riders will keep non-governmental relief efforts small.¹⁸ Moreover, significant redistribution is impossible at the local level in a society like ours where affluent people have significant mobility: wealthy opponents of redistribution can move to jurisdictions lacking such policies, causing the burden on those remaining behind to become more concentrated until they, too, find it intolerable.¹⁹ Thus, local programs in aid of the poor effectively require virtually unanimous political support, a hurdle most other public policies need not surmount. As states increasingly compete for businesses and affluent residents, or as tax limitation campaigns rely increasingly on interstate comparisons, this will become increasingly true at the state level. This makes low-income people increasingly dependent on the national government.

Program designs that increase their supporters’ information costs also will prove difficult to sustain. Most rent-seekers presumably understand the benefits they receive, whether from one source or twenty; insignificant or inaccessible programs are unlikely to fool them. By contrast, low-income people’s middle-income sympathizers are likely to be bewildered by a proliferation of programs

farms that are difficult to defend on the merits.

¹⁸MUELLER, at 47-49.

¹⁹*Id.*, at 677.

and overestimate what society is already doing.²⁰

On the other hand, most anti-poverty programs' budgets are sufficiently modest that they need not displace other major spending programs or tax preferences. For example, this country spends as much in three weeks in Iraq as the Food Stamp Program spends in a year; the middle-class components of President Bush's tax cuts cost more each year than food stamps and the earned income tax credit (EITC) combined. Thus, their opponents suffer from classic collective action problems: these programs' costs – in the form of foregone spending or additional taxes – are spread widely enough that few would benefit enough from cutting these programs to justify the effort of achieving those cuts.

This suggests a discontinuity in the politics of anti-poverty programs, with the positions of those programs' opponents responding far more to the scale of proposed changes than their supporters. Small cuts may be politically infeasible because programs' supporters will react angrily to the symbolism while the proceeds are insufficient to win significant support; because they are not personally affected, however, those supporters' reaction may not be much more intense to proposed cuts large enough to fund meaningful advances in some other group's agenda. When anti-poverty programs are reduced incrementally, it generally is through design features that allow those cuts to occur passively such as a failure to adjust for inflation or the failure to increase an appropriation to respond to increased need during recessions.²¹ Conversely, when media stories or other stimuli galvanize anti-poverty advocates, they may be able to create small new programs or achieve modest increases in existing ones without threatening other groups' core agendas. On the other hand, to offset the effects of periodic major cuts in anti-poverty programs, and to achieve any significant net progress toward alleviating poverty, anti-poverty advocates must capture rare moments of intense public sympathy for low-income people to achieve major improvements despite the far greater opposition such proposals are likely to meet. Those anti-poverty advocates that find satisfaction simply in having “done something” may not value broad improvements enough more than modest ones to marshal the far greater political capital necessary for major advances.

B. Competing Models of the Substance of Anti-Poverty Law

All of these factors make the theoretical model of anti-poverty law pivotal. The model must provide a policy vision that will galvanize public interested anti-poverty advocates without goading them into a doomed absolutism. If possible, it also must offer the prospects of results that will tamp down fatalism about poverty. At the same time, it must reduce information costs for altruistic supporters of anti-poverty programs. A successful will position anti-poverty advocates to regularly exploit opportunities to improve those programs. Above all, it

²⁰David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 696-705 (2004)[hereinafter “Super, *Political Economy*”].

²¹David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2629-40 (2005)[hereinafter, “Super, *Fiscal Federalism*”].

must allow them to reliably capture the rare opportunities for major advances in anti-poverty policy to compensate for major budgetarily- and ideologically-driven cuts and to offset the effects of inflationary erosion. The appalling position of low-income people in the Gulf region before Hurricane Katrina, and the complete lack of a meaningful response to poverty despite strong, relatively sustained, public sympathy afterwards suggests that an examination of our model of anti-poverty policy is long-overdue.

Debates about anti-poverty policy in this country feature an extraordinary breadth of models. Some models on the left work from equal protection concepts, either recognizing poverty as a suspect classification or making housing, health care, and other important goods and services fundamental rights. This presumably would compel the state to assure those rights to low-income people. Others wish to emulate European social democracies by expanding the role of universal benefits from old-age security and basic education to health care, housing, and other essentials. An idea popularized by conservative economist Milton Friedman but whose present-day adherents are almost wholly on the left is the negative income tax, a form of guaranteed annual income.

On the right, some rhapsodize about the superior incentives for work and marriage that would come from the wholesale elimination of programs relieving poverty. Others would allow such programs, but only if run by private charities, presumably on a very small scale. Still others would accept public programs if subject to severe conditions involving work or other behaviors; in practice, these, too, would be tiny programs as few states have proven willing and able to organize work activities for more than a relative handful of people.

This section argues that none of these visions, on the left or the right, are politically sustainable in the long term. Specifically, subsection 1 asserts that contemporary social values in this country prevent public policy from either wholly eradicating or wholly ignoring economic deprivation. This ensures that this country's anti-poverty policy will, for the foreseeable future, follow an intermediate course. It shows that efforts on both left and right to advance extreme policies ultimately prove counter-productive, both to their respective causes and to the development of efficient, effective programs.

Subsection 2 then compares two centrist approaches with very different implications: one that focuses on the procedures by which substantively unconstrained discretion is exercised with respect to aiding low-income people and one that seeks to assure each member of society the minimum resources necessary to purchase their bare humanitarian needs in the market. To date, partially by default, this country has largely adopted the former model. Subsection 2 concludes that this discretion-dependent option is inferior for a host of reasons, not least that it repeatedly thrusts government into the role of making the kinds of error-prone ad hoc accommodations that it failed to execute in the period leading up to Katrina and then fails to appreciate or respond to the kinds of losses that low-income survivors of the catastrophe suffered.

1. The Implausibility of Extreme Responses to Poverty

Debate on the broadest contours of poverty policy is dominated by the far left

and the far right.²² As one leading conservative scholar noted, “[i]n the short run, it might be possible to pass legislation that would institute a guaranteed income for all or, at the other extreme, simply eliminate all government welfare programs over a period of time and allow private charitable efforts to take of people in need. But neither of these approaches will work unless accompanied by massive changes in deeply held public beliefs.”²³ Neither left nor right appears to be listening.

The left seeks to transplant Europe’s broad social supports to our shores.²⁴ At times it appeals to nationalistic pride in pointing out how much more poverty exists in this country than in much of the rest of the industrialized world. On other occasions, it argues that our gaping inequalities of wealth represent a failure of fundamental fairness. At still other points, it seeks to tap into American reverence for political democracy, suggesting that without greater “economic democracy,” our political democracy is compromised.²⁵

None of these arguments has gained much traction. Americans’ nationalism leaves them skeptical about borrowing policies from abroad. The right has successfully blamed Europe’s lingering economic malaise on excesses in its safety net. Conservatives also have undercut fairness arguments by inculcating beliefs that market outcomes are presumptively fair, that remedying any resulting inequities would be severely inefficient, and that most poverty results from moral failures rather than innocent misfortune.²⁶ Finally, seeing elections take place on regular two-year cycles, and being far more inclined to view politics in terms of individuals rather than institutions,²⁷ Americans fail to see any threat to their democracy.

The ascendancy of conservatism since the 1980 election has led many to believe that this country is prepared to accept a pure laissez-faire approach to poverty. President Reagan’s budget cuts of the early 1980s removed many working poor families from public programs while the 1996 welfare law sharply cut aid to

²²With relatively few of those most directly affected – low-income families – politically active, and fewer still self-identifying as public benefits recipients in their activism, ideological concerns motivate most involvement in public benefits policy. Much of this is concerned more with making symbolic points through public benefits programs rather than accomplishing anything directly. Super, *Quiet Revolution*, *supra* note 16, at 1273-83. Perhaps the far left and the far right are so disproportionately active because the changes moderates want to make in the status quo are insufficient to justify the costs of activism because moderates can win enough practical victories that they have little need for symbolic ones.

²³MARTIN ANDERSON, *WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES* 159 (1978).

²⁴REBECCA M. BLANK, *IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY* 140-42 (1997); MARTIN CARNOY & DEREK SHEARER, *ECONOMIC DEMOCRACY: THE CHALLENGE OF THE 1980S* 334-43 (1980).

²⁵CARNOY & SHEARER, at 322-32.

²⁶Super, *New Moralizers*, *supra* note 10, at 2053-56.

²⁷See THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* (1985).

non-working poor families (as well as subjecting the working poor to additional cuts). Many of the same arguments conservatives have wielded effectively to defeat proposals for European-style social guarantees would seem applicable to any social welfare programs.

Like their liberal counterparts, however, conservatives have found that Americans tend not to be purists on social policy matters. Key players in the Reagan Revolution emphasized that it was “far, far more concerned about ensuring that people who cannot help themselves receive help than it is about resolving the unsolvable dilemma that the very fact of receiving help, by definition, makes the person dependent.”²⁸ The Reagan Administration for the most part sought to portray itself as seeking to improve the efficiency of programs rather than eliminating them.²⁹ It thus recognized that Americans’ anti-ideological strain prevents them from seeing rigid laissez-faire doctrine as a satisfactory justification for ignoring people in distress.³⁰ The same difficulty in conceptualizing macroscopic problems that leads the electorate to overestimate the capabilities of private charities can also undercut arguments that any social benefits will bankrupt the government.

Over the past decade, conservatives have been systematically reducing government assistance to low-income people, citing supposed behavioral poverty and the need for shared sacrifice to address the nation’s fiscal problems.³¹ As the Bush Administration simultaneously cut taxes for the affluent and benefits for the impoverished, the argument for shared sacrifice lost credibility with serious students of public policy. That low-income people conspicuously bore a disproportionate share of the hardship from Hurricane Katrina expanded that realization to the general public: budget cuts’ consequences were falling on the blameless poor rather than just the idlers and miscreants that provided the cuts’ rhetorical justification.

Although Congress did pass another round of severe cuts in programs for low-income people in December 2005 and January 2006, Republican leaders did so only through massive arm-twisting and with hardly a vote to spare. Anxiety over budget cuts for low-income people prevented the normally pliant Republican House from passing a budget resolution in spring 2006. Even before the 2006

²⁸Martin Anderson, *The Objectives of the Reagan Administration’s Social Welfare Policy*, in *THE SOCIAL CONTRACT REVISITED: AIMS AND OUTCOMES OF PRESIDENT REAGAN’S SOCIAL WELFARE POLICY* 17 (D. Lee Bawden, ed., 1984). Dr. Anderson served as a senior White House domestic policy official in the first two years of the Reagan Administration. *Id.*, at 245.

²⁹*Id.*, at 18.

³⁰See Super, *New Moralizers*, at 2042 (finding a divergence between conservatives and the electorate on responding to innocent misfortune).

³¹The modern conservative theory that public benefit programs produce behavioral poverty can be traced back much farther, at least to the 1980s. CHARLES MURRAY, *LOSING GROUND* (1984). Fiscal arguments for cutting these programs, too, go back a quarter century to the Reagan budget cuts of 1981 and 1982. MICHAEL D. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 269 (1986). The Contract with America in 1994 effectively married these two themes to produce deeper cuts than either had on its own.

mid-term elections, the political potential for further deep budget cuts had largely dissipated. Conservatives seeking to dismantle public benefits can no longer realistically hope to achieve complete enactment of their agenda. They, too, need to find an alternative.

In sum, both extreme positions are inconsistent with entrenched U.S. sensibilities. Because the public's attention to anti-poverty policy is only intermittent, clever political maneuvering can allow one side or the other to achieve temporary victories, expanding programs beyond the extent of public support or cutting them more harshly than the majority of the electorate would want. When the public becomes aware of these deviations, however, policy typically corrects or even over-corrects itself. Fraud and maladministration scandals can help unravel liberals' work in building up more generous programs, opening the door to cuts in good programs as well as weak ones. Humanitarian crises, such as those following disasters, can provide opportunities to restore cuts conservatives have won in these programs and may produce spasms of ill-targeted spending that may subsequently become entrenched.³²

2. A Humanitarian Minimum or Reasonable Accommodations

Once one accepts that neither broad European-style social guarantees nor strict adherence to laissez-faire are plausible options for this country, the question arises what is a viable alternative. Apart from an on-going guerilla war between left and right, two coherent intermediate alternatives exist. First, one could assist low-income people up to some bare humanitarian minimum, well below the quality of life we aspire to provide for all of our people but enough to allow them to meet their most basic needs through the market. Second, one could accept severe poverty while providing ad hoc accommodations to ameliorate some of its harshest consequences. This subsection considers each in turn.

a. Maintaining a Humanitarian Minimum

The strategy of securing for low-income people the means to obtain for themselves the minimum necessities of life has suffered at the hands of enemies on both the left and the right. Conservatives dismiss this approach as creating "entitlements," taking advantage of the ambiguity of that term.³³ They railed against President Nixon's Family Assistance Plan, President Ford's Income Supplementation Plan, and President Carter's Program for Better Jobs and Income as the products of "a small, largely liberal, intellectual elite ... trying to foist on an unsuspecting public ... a guaranteed income."³⁴ They regarded the defeat of these

³²These opportunities may be wasted, however, if liberals are not ready with politically plausible policies to respond to the crisis. Thus, well-publicized deaths of children in foster care have not led to improved supports for low-income families designed to prevent foster placements because of the lack of persuasive proposals to that end. See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005). Similarly, the expansion of visible homelessness in the 1980s prompted only a modest set of policy changes. CHRISTOPHER JENCKS, *THE HOMELESS* 105-22 (1994); JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* 93-169 (1992).

³³Super, *Political Economy*, *supra* note 20, at 709-10.

³⁴Martin Anderson, *The Objectives of the Reagan Administration's Social Welfare Policy*, in *THE*

programs as evidence of the public's acute distaste for such guarantees.³⁵

Advocates have sought to avoid the public's suspicion of anti-poverty entitlements by framing proposals in terms of universality. This has worked to a point: social insurance, along with closely-associated means-tested programs,³⁶ have largely established a humanitarian minimum for the elderly, a large fraction of persons with disabilities, and a significantly smaller share of the recently unemployed. Conservative challenges to Social Security and Medicare failed because middle-income people can imagine themselves needing assistance in age and infirmity; assaults on unemployment insurance have fared better as fewer middle-income voters envision themselves unemployed for significant periods.

The social insurance approach, however, is unlikely to help with other problems, particularly chronic poverty, because middle-class people cannot imagine themselves facing that need. Attempts to universalize anti-poverty programs radically increase their costs while doing little to broaden their appeal. Efforts to persuade middle-income voters that government should provide them with "food security," in the same way it does Social Security, and hence that school meals should be free to all children, collapsed of their own weight when predictably few middle-class voters turned out to feel insecure about their food supplies.

Broad guarantees will bring attacks for destroying work incentives and creating a moral hazard.³⁷ Once the safety net gets beyond a certain point, these arguments become difficult to deflect. A new body of research suggests that families receiving somewhat more generous public benefits respond to work incentives better than the absolutely destitute.³⁸ This makes sense on several levels. Having one's life in utter chaos can lead to panic or depression, both of which impair rational thinking. Destitution also radically shortens an individual's time horizon: a mother with no way to feed her hungry children today may prefer a \$4 per hour off-the-books job that pays cash right away to a permanent job paying twice that but requiring her to wait two weeks for her first paycheck.

Establishing a substantive limit on the depth of poverty – achieving a humanitarian minimum – depends on a sweeping moral appeal, not instrumentalism.

SOCIAL CONTRACT REVISITED: AIMS AND OUTCOMES OF PRESIDENT REAGAN'S SOCIAL WELFARE POLICY 25 (D. Lee Bawden, ed., 1984).

³⁵*Id.*, at 25-26.

³⁶Although Supplemental Security Income (SSI) is not social insurance under most definitions, the Social Security Administration (SSA) operates it, and it relies significantly on eligibility decisions made for Social Security Disability Insurance. Similarly, Medicaid is means-tested but operates as a Medicare supplement for the elderly and those persons with disabilities that receive Medicare. Its nursing home component's means-test is designed to allow large numbers of middle-income people to receive care once Medicare's modest nursing care benefit runs out.

³⁷Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 27 (1992).

³⁸*See* CYNTHIA MILLER, MANPOWER DEMONSTRATION RESEARCH CORP., EXPLAINING THE MINNESOTA FAMILY INVESTMENT PROGRAM'S IMPACTS BY HOUSING STATUS (1998) (finding that almost all positive impacts of an incentive-laden welfare experiment occurred among recipients in subsidized housing)..

The experience of disasters suggests that this is feasible. Few plausible instrumental arguments exist for disaster relief – indeed, instrumental arguments will tend to favor aid to businesses in the affected region rather than to individual disaster victims. Yet the response to Hurricane Katrina shows these appeals can work: the electorate had no problem with people in New Orleans feeling a sense of entitlement to aid from the government in a crisis. Attempts to blame the victims in New Orleans failed: the public was not convinced that those not evacuating did anything wrong and felt that, even if they did, this was far more harm than most of the public was willing to visit upon even the “unworthy poor.” Despite widespread resistance to providing cash assistance to low-income people, after it was embarrassed FEMA announced that it would give debit cards worth \$2,000 each to displaced families.

Many liberals nominally support providing a minimum income for low-income people. Like conservatives, however, liberals often use anti-poverty policy for expressive purposes.³⁹ A humanitarian minimum modest enough to have any political chance of success – modest enough to represent the irreducible cost of indisputable necessities and to placate concerns about moral hazard – would send little expressive message. Efforts to up the ante on this concept before it is even adopted defeated it repeatedly in the far more liberal 1970s. It remains to be seen how broadly the lessons of the past thirty years have penetrated the liberal community.

b. Procedural Responses to Poverty

This country’s dominant response to poverty is largely agnostic as to what substantively should be done. Instead, its focus is procedural and participatory. It offers individual low-income people the opportunity to participate in determining the terms of their own relief through adversarial hearings before their benefits are terminated and before their applications are finally denied.⁴⁰ It finds participation in the project of relieving poverty ennobling and seeks to broaden that participation as broadly as possible. In so doing, it unites those on the left that prize the political empowerment of low-income communities, those on the right that prefer decentralization and privatization of these functions, and those of whatever persuasion who value participation in its own right.⁴¹

It optimistically valorizes legislatures as addressing poverty “one step at a time.” It encourages courts’ participation through aggressive construction of legislation in favor of low-income people (but eschews establishing any substantive norms on their behalf that would obviate other actors’ roles).⁴² It is devalues centralization and coordination of these programs – often sacrificing considerable efficiency – so that more people can participate in this effort

³⁹Super, *Quiet Revolution*, *supra* note 16, at 1274-78.

⁴⁰7 U.S.C. § 2020(e)(10) (2000).

⁴¹Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

⁴²King v. Smith, 392 U.S. 309 (1968).

through state and especially local governments. Similarly, it prefers involving numerous part-time charitable volunteers to full-time public servants.

Not surprisingly, this emphasis on process yields an uneven, often incoherent, substantive regime. Public assistance grant levels fall hopelessly short of HUD's fair market rents, even without allowing for other household expenses. Full-time minimum wage employment pays only about three-fifths of the poverty line for a family of four, even without accounting for health care, commuting, and child care costs.⁴³ Food stamp allotment levels are based on a food budget more than twenty percent below the least costly consumption pattern USDA has identified in its food consumption surveys.

Although not described as such, current policies in the United States are built around the concept of reasonable accommodation. We recognize and implicitly accept that millions of families lack the means to function independently in the market economy. We therefore provide numerous highly-focused accommodations, both as direct subsidies and departures from market pricing. These accommodations serve three general purposes. First, some major public programs increase low-income families' purchasing power in particular markets. Food stamps, housing vouchers, and Medicaid are the three largest examples of this kind of spending program. Rent control, the minimum wage, and the regulation of utility rates serve similar ends.

Second, some subsidies and market modifications help low-income people cope with expenses that are severe but experienced by relatively few people. Appointive counsel in criminal matters, waivers of filing fees for civil litigation, bankruptcy, waiver of certain Social Security overpayments, financial aid for higher education, and requirements that hospitals provide uncompensated care⁴⁴ are examples of these kinds of vehicles.

Third, some accommodations seek to fill in gaps left by the first two. Free and reduced-price school lunches, minimum service utility plans, senior citizens' discounts on public transit, Title I education subsidies, free admission days at museums, subsidies for low-income children's school books, soup kitchens, low-cost housing set-asides required in new developments, and a host of other minor discounts, subsidies, set-asides, and giveaways fall into this category.

Because it keeps highly-visible direct transfers to low-income families to a

⁴³To be sure, a two-parent family of four with only one bread-winner may not have to pay for child care. On the other hand, because a single minimum wage paycheck falls so far short of meeting the family's needs, the other adult seems likely to be seeking work or training unless the family's children need extraordinary care because they are very young or ill.

⁴⁴In the middle of the last century, the Hill-Burton Act imposed such a requirement on hospitals receiving federal construction assistance. Revenue regulations may require hospitals seeking preferential treatment as charities to provide a certain amount of such care. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Some states' licensure regulations may impose similar obligations. Finally, the Emergency Medical Treatment and Active Labor Act has a similar effect by prohibiting hospitals from turning away many patients from their emergency rooms even when the patient lacks the means to pay for care.

minimum, the accommodation strategy may seem closer to pure free market than a more generous income support program. This impression does not bear close scrutiny. In fact, this plethora of accommodations distorts the price structure in many individual markets rather than employing the relatively efficient tax system to raise the required funds from the economy as a whole. To the extent that the accommodations are manipulations of legal rules, they may create myriad inefficiencies.⁴⁵ To the extent they take the form of specialized transfer programs, they duplicate administrative costs,⁴⁶ a burden only partially ameliorated when one part of the system relies upon determinations made by another.⁴⁷ The accommodation approach is vulnerable both to duplication and gaps, with some receiving multiple subsidies for the same costs,⁴⁸ while others fall outside the coverage of any accommodation, fail to negotiate these separate eligibility determination systems,⁴⁹ or end up on a waiting list.⁵⁰

An accommodation-based system often relies on a mixture of direct transfers and market regulation intended to produce more favorable results for certain needy populations than the market would have produced on its own. These regulations impose the burden of accommodation on narrow segments of society without identifying any particular duty, or exceptional ability to pay, present in those segments. Even transfer payments, when funded on the state or local level, can distribute burdens in ways that are difficult to justify.⁵¹ Indeed, as proximity

⁴⁵Professors Kaplow and Shavell also find manipulation of legal rules inferior to transfer payments as a means of redistributing income due to one kind of under-inclusiveness: the failure of any given rule to help low-income people not coming in contact with that portion of the legal system. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 33-34 (2002). Each legal rule manipulated to this end creates additional inefficiencies.

⁴⁶The concern here is about another form of underinclusiveness: the failure of any given accommodation to reach low-income people facing a different kind of vital, urgent expense. Each separate accommodation creates added inefficiencies in the form of administrative costs, with eligibility determinations made, and benefits dispensed, by all major levels of government and by a plethora of agencies within each level.

⁴⁷Thus, for example, even though children in households the Food Stamp Program has determined needy may automatically receive free school lunches, schools nonetheless must maintain an eligibility determination mechanism for low-income children not receiving food stamps.

⁴⁸See, e.g., Clifford v. Janklow, 733 F.2d 534 (8th Cir. 1984) (finding states prohibited from taking housing subsidies into account when determining eligibility for the Low-Income Home Energy Assistance Program).

⁴⁹The complexity and disintegration of these processes can be a rationing method designed to hold down costs rather than an example of governmental ineptitude. David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 830-32 (2004) [hereinafter "Super, *Invisible Hand*"]; Albert L. Nichols & Richard J. Zeckhauser, *Targeting Transfers through Restrictions on Recipients*, 72 AM. ECON. REV. 372 (1982).

⁵⁰See Super, *Political Economy*, *supra* note 20, at 673-76.

⁵¹Thus, for example, the federal government has required states providing refuge to families evacuating areas hit by Hurricanes Katrina and Rita to pay part of the additional costs of Medicaid. Families' choices of destinations appear to result primarily from proximity; constructing a normative basis for imposing costs on this basis is difficult.

is the main basis on which these burdens are imposed, the accommodation-based strategy has the paradoxical effect of increasing the isolation of low-income people by taxing interactions with them. Thus, a hospital in an affluent area, or one that closes its emergency room, will not have to provide uncompensated care; an employer that automates low-skill functions will not have to pay minimum wage for labor whose market value is lower.

Moreover, because the media and electorate cannot closely monitor each of the numerous, separate interventions that make up the system of accommodation, they become particularly vulnerable to capture and manipulation by special interests lobbying for subsidies that benefit themselves over others that may be more urgently needed. These interests' lobbying may increase aggregate support for the program, but at the cost of siphoning off funding for relatively low-priority subsidies.⁵²

Finally, and most obviously, this strategy relies relatively little on the preferences, as expressed in market decisions, of the low-income people it aids.⁵³ Thus, families at the brink of homelessness may be tempted to sell their food stamps for fifty cents on the dollar to head off an eviction, wasting much of the value of the subsidy and disillusioning the public when it becomes aware of the transaction.

This accommodation-based model, in effect, seeks to emulate for people in extreme poverty the approach that the Americans with Disabilities Act (ADA)⁵⁴ applies to people with disabilities. In theory, at least, the ADA takes an individual's limiting condition – a disability – as a given and endeavors to design an accommodation that will allow that individual to participate fully in a specified important activity. In fact, of course, disability often is very much a social construct. The interpretation of extreme poverty, however, may be even more plastic: society can ameliorate the condition across-the-board, respond to it ad hoc, blame it on those experiencing it and refuse to respond, or just ignore it.

Even for persons with disabilities, the difficulty of securing reasonable ac-

The timing of these burdens on state and local governments is similarly irrational, imposing greater burdens at just the point that these governments' revenues are falling. Super, *Fiscal Federalism*, *supra* note 21, at 2629-40.

⁵²This country subsidizes agricultural prices directly and through production controls. Supporters justify these subsidies as aiding small, struggling farmers. In fact, most go to large agribusiness corporations. The increased food prices, however, burden low-income consumers and raise the cost of food assistance programs. Means-tested transfer payments for impoverished farmers would accomplish these programs' goals more efficiently, but would lack agribusiness's political heft.

⁵³HERBERT STEIN, *PRESIDENTIAL ECONOMICS* 292 (1985) (criticizing in-kind and voucher programs such as food stamps for denying low-income people the choice among possible consumption paths); Martha B. Coven, *The Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847 (2002).

⁵⁴Pub. L. No. 101-336, 104 STAT. 328 (1990) (codified at 42 U.S.C. §§ 12101-213 and scattered sections of 47 U.S.C.); see Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 460 (1991) (describing accommodation as central to the ADA methodology).

accommodations has driven some to advocate shifting to an income-based approach.⁵⁵ Accommodations are command and control devices and as such lack the ready adaptability of the market. The multiplicity of small accommodations increases the decisional resources required to adapt to any change and the likelihood that some of them will be left behind. Disasters both accelerate the need for adaptations and deplete the administrative resources necessary to bring it about. Accordingly, it should be no great surprise that federal, state, and local officials did not recognize the need for a special transportation program – probably including some combination of public transit, para-transit, ambulances, and gas vouchers – to evacuate the most vulnerable people from New Orleans and other threatened areas.

C. Disaster Relief as an Acute Form of Anti-Poverty Law

Popular culture, defying research, seeks to universalize the experience of disasters, holding that they are social levelers, afflicting all equally,⁵⁶ leaving rich and poor “all in this together.” To be sure, the occasional disaster will primarily afflict the affluent.⁵⁷ For the most part, however, “disasters disproportionately affect more marginalized groups, such as the poor, people of color, and women. Less access to resources leads to increased vulnerability.”⁵⁸ Low-income people may be unable to afford as much access to information that can help them prepare for the disaster,⁵⁹ employment flexibility and transportation that can allow help them to escape the disaster, homes in locations and structures that can withstand the disaster,⁶⁰ connections that can expedite aid after the disaster,⁶¹ and insurance to finance their recovery or relocation afterwards. Salaried workers may continue to be paid, but hourly workers typically receive no wages and no unemployment compensation.⁶²

In this country, people of color, immigrants, female-headed households, and persons with disabilities are disproportionately likely to have low incomes and hence far more likely to experience these disadvantages.⁶³ People of color,

⁵⁵Bagenstos, at 54-70; *but see* Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1724-35 (2000)(maintaining the viability of the traditional approach).

⁵⁶ALICE FOTHERGILL, *HEADS ABOVE WATER: GENDER, CLASS, AND FAMILY IN THE GRAND FORKS FLOOD* 72-74 (2004).

⁵⁷*See* KENNETH L. CARPER, *CONSTRUCTION FAILURES* 127-37 (2d ed. 1997) (describing the 1981 failure of pedestrian walkways in Kansas City’s luxury Hyatt Regency hotel). Even when the luxury liner *Titanic* sank, impoverished immigrants traveling in steerage were denied access to life-boats and suffered a grossly disproportionate share of the fatalities.

⁵⁸FOTHERGILL, at 26.

⁵⁹KATHLEEN J. TIERNEY, ET AL., *FACING THE UNEXPECTED: DISASTER PREPAREDNESS AND RESPONSE IN THE UNITED STATES* 36-37, 44 (2001).

⁶⁰*Id.*

⁶¹Lower-income people may not qualify for SBA loans. FOTHERGILL, at 60.

⁶²*Id.*, at 58-59.

⁶³ROBERT BOLIN & PATRICIA BOLTON, *RACE, RELIGION, AND ETHNICITY IN DISASTER RECOVERY* 217-21 (1986).

women, gays and lesbians, and persons with disabilities also face particular added risks in disasters. Relief efforts often bypass racial minorities.⁶⁴ Destruction of day-care facilities can cause women to leave their jobs.⁶⁵ They also can trigger or exacerbate domestic violence.⁶⁶ Gays and lesbians may face additional threats to their safety in the aftermath of a disaster as the close quarters of shelters and temporary housing may cause them to be outed to homophobic neighbors.⁶⁷ Disasters can increase substance abuse, stress, and other emotional ailments.⁶⁸ Federal agencies, non-profit relief agencies, and researchers have acknowledged this and set out to learn more about differential vulnerabilities.⁶⁹

The law of disasters thus is best understood as a subset of anti-poverty law specifically⁷⁰ and of civil rights law more generally. As in the case of anti-poverty law generally, public sentiment overwhelmingly rejects a both a pure laissez-faire approach to disasters and one that ignores the moral hazard of indemnifying people from the major losses they suffer.⁷¹

This section explores those parallels in more detail, justifying Part III's effort to learn more about the causes of the proceduralist model's failure to help so many of Katrina's victims. Subsection 1 shows the close historical linkage between the federal government's involvement in disaster relief – responding to acute poverty – and its relief of chronic poverty resulting from social and economic dislocation. Subsection 2 then maps the political dynamics that determine whether crises that heighten public awareness of poverty will result in lasting policy change.

1. The Parallel Growth of the Public Role in Responding to Acute and Chronic Poverty

The development of the federal government's on-going participation in responding to disasters has paralleled its direct involvement in fighting chronic poverty and, thus, is comparatively recent.⁷² Public opinion came to see the fed-

⁶⁴African-Americans' disproportionate victimization in some disasters has been attributed to the inferior construction of buildings allocated to their use, to individuals' lack of agency in the face of white dominance, and to whites' failure to provide aid to victims even when on the scene. HELEN SWICK PERRY & STEWART E. PERRY, NAT'L ACADEMY OF SCIENCES, *THE SCHOOLHOUSE DISASTERS: FAMILY AND COMMUNITY AS DETERMINANTS OF THE CHILD'S RESPONSE TO DISASTER* 45-46 (1959).

⁶⁵FOTHERGILL, at 62.

⁶⁶*Id.*, at 157-72; Jennifer Wilson, et al., *Domestic Violence after Disaster*, in *THE GENDERED TERRAIN OF DISASTER: THROUGH WOMEN'S EYES* 115-22 (Elaine Enarson & Betty Hearn Morrow, eds. 1998).

⁶⁷FOTHERGILL, at 114.

⁶⁸*Id.*, at 116-17, 123-35.

⁶⁹*Id.*, at 26.

⁷⁰Critics of public disaster relief cite cuts in aid to chronically low-income people as precedents. N. Scott Arnold, *The Role of Government in Responding to Natural Catastrophes*, in *LIBERTY AND HARD CASES* 28-34 (Tibor R. Machan, ed. 2002).

⁷¹James D. Wright & Peter H. Rossi, *The Politics of Natural Disaster: State and Local Elites*, in *SOCIAL SCIENCE AND NATURAL HAZARDS* 43, 51 (James D. Wright & Peter H. Rossi, eds. 1981)[hereinafter "Wright & Rossi, *Politics*"].

⁷²Michele Landis Lauber, "Overtaken by a Great Calamity:" *Disaster Relief and the Origins of the*

eral government increasingly as responsible for disaster prevention and amelioration in the Great Depression.⁷³ Conversely, empathy arising from natural disasters was pivotal in building support for the New Deal as a whole.⁷⁴ At the same time, widespread economic disaster broadened support for government management of the economy and relief of poverty. Prior to the Depression, “public opinion accepted reliance on local neighborliness and on extended volunteerism as the sources of rescue, recovery, and reconstruction” in a disaster.⁷⁵ Increases in the number of, and damage done by, disasters have increased public demand for governmental responses.⁷⁶ This led to a gradual systematization of the federal role⁷⁷ and a corresponding increase in the number of presidential disaster declarations,⁷⁸ paralleling the growth of programs in relief of chronic poverty. The decisive point for disaster relief may have been President Ford’s conclusion that “the federal government had political, if not legal, responsibility” to compensate victims of the collapse of the Teton Dam in 1976.⁷⁹ The urban riots of 1965-68 might have brought about a similar transformation in our understanding of public responsibility for responding to chronic poverty but ultimately did not do so. Hurricane Katrina offered a second opportunity for such a transformative moment but, again, the country squandered the opportunity.

Disasters transcend several persistent problems in the law’s response to chronic poverty. First, they simplify causation problems that commonly cloud our vision of human behavior and of legal relationships. In the absence of a disaster, an individual’s material deprivation is likely to have, or at least to appear to have, multiple causes. Although some – a depressed economy, inadequate schools in the community where the individual grew up, the lack of child care, bad luck in job-hunting – may be entirely innocent, many middle-class people will assume that others are blameworthy (e.g., chemical dependencies, not having applied for more jobs or having expressed more enthusiasm in interviews). Distinctions between innocent misfortune and misfortune resulting from one’s own

American Welfare State, 23 LAW & HIST. REV. 387 (2005).

⁷³Martin E. Silverstein, *The Impact of Traumatic Injuries on Disaster Recovery*, in PERSPECTIVES ON DISASTER RECOVERY 104 (Jerri Laube & Shirley A. Murphy, eds. 1985).

⁷⁴Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 L. & SOC. REV. 257 (1999).

⁷⁵*Id.*

⁷⁶*Id.*, at 104-05.

⁷⁷The first systematic federal response was the Disaster Relief Act of 1950. It focused only on repairing public buildings, but the Disaster Relief Acts of 1970 and 1974 authorized a wide array of assistance to individuals and gave the federal government a role in disaster mitigation and preparedness. The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 further strengthened and regularized these roles. FOTHERGILL, at 94.

⁷⁸*Id.*, at 91, 94-95.

⁷⁹R. Steven Daniels & Carolyn L. Clark-Daniels, *Transforming Government: The Renewal and Revitalization of the Federal Emergency management Administration (FEMA)*, in THE FEDERAL EMERGENCY MANAGEMENT ADMINISTRATION (FEMA) 80 (2002).

shortcomings are pivotal in social policy.⁸⁰ The plethora of real and presumed causes for hardship under ordinary conditions allow middle-class observers to focus on one or another based on their preconceptions of the people involved.⁸¹

A disaster, on the other hand, provides an apparent, and readily intelligible, innocent explanation for its victims' suffering. Other factors may still be present,⁸² but they will strike many as so comparatively insignificant that attempts to highlight them seem mean-spirited. Put another way, middle-class people can imagine themselves falling victim to a disaster far more readily than they can conceive of what it is like to be functionally illiterate as a result of an incompetent education.⁸³ Disaster survivors exhibit many of the same psychological conditions, such as learned helplessness, whose asserted presence in the chronic poor stroke calls for stern action.⁸⁴ Suddenly, and somewhat arbitrarily, freeing low-income people from the harsh presumptions with which middle-class people resolve complex problems of causation allows them to claim the more generous treatment afforded to victims of innocent misfortune. It also, however, highlights the weaknesses of our means of attaching blame to the suffering.

Middle-class citizens' judgments of institutions, too, transform in the wake of a disaster. In ordinary times, their appraisal of an administrative agency, or of the government as a whole, reflects both the degree to which they agree with its priorities and their impression of its effectiveness in pursuing those priorities. The public may show patience toward an agency that fails to solve one particular problem if they believe its resources are consumed in another worthy endeavor or if they regard the problem as particularly complex. In a disaster, however, the government's priorities cease to be reasonably contestable, and few people will regard the provision of basic life-saving aid as unduly difficult. If an agency fails to respond effectively to a disaster, it will not occur to voters that it might have had other priorities. Thus, President Bush's statement that "Brownie, you're doing a heck of a job" drew the public's ire because everyone felt confident they knew what the "job" was.

Second, and related, disasters conveniently convert macroscopic problems to a scale the public can more readily comprehend. The suffering of those whom a disaster has rendered acutely poor may be no worse than that of the chronically

⁸⁰Super, *New Moralizers*, *supra* note 10, at 2040.

⁸¹*See id.*, at 2041 (noting that middle-class observers inexperienced with some of low-income people's problems can discount critical factors' importance).

⁸²For example, an individual may have been unable to evacuate because he had mistreated the relatives on whose hospitality he needed to depend.

⁸³Research suggests that the more seemingly random a disaster is, the stronger the public sympathy it arouses. RUSSELL R. DYNES, *ORGANIZED BEHAVIOR IN DISASTER* 208 (1970).

⁸⁴Shirley A. Murphy, *The Conceptual Bases for Disaster Research and Intervention*, in *PERSPECTIVES ON DISASTER RECOVERY*, *supra* note 73, at 13. In the wake of a disaster, survivors alternate between periods of hypervigilance, hyperactivity, and affectivity, on the one hand, and emotional numbness, avoidance, and defensive denial, on the other. Don M. Hartsough, *Measurement of the Psychological Effects of Disaster*, in *id.*, at 34.

poor, but disaster survivors are a far more numerically and temporally contained group.⁸⁵ Thus, somewhat ironically, a significant factor in the public's generosity toward disaster victims is its perception that the calls on that generosity will be limited.

Third, because the stakes in disasters are so conspicuously high, they stimulate the unusual political dynamics associated with tragic choices. In particular, they prompt middle-class voters to adopt an egalitarianism that temporarily rejects many modes of allocation on which our society ordinarily depends. Allocation through the market, for example, systematically favors the affluent. This may be acceptable where the allocation concerns routine housing amenities – spacious quarters, a pleasant yard and garden, and the like – but far less so when it is survival in a disaster. Even those persons that do not regard wealth as an invalid basis for allocation under other circumstances may be troubled by its correlation with race in the wake of a disaster: allowing African-Americans to suffer and die disproportionately becomes unacceptable even if it results from relief was allocated on a nominally race-blind basis.⁸⁶

Finally, disasters bring sudden, dramatic downward social and economic mobility.⁸⁷ Receipt of disaster relief often sensitizes the acute poor to the problems of the chronic poor.⁸⁸

2. The Political Dynamics of Relieving Acute Poverty

This confluence of factors changes the character of political struggles in the succeeding months.⁸⁹ Because they rivet the public's attention,⁹⁰ disasters pro-

⁸⁵In this sense, disasters play a role similar to that of the fall holiday season in concentrating consciousness of suffering, if not the suffering itself, into bundles small enough to feel manageable to the general public. People contribute to holiday food drives and help cook Thanksgiving dinners to be served to the homeless not because they seriously believe that low-income people are not hungry and homeless during the rest of the year but because those limited tasks seem achievable while the task of ending that suffering is too daunting and a coherent definition of a more substantial partial response is elusive.

⁸⁶Exclusionary behavior typically declines in the wake of a disaster. TIERNEY, ET AL., *supra* note 59, at 110.

⁸⁷FOTHERGILL, at 53.

⁸⁸*Id.*, at 98-103. This egalitarianism, however, has its limits. To the limited extent that disasters do submerge distinctions of power and status, those lines re-emerge quickly during the recovery period. *Id.*, at 74-78. Middle-class disaster victims often seek to distinguish between themselves and the chronic poor, emphasizing that their situation is temporary. *Id.*, at 95, 97. Stigmatization of welfare during normal times causes victims to feel shame when they receive relief after a disaster. *Id.*, at 80-85.

⁸⁹The Dust Bowl disaster's effects lasted so long that they produced an unusual degree of popular political response. William C. Pratt, *Rethinking the Farm Revolt of the 1930s*, in AMERICANS VIEW THEIR DUST BOWL EXPERIENCE 325-34 (John R. Wunder, et al., ed. 1999). This ranged from radical leftists to populist movements for more generous federal assistance programs to rabid anti-Semitism. *Id.*, at 334-37.

⁹⁰This is not to say that they universally ennoble the public: some of this attention is expressed in morbid, voyeuristic ways. See Robert N. Strassfeld, *Taking Another Ride on the Flopper: Benjamin Cardozo, Safe Space, and the Cultural Significance of Coney Island*, 25 CARDOZO L. REV. 2189 (2004) (describing amusement park attractions recreating the Galveston Hurricane, the Johns-

vide an immediate opportunity for change in policy areas otherwise stalemated in obscurity.⁹¹ Critics of the status quo try to seize these opportunities by generalizing from the disaster and urging the nation to “heed the lessons” that failings surrounding the disaster taught.⁹²

These changes, however, are only transitory. In the recovery period, secondary values, such as wealth, status, and comfort, regain primacy.⁹³ Newspapers rapidly lose interest in disasters as dramatic events give way to prosaic rebuilding efforts.⁹⁴ The established order’s apologists therefore emphasize the exceptional nature of the disaster and try to hasten its disappearance from the collective consciousness.

Thus, those favoring more generous treatment of low-income people generally try to prolong and expand the heightened egalitarianism the disaster engendered and to broaden skepticism that the market or the ordinary functioning of the political process will treat low-income people fairly. In particular, they try to enact relief policies that eschew many of the limitations and conditions that hobble existing anti-poverty programs.⁹⁵ They then try to persuade middle-class voters that the tragic choices that the disaster renders in stark relief are of a type with those afflicting the hungry, the homeless, and the uninsured on a daily basis. Champions of racial justice, in turn, try to memorialize the insights that market

town Flood, and crowded, burning tenements).

⁹¹Special interest groups and politicians long have exploited disasters to highlight issues of importance to them or to gain favorable publicity. CHARLES E. FRITZ & J.H. MATHEWSON, NAT’L ACADEMY OF SCIENCES, CONVERGENCE BEHAVIOR IN DISASTERS: A PROBLEM IN SOCIAL CONTROL 58 (1957); see JOHN W. KINGDON, AGENDAS FOR CHANGE 187 (2d ed. 1995) (arguing that political change occurs only at the confluence of three streams of inputs, one of which is public attention).

⁹²The lessons can be about private as well as public law. See Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333 (2000) (tracing the adoption of strict liability tort standards to a series of disasters, including the Johnstown Flood of 1889). Moreover, those seeking to teach these lessons may have policy agendas quite distinct from relief of human disaster victims. See Phillip M. Bender, *Restoring the ELWHA, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest*, 17 J. LAND RESOURCES & ENVTL. L. 189, 207 (1997) (invoking the disasters resulting from the failures of the Johnstown and St. Francis dams in support of environmentalist proposal to restore rivers’ natural flow).

⁹³James D. Thompson & Robert W. Hawkes, *Disaster, Community Organization, and Administrative Process*, in MAN AND SOCIETY IN DISASTER 282 (George W. Baker & Dwight W. Chapman, eds., 1962).

⁹⁴HARRY ESTILL MOORE, ET AL., NAT’L ACADEMY OF SCIENCES, BEFORE THE WIND: A STUDY OF THE RESPONSE TO HURRICANE CARLA 126 (1963); James Dao, *Louisiana Sees Faded Urgency in Relief Effort*, N.Y. TIMES, Nov. 22, 2005, at A16.

⁹⁵The most striking example of this sort of proposal in the wake of Hurricane Katrina was S. 1716. Co-sponsored by the Republican Chairman and Democratic Ranking Member of the Senate Finance Committee, this legislation would extend federally-financed health insurance to all low- and moderate-income people in the affected areas without regard to Medicaid’s usual rules relating to age, health, or family status. The Finance Committee reported out this measure, but Senate Majority Leader Frist and Senate Budget Chairman Gregg prevented it from coming to the floor. Had it passed, it would have provided an important precedent for national health insurance.

allocations have disproportionate racial impacts, particularly where access to capital is crucial to successfully competing.⁹⁶ To succeed, both groups must persuade the electorate that the egalitarianism of the post-disaster period can be transplanted without the resulting demands on society becoming unmanageable or destructive to popular non-egalitarian principles, such as market allocation.

In particular, they may argue that disasters demonstrate the continued value of the concept of social insurance, with the rest of the country intervening to relieve the affected states' burdens. Although critics have invoked moral hazards to attack other kinds of social insurance, these concerns have far less impact on disaster relief policy. This attitude is in part a function of the more compassionate post-disaster climate. In part, however, it reflects the defensible conclusion that allowing individuals to suffer the ill-effects of their miscalculations in one disaster are unlikely to have any compensation in terms of savvier future performance because individuals typically do not assume they will be in similar circumstances again. Both the compassion and the skepticism about the practical consequences of theoretical moral hazards can inform debates on social insurance generally.

Opponents of government interventions against poverty and racial injustice, on the other hand, will seek to slow action, waiting for the public's attention to wander.⁹⁷ The proceduralist model gives opponents of broader reform the means to do this. They emphasize all of the ways in which conditions surrounding the disaster differ from those at other times. They will try to focus electorate's attention on relief projects narrowly on the particular disaster to keep them from drawing broader parallels. They also will try to give the public something to do – follow the plight of individual disaster victims, volunteer, and donate their personal funds – as alternatives to political activism.⁹⁸ They seek out and highlight ceremonies, anniversaries, or other arbitrary points at which the disaster response

⁹⁶See MELVIN R. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 91-125, 175-94 (1997) (finding racial disparities in wealth are far greater than those in income). The greater wealth of whites in the gulf coast states allowed them to purchase housing on higher ground, to pay for features making it more storm-proof, to stockpile more supplies, and to purchase reliable vehicles assuring them of the ability to evacuate. Affluent people's preference for living on high ground, with appealing views, also protected them disproportionately from other disasters, such as the Johnstown flood when a dam suddenly broke and washed away the mining communities in the valley below. See DAVID G. McCULLOUGH, *THE JOHNSTOWN FLOOD* 100 (1968); WILLIS FLETCHER JOHNSON, *HISTORY OF THE JOHNSTOWN FLOOD* 15, 32-34 (1889). Possessing superior communications technology sometimes enables more affluent persons to receive greater advance warnings of impending disasters.

Vulnerability to small-scale medical and economic disasters similarly depends on wealth and, thus, implicitly on race. Competitions for jobs and for admissions to educational programs similarly reward accumulations of human capital. Applying the same version of egalitarianism to these problems that middle-class voters freely embrace in the wake of disasters could transform the debate about affirmative action.

⁹⁷E.J. Dionne, *That Was a Short War on Poverty*, WASH. POST, Oct. 14, 2005, at A19.

⁹⁸See Part III.C, *infra*.

period can be declared complete⁹⁹ and warn of widespread social disruption if relief policies are allowed to linger in effect. These arguments do not have to ultimately persuade; it suffices that they slow down policymaking enough to outlast the heightened public concern.

The political struggles after a disaster exposes severe poverty are an accelerated version of those over relief of chronic poverty. Because most of low-income people's political champions are middle-income people with little direct knowledge of poverty and a host of other interests, anti-poverty activists must strike quickly to convert benevolent sentiments into law when public attention turns to poverty. Unfortunately, the breadth of participation that the procedural model prizes is inconsistent with expeditious policymaking.

III. The Proceduralist Model's Failure to Protect Low-Income People Before and After Hurricane Katrina

Long before Katrina, the proceduralist model's clumsiness and ineffectuality were plain to those willing to see. First, it had proven largely incapable of advancing significantly low-income people's position. Highly participatory, but thoroughly unproductive, debates among low-income people's sympathizers killed President Nixon and Carter's progressive welfare reform proposals.¹⁰⁰ Similar divisions squandered the opportunity to make meaningful gains through the Family Support Act of 1988.¹⁰¹ The liberal Food Stamp Act of 1977¹⁰² and the conservative Omnibus Budget Reconciliation Act of 1981¹⁰³ patched the main ambiguities in the food stamp and welfare statutes, respectively, effectively ending the era of court-driven expansion low-income people's rights. *Goldberg's* fair hearing process did not open the system to recipients' ideas; it spurred the system to ossify around rules that, although often insensitive, were well-suited to quasi-judicial application. What progress was made for low-income people over the past few decades was largely made in obscure, highly un-participatory places: President Nixon pushing the Supplemental Security Income program through Congress,¹⁰⁴ farm state members growing the Food Stamp Program, number-crunchers creating and expanding the earned income credit, and a handful of insiders with mastery of congressional budget procedures phasing in vast expansions of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and Medicaid.

More alarmingly, the proceduralist model proved incompetent even at protecting the modest aid low-income people already had. States' disinterest allowed real welfare grant levels to collapse in the inflation of the 1970s. Deep cuts in

⁹⁹See DORIS A. GRABER, *MASS MEDIA AND AMERICAN POLITICS* 143 (5th ed. 1997).

¹⁰⁰MILDRED REIN, *DILEMMAS OF WELFARE POLICY: WHY WORK STRATEGIES HAVEN'T WORKED* 61 (1982); VINCENT J. & VEE BURKE, *NIXON'S GOOD DEED* (1974).

¹⁰¹Pub. L. No. 100-485 (1988).

¹⁰²Pub. L. No. 95-464 (1977).

¹⁰³Pub. L. No. 97-35 (1981).

¹⁰⁴BURKE & BURKE, at 188-204.

means-tested programs paid for massive tax cuts in the early 1980s and mid-1990s. Only a tiny fraction of recipients improperly denied or terminated from public benefits requested fair hearings, and most of them lost.¹⁰⁵

Prior to Katrina, however, the model's defenders could claim an unfriendly political climate as an excuse: no model, they argued, could protect interests as unpopular as those of low-income people. Although careful analysis of public sentiment finds that claim badly overstated, it was enough to forestall close examination of proceduralism's faults. Since August 29, 2005, however, that argument has been smashed as surely as the press-board houses on the Gulf Coast. The proceduralist model's clumsiness before the storm proved lethal for many hundreds of vulnerable people. And its inability to articulate clear substantive to which a sympathetic but distractible public might attend squandered a wonderful opportunity to make lasting change and left hundreds of thousands of low-income people in even more desperate circumstances than they had experienced before.

This Part chronicles the proceduralist model's failures before and after Hurricane Katrina struck the Gulf coast. Section A shows how more affluent policy-makers' lack of understanding of low-income people's circumstances can lead to disastrous policies even where intentions are noble. This was evident both in the failure to evacuate low-income people before the hurricane and in the persistent diaspora of evacuated people since. The proceduralist model's deliberate ambivalence about the relative importance of various substantive interests exacerbates low-income people's vulnerability to middle-class people's misapprehensions. Section B shows how another central feature of the proceduralist model – the desire to involve as many levels of government and private institutions in possible – further undermined the protection and relief of disaster victims. Finally, section C shifts the focus away from what the proceduralist model attempts to do and onto what it does *not* do: value and protect many of the kinds of ephemeral interests that collectively provide much of the security that low-income individuals and communities enjoy.

Running throughout all of these discussions is another chronic defect of the proceduralist model. Building new ad hoc programs in response to each situation largely wastes the knowledge and decision-making that was allocated to designing each prior program. It is likely to mean that the new program will take longer to implement even though it may be very hurriedly designed. This haste is likely to sacrifice several important substantive values, compounding the problems that the delay itself caused.¹⁰⁶

A. Sensitivity Problems

In the relief of both chronic and acute poverty, the proceduralist model assumes a far greater degree of consensus than in fact exists. This mistake is un-

¹⁰⁵David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1086-89 (2005)[hereinafter "Super, *Efficient Rights*"].

¹⁰⁶David A. Super, *Discretion and Disaster* (forthcoming 2007).

derstandable: few are prepared to seem heartless enough to condemn relief of disaster victims, and not many more will declare indifference to the plight of the poor, especially low-income children. Suggesting that someone secretly harbors such views seems insulting. Accordingly, decisions to initiate disaster relief efforts, and the norms that guide those efforts, receive little explicit discussion.¹⁰⁷

Political forces generally suffice to get disaster relief efforts underway. The absence of explicit norms guiding those efforts is more problematic: officials are expected to provide reasonable accommodation of low-income people, but what is “reasonable” remains opaque. Compounding this problem is the discretionary procedural model’s reliance on administrators to identify the nature and severity of needs largely ad hoc. The process of accommodation thus depends on officials’ understanding of, and empathy for, the vulnerable people being accommodated. This has been a continuing difficulty for persons with disabilities: even where policymakers advert to some disabilities by installing wheelchair ramps or Braille signs, they ignore others requiring different kinds of accommodation.¹⁰⁸ More generally, a failure of empathy has led courts to develop an array of doctrines that sap the accommodation requirement of much impact.¹⁰⁹ Similar difficulties plague accommodation-based anti-poverty strategies: they depend on the ability of politicians and regulators – mostly middle-class, white, male, and healthy – to understand the conditions of impoverished people, many of whom live in very different kinds of communities, face the pressures of mothers raising children on a shoestring, or are infirm.

Failures of empathy need not be the products of malice or even indifference: the New Orleans officials that left public transportation and para-transit out of evacuation plans were elected by low-income people and vulnerable to defeat for failing to serve that community.¹¹⁰ Nor is physical integration alone a sufficient remedy, as valuable as it is.¹¹¹ In much of New Orleans, people of very different incomes lived in close proximity, yet severe disparities in purchasing power led to disparities in access to transportation. Low-income people’s homes also were likely to be the least resilient against harm, and low-income renters lack access to many kinds of disaster aid that are helping more affluent homeowners and businesses rebuild or relocate. Similar disparities in income are likely to result in

¹⁰⁷Only relatively recently have the norms underlying efforts to relieve chronic poverty received explicit discussion. Even this conversation is often obscured by each side attributing extreme positions to its adversaries.

¹⁰⁸Braille signs do little for individuals with limited hearing. Lift vans may be neither necessary nor sufficient to transport persons with severe developmental disabilities.

¹⁰⁹Samuel R. Bagenstos, *The Future of Disability Law*, 114 *YALE L.J.* 1, 34-43 (2004).

¹¹⁰Conversely, upper-income people may feel strongly about aiding the unfortunate. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 268 n. 21 (1980). On the other hand, indifference does seem to play a significant role: long before Hurricane Katrina, the National Academy of Sciences had warned that people without reliable cars was a major concern in evacuating threatened areas. TIERNEY, ET AL., *supra* note 59, at 96.

¹¹¹DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 125 (1987).

disparate impacts of other kinds of disasters.

Even if some middle- or upper-income policy-makers recognize a need, responding to it requires both fiscal and decision-making resources; if either is unavailable, the need will go unaccommodated. To provide an accommodation requires a host of subsidiary decisions about the nature and implementation of the accommodation. If it is regulatory, an enforcement apparatus must be constructed or co-opted and claims for exemptions must be decided. If it is a specialized transfer program, policy-makers must decide what level of income is so low that accommodation is required, whether distinctions will be made between the “worthy” and “unworthy” poor and, if so, what those distinctions will be. The risk of moral hazard must be addressed separately for each accommodation.

All of these many decisions must be reopened if needs or political circumstances change. This renewed debate requires further resources, as does the implementation of any resulting policy changes. Each debate that ends in a compromise is likely to produce more inefficient complexity and to increase further the incidence of gaps and duplication in coverage. Liberals may nonetheless welcome these debates if they are fixated on making incremental progress, no matter how slight, and believe they can prevail with technical arguments.¹¹² Conservative activists similarly may not mind this inefficiency if they think they can prevail with economic and moral arguments.

This section examines two catastrophic failures of sensitivity to low-income people in connection with Hurricane Katrina. Subsection 1 documents the failure to move quickly to evacuate vulnerable people from New Orleans. Subsection 2 shows that government doing equally badly under far less time pressure when it comes to helping displaced people find permanent homes. .

1. The Failure to Evacuate New Orleans

The failure to evacuate one hundred thousand or more people from New Orleans severely exacerbated the suffering and loss of life that Katrina caused. Although a handful of persons with full agency chose to remain out of bravado, the vast majority faced severe obstacles to leaving. Many were extremely low-income people that lacked reliable cars, money for gas, or the resources to survive somewhere outside of the disaster area. Others were people with disabilities physically or mentally incapable of moving on their own.

Key city officials, from Mayor Nagin on down, were well aware that 100,000 people lacked the means to evacuate themselves.¹¹³ The City’s disaster plan declared that “[a]pproximately 100,000 Citizens of New Orleans do not have means of personal transportation.”¹¹⁴ It tacitly admitted the lack of plans for

¹¹²See Super, *New Moralizers*, *supra* note 10, at 2046-48 (criticizing liberals’ over-confidence in their facility with technical arguments).

¹¹³S. Rep. No. 109-322, at 154 (2006).

¹¹⁴CITY OF NEW ORLEANS COMPREHENSIVE EMERGENCY MANAGEMENT PLAN 11 (2005)[hereinafter CEMP], *available at* <http://msnbcmedia.msn.com/i/msnbc/Components/Interactives/News/US/Katrina/docs/City%20Of>

helping these people: “[s]helter assessment is an ongoing project.”¹¹⁵ Similarly, the regional disaster plan offered only the vague promise that “school and municipal buses will be used to transport evacuees who do not have transportation.”¹¹⁶ Although the City’s chief of emergency preparedness had identified the lack of contracts with transit providers as a problem more than a year earlier, little was done to prepare to fulfill this commitment.¹¹⁷

Being intellectually aware that 100,000 people lacked their own transportation is not at all the same thing as empathizing with them. More affluent people have reserves of financial and social capital that they can call upon in desperate situations. They may have difficulty putting themselves in the place of people living hand-to-mouth at best, many of whom lack any such reserves. For example, even after the disaster, media accounts and official reports largely have failed to note that the number of people stranded in New Orleans was undoubtedly far greater than it otherwise would have been had the hurricane struck a few days later, after Social Security, SSI, welfare checks, and food stamp allotments arrived at the beginning of the month.¹¹⁸ Some criticized FEMA for failing to provide for making gas available people who had exhausted their monthly budgets.¹¹⁹ FEMA insisted that “that is a horrible path to go down” and insisted that, if anyone should provide such aid, it would be state or local governments.¹²⁰ This sort of debate, to which no widely accepted norm provides a clear answer, is emblematic of the consequences of the reasonable accommodation approach in particular and proceduralist anti-poverty law in general.

2. Displaced People

Katrina wiped out substantial low-income communities across the Gulf region. Mississippi lost 95% of its public housing stock and 45,000 homes.¹²¹ Four in five dwellings in East Biloxi were destroyed.¹²² Two-thirds of Biloxi homeowners, primarily low-income people, lacked flood insurance.¹²³ Long after the disaster, less than one-eighth of the residents of lower Plaquemines Parish and the East Bank had returned.¹²⁴

The elimination of low-income communities in the Gulf region after Katrina bears striking resemblance to the dispossession of Native Americans from their lands earlier in this country’s history. Low-income communities in the Gulf region faced many serious problems before Katrina. The locations to which the

%20New%20Orleans%20Emergency%20Preparedness%20-%20Hurricanes.pdf.

¹¹⁵*Id.*

¹¹⁶SOUTHEAST LOUISIANA CATASTROPHIC HURRICANE FUNCTIONAL PLAN 78 (2004).

¹¹⁷S. Rep. No. 109-322, at 114.

¹¹⁸H. Rep. No. 109-396, at 106 (2006).

¹¹⁹*Id.* (quoting testimony of Rep. Gene Taylor of Mississippi).

¹²⁰*Id.* (quoting testimony of Michael Brown).

¹²¹VAILL, at 4.

¹²²*Id.*

¹²³*Id.*

¹²⁴PIPA & GREEN, at 36.

displaced people have been consigned since the disaster, however, have been far, far worse. Like the Native Americans of an earlier era, the locations to which they were removed were selected primarily because few others wanted the land. New Orleans and Plaquemines Parrish declined to restore electrical and water service to large low-income areas;¹²⁵ under FEMA rules, this prevented residents of these areas from having trailers on their land and resulted in residents of these communities becoming the primary residents of FEMA's trailer parks.¹²⁶

The typical FEMA trailer offers just 240 square feet for a family.¹²⁷ FEMA established its sites in undesirable areas, such as at the edge of a major commercial airport,¹²⁸ and in remote areas with little access to jobs, public transportation, or other important services.¹²⁹ The unemployment rate in June 2006 for evacuees that were not living in their pre-Katrina homes was 25.9%, while it was 5.9% for those living in their pre-Katrina homes

More than one in five school-age children in these parks either was not in school at all or had missed at least ten days of school in the past month.¹³⁰ Nearly half of these children's parents feared for their safety in the trailer parks; only one in five did in urban Louisiana before the disaster.¹³¹ The incidence of depression and anxiety among children in trailer parks quadrupled from pre-disaster levels, with asthma, developmental delays, and other illnesses showing sharp increases as well.¹³² Overcrowding caused many of these illnesses.¹³³ The lack of medical services prevented many of these parents from obtaining treatment for their children.¹³⁴ On a wide range of measures of physical and mental health, children in FEMA trailer parks fared significantly worse even than other people in the disaster area.¹³⁵ Their parents' health, too, seriously deteriorated, with fifty-three percent of women and thirty-one percent of men experiencing clinical psychiatric symptoms.¹³⁶ With few pre-disaster mental health facilities open or accessible, however, less than one in five of these women has

¹²⁵*Id.*

¹²⁶DAVID ABRAMSON & RICHARD GARFIELD, COLUMBIA UNIV., ON THE EDGE: CHILDREN AND FAMILIES DISPLACED BY HURRICANES KATRINA AND RITA FACE A LOOMING MEDICAL AND MENTAL HEALTH CRISIS 12-13 (2006).

¹²⁷VAILL, at 4.

¹²⁸*Id.*, at 5.

¹²⁹*Id.*, at 5, 18; Mark Waller, *Parish is in No Hurry to Clear Trailer Clusters; Officials Get Few Complaints*, TIMES-PICAYUNE, Jan. 24, 2007, at 1.

¹³⁰ABRAMSON & GARFIELD, at 3.

¹³¹*Id.*

¹³²DAVID ABRAMSON, ET AL., COLUMBIA UNIV., THE RECOVERY DIVIDE: POVERTY AND THE WIDENING GAP AMONG MISSISSIPPI CHILDREN AND FAMILIES AFFECTED BY HURRICANE KATRINA 8 (2007).

¹³³David L. Feinberg, *Hurricane Katrina and the Public Health-Based Argument for Greater Federal Involvement in Disaster Preparedness and Response*, 13 VA. J. SOC. POL'Y & L. 596 (2006).

¹³⁴*Id.*, at 9.

¹³⁵*Id.*, at 10.

¹³⁶ABRAMSON & GARFIELD, at 14.

received counseling.¹³⁷ As much as anything, the loss of the communities they had had before the disaster weighs on these people.¹³⁸

Columbia University researchers concluded that “those with the least ... are increasingly jobless and isolated in dismal trailer parks.”¹³⁹ Among people that ended up in the trailer parks, the share with salaried income dropped from sixty-five percent to forty-five percent.¹⁴⁰ Even among this disadvantaged group, the losses were not evenly shared: over half of displaced people in Mississippi with pre-disaster salaries below \$10,000 saw their wages drop or disappear compared with only fifteen percent of those with pre-disaster incomes of \$20,000 or more.¹⁴¹ Public assistance receipt, however, did not offset this loss in employment, leaving many displaced families in dire straits.¹⁴² Without incomes, they were wholly dependent on FEMA. When FEMA stopped paying for propane tanks for their trailers, they had to do without heat.¹⁴³

This isolation and disempowerment was not evenly shared. Some 79% of FEMA trailer park residents were African-American, compared with 49% of displaced people in private trailer parks.¹⁴⁴ Virtually all of the public housing residents denied the opportunity to return to their homes in New Orleans are African-American. A year after the disaster, two-thirds of all single-mother-headed families had not returned to the New Orleans area.¹⁴⁵ A year after the disaster, half of East Biloxi’s population, including most of its low-income Vietnamese immigrant community, were still living in trailers.¹⁴⁶ African-American evacuees were almost five times more likely to be unemployed than white evacuees.¹⁴⁷ Anecdotal accounts suggest that these numbers had improved only modestly by the hurricane’s second anniversary.

About three in five displaced people in FEMA trailer parks hoped to return to their former communities.¹⁴⁸ Nonetheless, in February 2007, a year and a half after the disaster, at least 37,500 people remained in these dismal trailer parks.¹⁴⁹ Some one to three hundred thousand people are projected to never be able to return, including eighty percent of the city’s African-American residents.¹⁵⁰

¹³⁷VAILL, at 4.

¹³⁸Reckdahl.

¹³⁹ABRAMSON, ET AL., at 5.

¹⁴⁰*Id.*

¹⁴¹*Id.*, at 7.

¹⁴²*Id.* This result was obtained even when researchers counted modest WIC nutrition benefits, typically worth one a hundred dollars or so per month, as public assistance.

¹⁴³ABRAMSON & GARFIELD, at 3.

¹⁴⁴*Id.*, at 12.

¹⁴⁵VAILL, at 3.

¹⁴⁶UYEN LE, *THE INVISIBLE TIDE: VIETNAMESE AMERICANS IN BILOXI, MS* (2006).

¹⁴⁷Karen Kosanovich, *The Labor Market Impact of Hurricane Katrina: An Overview*, 129 MONTHLY LAB. REV. 3, 10 (2006).

¹⁴⁸ABRAMSON & GARFIELD, at 10.

¹⁴⁹ABRAMSON, ET AL., at 5.

¹⁵⁰Anna W. Shavers, *Katrina’s Children: Revealing the Broken Promise of Education*, 31 T.

Those that relocated to other cities fared only modestly better. FEMA's welter of rapidly changing rules restricting aid resulted in cutoffs of three-quarters of families before they had received all of the housing aid Congress authorized.¹⁵¹ Vietnamese-speaking displaced people were unable to understand FEMA's requirements and as a result often did not receive aid.¹⁵² Less than half of the families displaced from public housing projects in New Orleans are receiving housing assistance elsewhere.¹⁵³ And a year after the disaster, a quarter million displaced people were still in Texas as well as one hundred thousand in Georgia.¹⁵⁴

That government provided evacuees emergency shelter but has been unable to move beyond that to help them rebuild their lives shows the severe limitations of an anti-poverty regime depending on the empathy of elites. Highly visible suffering – families out in the elements – stimulates a response. The physical, psychological, educational, and economic effects of prolonged isolation in remote trailer camps, and the loss of informal networks that supplied numerous goods and services that low-income people cannot afford to purchase, are too subtle, and too far outside policymakers' experience, to resonate. Some "get it," but not enough to bring cloture, or even urgency, to debates over whose responsibility recovery efforts should be.

B. Decentralization Issues

Hurricane Katrina has widely been portrayed as a failure on all levels of government as well as some major charities. It ended Louisiana Governor Blanco's political career, began the plummet in President Bush's popularity, exposed massive incompetence in New Orleans's government, and led to purges at FEMA and the American Red Cross. Yet although these officials' failings were quite real, this fault-finding had limited practical value. This is true in part because disasters in any given location are sufficiently rare event that the state and local officials presiding over the next were likely to be different in any event.

In addition, some of the critical failures resulted from misunderstandings or disagreements about which public or private entity bore responsibility for a particular function. The proceduralist model tends to analyze anti-poverty work on the basis of inputs, valuing broad participation and expressions of concern, rather than outputs realized by people in need. As such, it tends to favor broad diffusion of responsibility within both the public and private sectors. This spreading of responsibility, rarely allocated by clear, widely accepted principles, all but ensures that crucial needs will be lost in the shuffle.

MARSHALL L. REV. 499, 506 (2006); MANUEL PASTOR, ET AL., RUSSELL SAGE FOUND., IN THE WAKE OF THE STORM: ENVIRONMENT, DISASTER AND RACE AFTER KATRINA 4, 9 (2006). The permanent displacement from New Orleans is so racially skewed that the city's African-American population is projected shrink from two-third of the total to scarcely half that share.

¹⁵¹Spencer S. Hsu, *Order Shows FEMA Aid Shortcomings; Fraction of Households to Reach Cap; Bureaucracy Is Faulted*, WASH. POST, Dec. 3, 2006, at A16.

¹⁵²LE.

¹⁵³Katy Reckdahl, *Razing a Community*, GAMBIT WKLY., (Oct. 31, 2006).

¹⁵⁴Quigley.

Hurricane Katrina provided a striking, but hardly unusual, example of this problem. Subsection 1 shows how our unprincipled insistence on devolving responsibility to state and local governments lacking the sophistication and resources to meet vulnerable people's needs compounded the disaster. Subsection 2 then examines this country's preference for private charitable aid to the poor over governmental programs in the context of disasters.

1. Reliance on State and Local Governments

Much of suffering after Katrina was the predictable result of localism. Devolution draws much of its impetus from the general American preference for minimizing governmental intervention: localities are thought to be the least active level of government. Thus, localism tends to increase the likelihood of inaction.¹⁵⁵ Assigning responsibility for a task to local government may be a plausible compromise when we are divided about whether that task should be performed at all, but for activities such as disaster planning and relief about which a broad consensus exists, it risks just the kind of indecision and inaction that obstructed New Orleans's planning for hurricanes and its inept evacuation efforts. Whatever the shortcomings of political appointees in FEMA and other federal agencies, their line staff had far more experience responding to disasters that state or local officials in any one place could. City and state officials had more preparation than most, including a major practice exercise the year before. At the crucial moment, however, key officials hesitated to recommend an evacuation and to take steps to help those too poor or too sick to leave.

Hurricane Katrina's aftermath also demonstrated the distributional inequities devolution tends to produce. To be sure, the federal government made major contributions to the costs of rebuilding. The expectation that it work through state and local governments in that effort, significantly undermined the value of its contributions. To avoid an obvious moral hazard, giving states responsibility for making anti-poverty policy requires that they bear substantial financial responsibility for the policies selected. That, however, tends to negate the existence of a primary federal responsibility for low-income people's problems. The normative basis for treating poverty as a state or local responsibility even in ordinary times is dubious: poverty is not distributed among states evenly, randomly, or even significantly in proportion to the wisdom of public policies. In the wake of Katrina, however, this stubborn insistence on state and local responsibility generates a host of quite insoluble problems. The Bush Administration's insistence until recently that states and localities match some federal funds made disproportionate amounts available to relatively lightly affected areas, whose revenues could support the match.¹⁵⁶

Moreover, poorer localities, such as New Orleans, had fewer financial reserves and less appeal to long-term lenders. They could not maintain local services when their tax revenues collapsed after Katrina. New Orleans lost \$168

¹⁵⁵Wright & Rossi, *Politics*, *supra* 71, at 48.

¹⁵⁶Paul Krugman, *Katrina All the Time*, N.Y. TIMES, Aug. 21, 2007, at A15.

million in revenue and laid off 3,000 employees. These included many building inspectors,¹⁵⁷ making it difficult for residents to obtain rebuilding permits. Prohibitions on rebuilding within the 100-year flood zone effectively rendered seventy percent of East Biloxi's Vietnamese community ineligible for Community Development Block Grant funds for rebuilding.¹⁵⁸ States increased the regressivity of disaster relief programs by reducing or denying aid to people without pre-disaster flood insurance, who are disproportionately low-income.¹⁵⁹ Thus, little progress has been made on restoring large swaths of New Orleans while disaster aid funds have helped build luxury apartments in Tuscaloosa, over a hundred miles inland in Alabama,¹⁶⁰ a state whose storm damage was confined to coastal area and far less pervasive than that in Louisiana and Mississippi.

Even within the proceduralist model's own terms, the recovery and rebuilding after Katrina have been abject failures. With low-income people disproportionately still displaced from their communities, they lacked meaningful opportunities for input on those policies.¹⁶¹ Nor was the apparent local control altogether real. Because the federal government offered to pay a higher share of the cost of infrastructure repairs and improvements,¹⁶² states had incentives to skew their limited resources towards brick and mortar projects.

2. Reliance on Private Charities

Participation in charitable work has long been an important way for people to build the civic ties that hold communities together and promote other kinds of pro-social behavior.¹⁶³ Accordingly, Americans traditionally express a preference for flexible, *ad hoc* community responses to disasters relief.¹⁶⁴ Some argue that this justifies a reduced governmental role.¹⁶⁵ This echoes a broader trend outside the disaster context: shifting the pursuit of public values that cannot be expressed in economic terms to private charities, particularly with regards to

¹⁵⁷Marcia Johnson, *Addressing Housing Needs in the Post Katrina Gulf Coast*, 31 T. MARSHALL L. REV. 327, 347 (2005-2006).

¹⁵⁸UYEN LE, *THE INVISIBLE TIDE: VIETNAMESE AMERICANS IN BILOXI, MS* (2006).

¹⁵⁹PIPA & GREEN, at 14-15.

¹⁶⁰Krugman.

¹⁶¹LE.

¹⁶²Although President Bush's speech from Jackson Square was noteworthy for its forthright discussion of poverty, it also made these implicit priorities clear. "Federal funds will cover the great majority of the costs of repairing public infrastructure in the disaster zone, from roads and bridges to schools and water systems." 41 WEEKLY COMP. PRES. DOC. 1407 (Sept. 15, 2005). His initial proposals for aiding displaced individuals were limited to one-time transportation assistance and tax benefits of dubious value to the poor and unemployed. *Id.*, at 1406-07. Congress ultimately did provide some additional funds through the Temporary Assistance for Needy Families (TANF) block grant, but conditioned them to address only a limited subset of human needs.

¹⁶³ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* bk. 2, ch. VII, at 123-28 (Phillips Bradley, ed. 1947).

¹⁶⁴RISA PALM & JOHN CARROLL, *ILLUSIONS OF SAFETY: CULTURE AND EARTHQUAKE RESPONSE IN CALIFORNIA AND JAPAN* 103 (1998).

¹⁶⁵*Id.*

social services for low-income people.¹⁶⁶

The aftermath of Hurricane Katrina and other disasters, however, illustrates several dangers of anti-poverty policy's reliance on private charities. Private charities are both inefficient and ineffective at delivering disaster relief as compared with the government. Second, relying on private charities to relieve both acute and chronic poverty causes serious distributional inequities. Finally, when private charities are given the role of a large adjudicatory bureaucracy, they tend to lose the community-building characteristics that cause us to gravitate toward charities.

Yet in each case, the proceduralist model of anti-poverty law proves ill-equipped to acknowledge, much less remedy, the problem. The proceduralist model has no affirmative claims with regards to efficiency. Instead, it treats efficiency losses as the inevitable consequences of procedural safeguards; it recognizes that those losses can sometimes be sufficiently severe to warrant abandoning those safeguards. The proceduralist model is agnostic as to distributional concerns, assuming that the political process can be counted upon to produce satisfactory results. And its espousal of dignitary interests as an alternative justification for expanding procedural rights leave it vulnerable to arguments for the community-building power of private charities.

a. Charity and Inefficiency

The inefficiency of relying upon private charity for relief of acute or chronic poverty is its most apparent shortcoming. The cheapest way to raise money for any public project is through taxes. Even the most efficient charity must spend a far higher portion of its receipts fundraising than does the government. Those costs tend to be understated through the exclusion of the value of many in-kind contributions, such as air time for public service announcements and volunteers' time.

Moreover, the government has far better information about the nature, extent, and location of need. Private charity's ability to distribute, and particularly to raise, resources depends heavily on the mass media. This is highly problematic for several reasons. Disaster-ridden communities may resent news media, investigative bodies, or relief groups publicizing the disaster to motivate donors.¹⁶⁷ Indeed, some media coverage of a disaster can interfere with relief and recovery efforts.¹⁶⁸ Competition for finite donor funds drives primary disaster relief organizations to haggle over which should receive more credit for its work.¹⁶⁹ As the potential for donations becomes apparent, secondary organizations may search for ways to adapt their strengths to meeting the problems of the disaster.¹⁷⁰ The

¹⁶⁶See, e.g., Robert Woodson, Sr., *Welfare Reform: A Message from the "Receiving End"*, in WELFARE REFORM: PROSPECTS AND PERSPECTIVES 73 (1995).

¹⁶⁷FRITZ & MATHEWSON, *supra* note 91, at 58.

¹⁶⁸*Id.*, at 74-76.

¹⁶⁹Thompson & Hawkes, *supra* note 93, at 295.

¹⁷⁰*Id.*, at 289.

media inevitably misses a great deal of need in less accessible or less photogenic places while overemphasizing real but finite need in other places. Thus, for example, the media cyclone surrounding the September 11 attacks led to numerous, wholly useless, blood drives despite the fact that those attacks left only a tiny number of people living but injured.

One could appeal to the media to improve its performance in this area, but whether that is either feasible or desirable remains unclear. Journalists' are not trained to assess disasters or to determine the best methods of delivering relief. Even if they were, the recipients of their dispatches – donors in distant areas – are ill-equipped to interpret those assessments and allocate their contributions accordingly, much less to determine which charities are most trustworthy and effective.¹⁷¹ Where relief is needed in more places than the media can cover in scarce air time or column space, those needs that do receive coverage may be met, or even more than met, while others are ignored. And even if all of these problems could be overcome, assuming this role distracts the media from other vital functions – particularly holding public officials accountable – that others cannot readily meet.

Properly understood, relief of the suffering has many of the characteristics of a natural monopoly. It is heavily dependent upon networks to gather resources and information about suffering and to match those resources to that suffering. The volume and complexity of this information may be difficult or impossible to organize through external interactions among separate entities.¹⁷² Disaster relief also requires identifying and deflecting opportunists seeking to abuse the relief without imposing undue burdens on those in genuine need. These activities are characterized by steadily declining marginal costs. Government provision therefore is likely to be the most efficient means of meeting most needs.

b. The Distributional Consequences of Reliance on Private Charity

Government's deference to private charities for disaster relief also has disturbing distributional consequences. Donors with the most resources will steer their contributions to charities that appear to be serving people with whom they can identify, which are likely to be those of a similar race and ethnicity and those that appear to have living a similar lifestyle before the disaster.¹⁷³ In addition, the supply of donations is only modestly elastic. For each additional dollar contributed to disaster relief, donors may trim their personal savings and consumption some but also reduce their giving to other causes. Those most inclined to donate

¹⁷¹*La. Officials Probe Pilfered Donations*, N.Y. TIMES, Sept. 18, 2005, at A17.

¹⁷²These same factors tend to lead corporations to make needed factors of production internally rather than purchase them on the market. R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 45 (1988); HAROLD DEMSETZ, *ECONOMIC, LEGAL, AND POLITICAL DIMENSIONS OF COMPETITION* 25, 32-34 (1982)[hereinafter DEMSETZ, *COMPETITION*]. In disaster relief, information is one of the most valuable factors of production.

¹⁷³See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (describing how this could happen without any conscious malice).

to relieve human suffering after a disaster also are likely to be among the donors of other groups aiding vulnerable people. Reports that non-disaster-related charities suffered drop-offs in donations after the Indian Ocean tsunami and again after Hurricane Katrina seem to confirm this concern.

One of the federal government's costliest responses to Katrina was through tax preferences.¹⁷⁴ Many of these only applied to extremely wealthy individuals who otherwise would have reached the ceiling on deductible contributions.¹⁷⁵ Relatively little of these benefits of these tax preferences appear to have reached Katrina's victims; most obviously, people whom the disaster threw out of work have no taxable against which to take deductions.¹⁷⁶ The cost of tax preferences for wealthy developers, however, swelled the oft-cited figures for the total cost of federal contributions to disaster relief, helping to persuade the public that either the problems of the Gulf Coast had been solved or that any failure to do so was due to governmental incompetence rather than the lack of funds.

Reliance on private charity to provide the most vital forms of relief cannot be justified as the best way of serving those in need. It may reflect a "small is beautiful"¹⁷⁷ sensibility or a nostalgia for an imagined time when problems and their solutions could be found within a small community. Alternatively, it may reflect a norm against taxation that is so strong it applies even to taxation in support of activities, such as disaster relief, that are widely acknowledged to be important and necessary. Put another way, the anti-taxation norm exists not just to constrain the government from forcing an individual to contribute to activities with which she or he substantively disagrees but also to serve a dignitary purpose of allowing the individual to be the one that decides to make contributions to efforts that she or he supports. In the particular case of charitable responses to disasters, it can be presumed that individuals feel a sense of moral uplift from making voluntary donations that they lack from paying taxes or even forming part of a political majority that demands a governmental response. They also may feel that their donations are a form of social insurance premium because donees are implicitly bound to reciprocate;¹⁷⁸ in the current climate of skepticism about government, paying taxes to support actual social insurance programs provides no similar confidence.

c. Charities and Community Spirit

The persistence of the wasteful and inefficient charitable model of disaster relief raises at least two important questions. First, is the moral argument against being taxed even for concededly laudable purposes such a high imperative that

¹⁷⁴Meredith M. Stead, *Implementing Disaster Relief Through Tax Expenditures: An Assessment of the Katrina Emergency Tax Relief Measures*, 81 N.Y.U. L. REV. 2158 (2006).

¹⁷⁵*Id.*, at 2177.

¹⁷⁶*Id.*, at 2187.

¹⁷⁷E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* (1975).

¹⁷⁸ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 176-77 (1991).

society at large should pay for it with the considerable inefficiencies – and disaster victims should pay for it far more dearly? Much of law is a debate between efficiency and values alleged to be so important that they transcend efficiency.¹⁷⁹ In recent decades, liberals most commonly have been those arguing for disregarding economic efficiency in favor of other social values. Here, however, the tables are turned. Advocates of a strong public response can fairly ask whether, in the face of such dire need, the aesthetic values charity serves are important enough to justify the extra suffering that results from unmet need and misallocations of resources.

Second, can social conventions change sufficiently to generate a degree of pride and satisfaction from supporting relief efforts politically that approaches that achieved through individual donations? The higher value we place on financial donations over political support is surely a social construction. Modifying that construction so that more people could feel satisfaction through building a just society would eliminate considerable dead-weight economic loss. It also would have great advantages for long-term social cohesion. It therefore seems important to determine why we value private virtue so much more than public virtue.

Part of the answer seems to be that private giving seeks not only to alleviate suffering but also to recreate a sense of community. The Red Cross, like the federal government, is a sprawling organization with a vast payroll composed, no doubt, of the about same mix of good, bad, and mediocre employees as the federal civil service.¹⁸⁰ It has, however, carefully cultivated the image of individual volunteers helping individual disaster victims, something the government has failed to do. Donors to the Red Cross can identify with its volunteers and imagine that supporting those volunteers financially is the next best thing to personally providing aid. Not only has the government failed to provide many images of aid-giving that can prompt similar identification, but its news coverage often gives a sharply contrasting image. Its greater openness makes its misallocations of resources more accessible to the media, yielding the misimpression that it is far less efficient than private charity. Precisely because it is judged on efficiency of results rather than integration into a community, it tends to turn away volunteers;¹⁸¹ private charities may divert many or most volunteers into make-work

¹⁷⁹Super, *New Moralizers*, *supra* note 10, at 2087.

¹⁸⁰In fact, the Red Cross's failures in Katrina's wake were strikingly similar to some of FEMA's. See Stephanie Strom, *President of Red Cross Resigns; Board Woes, not Katrina, Cited*, N.Y. TIMES, Dec. 14, 2005, at A1 (describing criticism).

¹⁸¹Although much of the public assumes that volunteer labor, because it is free, is a valuable resource that can contribute to effective relief. In fact, most activities crucial to disaster relief, like other activity creating economic value, have significant economies of scale. Moreover, capital, both human and physical, can dramatically improve the productivity of labor. New Orleans did not need a bucket brigade to deal with its flood; it needed expert civil engineers to maintain and patch its levees and to repair massive pumping stations. In addition, the out-of-pocket costs of labor often pale compared to the costs of organizing the enterprise. Those costs rise with the number of

jobs, but they still honor the desire to become personally involved.

Relieving a major disaster, however, is a huge and complex job. And precisely because they have fewer resources than the government, private charities must be even more fastidious about whom they aid. The Red Cross repeatedly has aroused deep resentment in disaster-stricken communities when, after the first wave of relief, it begins to ask questions required to means-test further aid.¹⁸² Charities, even those with large bureaucracies such as the Red Cross, have less experience protecting the integrity of aid funds than public welfare agencies. It therefore should not be surprising that the Red Cross both suffered false claims and delayed needed aid with ill-designed verification requirements.¹⁸³

C. Undervaluing Non-Monetized Property Interests

President Bush declared a national “commitment ... to help the citizens of the gulf coast to overcome this disaster, put their lives back together, and rebuild their communities.”¹⁸⁴ He broadly pledged to “restore all that we have cherished from yesterday.”¹⁸⁵

Restoring the stricken areas’s social fabric is of special importance to low-income people. Their assets are likely to be disproportionately non-monetizable. This is true both because their absolute stocks of monetizable assets are relatively low and because their material poverty has compelled them to seek social alternatives for meeting needs others address with money. In a stable, established community, an individual will learn over time which of her or his neighbors have need for her or his talents and can be expected to barter for them. Reputation in such a community may be crucial: bartering child care services, for example, is far more difficult with strangers. Reputation also can help small business find reliable spot labor and desperate people find emergency employment.

The destruction of low-income communities in the region did not end with the storm and floods. The small businesses that helped sustain these communities failed in large numbers. New Orleans lost twenty-seven percent of businesses overall but forty-two percent of those with five or fewer employees.¹⁸⁶ In September 2005, 791 Louisiana employers had mass layoffs; 113 Mississippi employers did the same that month. Throughout the region, an additional 358

actors whose labors must be organized, with the amount of supervision each requires, and with the unreliability of the sources of labor. DEMSETZ, COMPETITION, *supra* note 172, at 25, 41. Supervising a mob of well-intentioned volunteers with uncertain skills and uncertain attention spans may well cost more, and have greater risk of failure, than relying on a much smaller group of skilled government employees.

¹⁸²DYNES, *supra* note 83, at 194-95.

¹⁸³For example, at a time when gasoline was largely unavailable on the Gulf Coast, it required survivors from the Mississippi coast to travel fifty miles inland to apply for aid and then, when they arrived, announced it would not process any application without a photograph of a damaged house.

¹⁸⁴41 WEEKLY COMP. PRES. DOC. 1406 (Sept. 15, 2005).

¹⁸⁵*Id.*, at 1407.

¹⁸⁶Gary Perilloux, *Study: Storms Kill Many La. Firms*, BATON ROUGE ADVOCATE, Mar. 9, 2007, at A1. St. Bernard Parish lost fifty-four percent of its businesses while Cameron Parish lost twenty-two percent. *Id.*

mass layoffs had occurred by December.¹⁸⁷ Unemployment rates remain high long after the disaster.¹⁸⁸ Even before the recent credit crunch, one in ten homeowners in the area was facing foreclosure, a rate far in excess of the national average.¹⁸⁹

Public services vital to impoverished families have remained battered. New Orleans has only half of the schools and thirty percent of the child care centers it had before the storm.¹⁹⁰ East Biloxi has had no low-income child care programs at all since Katrina.¹⁹¹ Less than half of New Orleans's public transit routes are back in operation, with service unreliable on many of those.¹⁹²

Mayor Nagin explicitly proposed to rebuild the affluent areas of New Orleans first.¹⁹³ Increasingly, evidence suggests that large low-income communities may never be re-established. Major developers working closely with the mayor declared that low-income would not return because they could not afford to do so in the new environment redevelopment was creating.¹⁹⁴ Land speculators are buying up much of the land on which low-income communities stood for future development.¹⁹⁵ Similarly, reconstruction in East Biloxi has focused on putting tourist hotels, casinos, and parks on land that low-income Vietnamese and African-American communities once occupied.¹⁹⁶

Congress appeared to have addressed this concern by allocating \$10.4 billion through the Community Development Block Grant (CDBG) for rebuilding homes, with the majority earmarked for low- and moderate-income people.¹⁹⁷ A year later, however, only eighteen of the 77,000 homeowner applicants had received any money.¹⁹⁸ By February 2007, 359 out of more than 100,000 applicant homeowners had received rebuilding grants.¹⁹⁹ The situation is only

¹⁸⁷Sharon P. Brown & Patrick Carey, *Conducting the Mass Layoffs Statistics Program: Response and Findings*, 129 MONTHLY LAB. REV. 70 (2006).

¹⁸⁸Sharon P. Brown, et al., *The Effect of Hurricane Katrina on Employment and Unemployment*, 129 MONTHLY LAB. REV. 52 (2006).

¹⁸⁹David Cho & Nell Henderson, *Housing Foreclosures Hit Hard; Gulf Coast Homeowners, Already Stretched Thin, Struggle to Make Payments*, MONTEREY COUNTY HERALD, March 16, 2007.

¹⁹⁰GREATER NEW ORLEANS COMMUNITY DATA CENTER, THE BROOKINGS INSTITUTION METROPOLITAN POLICY PROGRAM. THE KATRINA INDEX: TRACKING RECOVERY OF NEW ORLEANS & THE METRO AREA 4 (2007).

¹⁹¹VAILL, at 4.

¹⁹²GREATER NEW ORLEANS COMMUNITY DATA CENTER, at 4.

¹⁹³Peter Beaumont, *Drowned City Cuts Its Poor Adrift*, THE GUARDIAN, Dec. 11, 2005.

¹⁹⁴*Id.*

¹⁹⁵THE OPPORTUNITY AGENDA, HOUSING: WELCOMING KATRINA'S VICTIMS BACK HOME (2006).

¹⁹⁶LE; TONY PIPA & STEVE GREEN, OXFAM AMERICA, FORGOTTEN COMMUNITIES, UNMET PROMISES: AN UNFOLDING TRAGEDY ON THE GULF COAST 2, 8 (2006).

¹⁹⁷Bill Quigley, *Robin Hood in Reverse: Corporate and Government Looting of the Gulf Coast*, LA. WEEKLY, Nov. 20, 2006.

¹⁹⁸*Id.* (writing as of November 1, 2006).

¹⁹⁹DAVID ABRAMSON, ET AL., COLUMBIA UNIV., THE RECOVERY DIVIDE: POVERTY AND THE WIDENING GAP AMONG MISSISSIPPI CHILDREN AND FAMILIES AFFECTED BY HURRICANE KATRINA 12

modestly better: only a few thousand of the 45,000 homes destroyed in Mississippi have been rebuilt.²⁰⁰ HUD granted Mississippi a waiver of CDBG's requirement that most money help low-income people;²⁰¹ Louisiana has sought to charge off a \$200 million bail-out of a utility company to this low-income set-aside.²⁰² Federal funds also have subsidized a car dealership in Baton Rouge, a shopping mall in Lafayette, and a luxury hotel in Livingston.²⁰³

Moreover, although more than half of the people displaced from New Orleans were renters, no money was allocated initially to help them return to the city.²⁰⁴ Ultimately, some 3.5 percent of Louisiana's CDBG funds were set aside to help low-income renters return.²⁰⁵

The destruction of housing stock along the Gulf coast has caused rents to skyrocket, preventing most low-income families from returning without aid.²⁰⁶ Those that have often are doubling- and tripling-up with other families in small apartments.²⁰⁷ Yet far from helping, HUD and local housing authorities have barred the return of thousands of families to public housing units that are among the sturdiest low-income housing in the region and were only lightly damaged in the storm.²⁰⁸ Indeed, HUD is seeking tax credits to demolish 5,000 lightly damaged public housing units in New Orleans – more than half of the city's pre-disaster stock – many of them on attractive real estate near the French Quarter.²⁰⁹ Plans call for making only 4,000 reconstructed units of housing available for the 84,000 low-income renters that lost their homes in the New Orleans area.²¹⁰ Similarly, the East Biloxi housing authority has only 35% of its pre-disaster units occupied.²¹¹

Laypeople and even many lawyers are accustomed to thinking of property ownership in absolute terms: either someone owns a particular piece of property, or she does not. This is, of course, analytically flawed: the rights of action relating to a particular piece of property are almost always divided among several en-

(2007).

²⁰⁰SARAH VAILL, WOMEN'S FUNDING NETWORK, CALM IN THE STORM: WOMEN LEADERS IN GULF COAST RECOVERY 4 (2006); Jonathon P. Hooks and Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes those Most in Need*, 43 Cal. W. L. Rev. 21, 24 (2006).

²⁰¹PIPA & GREEN, at 14.

²⁰²Quigley.

²⁰³*Id.*

²⁰⁴*Id.*

²⁰⁵PIPA & GREEN, at 14.

²⁰⁶In the Biloxi area, average rents for a two-bedroom apartment are \$1,000. VAILL, at 13. A family of three in Mississippi that is fortunate enough to get welfare – the great majority of low-income Mississippi families cannot – receives less than \$200 per month. Rents have increased eighty percent in New Orleans. Quigley.

²⁰⁷Reckdahl.

²⁰⁸Over eighty percent of public housing units in New Orleans, largely brick and concrete structures that stood up well to the winds and waters, remain vacant. Quigley; VAILL, at 3.

²⁰⁹Quigley.

²¹⁰PIPA & GREEN, at 15.

²¹¹*Id.*, at 20; Nicolai Ouroussoff, *All Fall Down*, N.Y. TIMES, Nov. 19, 2006, at 41.

tities.²¹² “There is no such thing as absolute ownership, not even in an economic system characterized by complete private ownership. For even a system with private ownership of scarce resources will prohibit certain actions in the interest of the community as a whole.”²¹³

This narrow vision of vested rights has had a profound effect on disaster recovery policies. Except in case of coastal erosion, disasters do not destroy fee simple ownership of land; this limits land owners’ losses in a way not applicable to renters. Losses of estates on that land, however, are handled quite disparately. Heavily subsidized disaster insurance or direct transfer payments offset losses owners of damaged or destroyed buildings face: although their wealth suggests that they are better able to protect themselves through the market from these losses, we often indemnify them even if they have not done so. By contrast, recovery programs typically ignore renters’ loss of their leasehold rights. Although some tenants may be quite affluent, many will have lacked the means to insure themselves against their financial losses. Worse, while the destruction of competing housing stock may improve owners’ market positions, it is likely to leave renters with fewer choices and greatly diminished market power.

Stating that renters in New Orleans, East Biloxi, and other low-income communities had no rights to their homes because they did not own them is as bankrupt analytically as it is morally. The extent of their rights is a question of public policy. Most low-income renters’ formal monetary interest in their homes in disaster areas – the value of the unexpired terms of their leases and any rights of renewal they may have had – pale in absolute terms. When subsidized flood insurance reimburses landlords for their destroyed buildings and allows them to redevelop the area for use by more affluent people, however, it frees them from the effective encumbrances that market conditions gave their former tenants on their property.

IV. How Anti-Poverty Law Must Change

Recognition of the proceduralist model’s deficiencies has been growing. Progressives have come to recognize that tighter legislative drafting and more conservative courts make liberal construction of social welfare statutes anything but inevitable.²¹⁴ Ronald Reagan’s success waging war on mythical “welfare queens” shattered the faith many had in widely shared benevolent norms toward the poor and in policymakers’ openness to serious debate based on verifiable data. Yet conservatives’ recent policymaking successes have not warmed them to proceduralism. Some equate fair hearings with obstruction of behavioral requirements and obfuscation of the moral messages those requirements seek to convey.²¹⁵

²¹²Armen A. Alchian & Harold Demsetz, *The Property Right Paradigm*, 33 J. ECON. HIST. 16 (1973).

²¹³CARL J. DAHLMAN, *THE OPEN FIELD SYSTEM AND BEYOND* 70 (1980).

²¹⁴Super, *Efficient Rights*, *supra* note 105, at 1084-86.

²¹⁵REP. NANCY L. JOHNSON, ET AL., U.S. HOUSE OF REPRESENTATIVES, *WELFARE REFORM HAS*

Unfortunately, both ideological rigidity and a lack of imagination have obstructed creation of a new, alternative model. Anti-poverty advocates may recognize that the current model is not doing well but have learned that policy regimes are rarely so bad they cannot be made worse. Proceduralism's successes in other areas, such as employment, also may dampen liberals' inclination to criticize it for failing low-income people. Some conservatives have little interest in *any* model of anti-poverty law while their more moderate colleagues have feared that a more substantive approach to anti-poverty law will lead to a political auction that conservatives cannot win and the nation cannot afford.

Section A shows how rapidly the political imperative to address poverty dissipated in the aftermath of Hurricane Katrina. Because anti-poverty law depends on transitory expressions of public concern rather than on-going interest group pressure to produce significant initiatives, the inability to find proposals that could advance under these circumstances dooms it to an accelerating collapse unless a new model can be found. Section B then suggests what that model might look like. In short, it would seek to give legal recognition to interests that are the most vital low-income people's well-being and that have the strongest support in society.

A. Episodic Public Commitment

The national dialogue on poverty that Katrina was supposed to trigger quickly disappeared.²¹⁶ Interest in the Gulf Coast generally, and in low-income people in particular, faded rapidly. Poverty quickly disappeared from the news media, which measured progress by New Orleans's hotel occupancy rates during Mardi Gras.²¹⁷ The casino and condo development industries in Biloxi have returned to almost pre-disaster levels of profitability.²¹⁸

A month after Katrina hit, the share of the public believing that this country is divided between haves and have-nots jumped ten percentage points.²¹⁹ Still, fewer people held this view than saw no such divide; and roughly equal numbers of people expected the government to spend too much and too little on disaster relief.²²⁰ Researchers found that Hurricane Katrina did little to expand public awareness of poverty because most of the public already was aware and most of the rest is ardently opposed to acknowledging poverty in this country.²²¹ The

ALREADY ACHIEVED MAJOR SUCCESSSES: A HOUSE REPUBLICAN ASSESSMENT OF THE EFFECTS OF WELFARE REFORM 27 (1999)

²¹⁶Allen G. Breed, *Post-Katrina Dialogue on Poverty Fizzles*, S.F. EXAMINER, April 1, 2006, at A1.

²¹⁷Erin A. Kaplan, *Blacks Must Continue Righteous Anger*, ALBANY TIMES UNION, Mar. 3, 2007, at A9.

²¹⁸LE; PIPA & GREEN, at 20.

²¹⁹PEW CENTER FOR THE PEOPLE & THE PRESS, GROWING NUMBER SEES U.S. DIVIDED BETWEEN 'HAVES' AND 'HAVE-NOTS'; KATRINA RELIEF EFFORT RAISES CONCERN OVER EXCESSIVE SPENDING, WASTE 2 (Oct. 19, 2005).

²²⁰*Id.*

²²¹David B. Grusky & Emily Ryo, *Did Katrina Recalibrate Attitudes Toward Poverty and Inequality?: A Test of the "Dirty Little Secret" Hypothesis*, 3 DU BOIS REV. 59 (2006).

biggest change in public opinion was a deeper skepticism that government could help.²²² Although Katrina's aftermath hardly provides a fair test of what government *could* do, it certainly does support a pessimistic view of what it *did* do.

To be sure, some continued to cite Hurricane Katrina as reason to redouble efforts to fight poverty.²²³ Clearly, however, the prime opportunity to seek lasting change passed: even when control of Congress turned over in 2006, placing representatives of extremely low-income districts in key positions of power, major anti-poverty initiatives appear nowhere on the policy agenda.

Anti-poverty activists have correctly regarded the collapse of the post-Katrina debate as an ominous sign for the anti-poverty agenda generally. As Lawrence Bobo noted, a "sense of obligation to help victims of natural disaster has been important to major political reform efforts of the past. ... In particular, the analogy made to natural disasters, which carried the clear moral obligation for society to help those in need, was often an element of the case for new policy designed to alleviate the hardship of an economic disaster."²²⁴ Seeing the political system incapable of designing a meaningful response to poverty even after a disaster of this scope should also impel conscientious conservatives²²⁵ to action: it certainly suggests that the assault on what they regarded as programs' excesses may have gone too far and that a substantive approach to anti-poverty law is unlikely to be dominated by the left.

The inability to formulate a viable change in anti-poverty policy to respond to this outpouring of public sympathy demonstrates the bankruptcy of the procedural model that long has organized that policy. Indeed it does so more definitively than the reverses suffered in the early 1980s and mid-1990s. With a core element of anti-poverty policy's political constituency being sympathetic but distracted and ill-informed middle-income people, and with anti-poverty policy having increasingly become identified with only one of the two political parties, periodic reverses are difficult to avoid. The inability to advance despite the overwhelming public sympathy following Katrina suggests that anti-poverty policy will keep ratcheting down: it can deteriorate, but its structure is too decrepit to sustain meaningful expansion. A better model is urgently needed.

B. Mixing Proceduralist and Substantive Advocacy: Lessons from the Environmental Movement

That anti-poverty law's overwhelming reliance on proceduralism was far from inevitable can be seen by tracing the environmental movement's development over much the same time. To be sure, the two causes differed in significant poli-

²²²LE; PIPA & GREEN, at 20..

²²³SANDRA PIANALTO, FED. RESERVE BANK OF CLEVELAND, THE CHALLENGE OF CONCENTRATED POVERTY (June 22, 2006).

²²⁴Lawrence D. Bobo, *Katrina: Unmasking Race, Poverty, and Politics in the 21st Century*, 3 DU BOIS REV. 1, 2 (2006).

²²⁵See Super, *Quiet Revolution*, *supra* note 22, at 1377 (describing conservatives' efforts to expand the Food Stamp Program in 2000-02).

tical and legal dimensions. Environmentalism primarily sought regulatory interventions to redistribute resources; the anti-poverty movement's aims were primarily fiscal. Environmentalists could sell more of their agenda to middle-class voters on instrumentalist grounds, although both movements relied primarily on altruism to motivate their supporters. Environmentalists were more directly threatening to powerful private interests, but anti-poverty advocates were facing strong race-based passions. Nonetheless, both were seeking ways to convert popular sentiment into on-going legal structures at very much the same time. Their divergent courses therefore prove instructive.

In early 1970, both movements won vast new proceduralist opportunities. The National Environmental Policy Act (NEPA) provided the means to force public agencies to consider the environmental consequences of their actions.²²⁶ Weeks later, *Goldberg* provided a parallel requirement of closer scrutiny for decisions terminating people from public benefits. In both cases, the required reviews were hoped to enlighten, or shame, officials into making more sensitive decisions.²²⁷ This emphasis on participation and reasoned debate implied a consensus about norms that in both instances was largely illusory. Both anti-poverty advocates and environmentalists eagerly set about enforcing these new procedural rights.

Both groups also won landmark cases finding broad frights in vaguely-written statutes: *King v. Smith*,²²⁸ implying a prohibition on state-designed eligibility conditions in a requirement that aid be paid promptly to all eligible individuals, and *Citizens to Preserve Overton Park v. Volpe*,²²⁹ implying a requirement that the government show extraordinary reasons for routing highways through parks in the Administrative Procedure Act and some vague highway legislation. These cases offered the prospect of finding some substantive statutory rights without winning new legislation. The prospects of converting procedural rights directly into substantive ones, however, proved short-lived in both fields. Shortly after *Goldberg*, *Dandridge v. Williams*²³⁰ slammed the door on substantive constitutional anti-poverty rights. Not long afterwards, the Court first discouraged and then, in *Stryker's Bay Neighborhood Council v. Karlen*,²³¹ rejected attempts to review the substance of environmental decisions through the environmental impact statement (EIS) process.

This left new action by Congress as the only likely source for new substantive rights. Recognizing this even before NEPA's limitations became manifest, environmentalists negotiated with the Nixon Administration to win enactment of the Clean Air Act later in 1970. That legislation heralded a series of important

²²⁶RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 68 (2004).

²²⁷*See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

²²⁸392 U.S. 309 (1968).

²²⁹401 U.S. 402 (1971).

²³⁰397 U.S. 471 (1970).

²³¹444 U.S. 223, 227-28 (1980).

substantive environmental statutes that largely transformed the model of environmental law away from proceduralism.²³² By contrast, liberal anti-poverty advocates allied with right-wingers to kill President Nixon's Family Assistance Plan, foreclosing opportunities for major substantive anti-poverty legislation for many years. That left them to develop hearing rights and to try to cobble together minor initiatives from federal, state, local, and charitable sources to address poverty.

Challenges to EISs and litigation under the APA continued, but they shared environmentalists' time with suits to compel issuance of substantive environmental standards under the Clean Air Act, the Clean Water Act, and other substantive environmental legislation.²³³ Environmentalists consistently lost challenges to EISs that made it to the Supreme Court,²³⁴ and in 1978 the Supreme Court unanimously quashed APA litigation seeking to broaden environmentalists' participatory rights in *Vermont Yankee*. By then, however, environmentalists had transformed themselves into net consumers of substantive regulations.²³⁵ They lost a battle in *Vermont Yankee*, but the Court's reduced tolerance for proceduralism advanced the broader environmental agenda by denying their opponents important means for blocking new substantive rules. Had environmentalists relied as heavily on proceduralism as low-income people's advocates did, *Vermont Yankee* and the continual defeat of major EIS challenges might well have left them just as sclerotic and ineffectual. Their adoption of a far more substantive model – and their recognition that sharply divergent norms made thorough consideration of a problem no guarantor of a favorable result²³⁶ – allowed them to continue making progress on many fronts even when their confirmed opponents controlled the executive branch.

C. Toward a New Model of Anti-Poverty Law

The most effective model of anti-poverty law would combine substantive and procedural elements, with each performing a distinct function. Property rights – and substantive law more generally – are the means by which society remembers commitments it made at an earlier time. Procedural rules help ensure against errors in applying those substantive rules, either due to carelessness or because some of those wielding power reject the substantive rules. Put simply, property

²³²LAZARUS, at 69-79.

²³³See, e.g., *NRDC v. Reilly*, 976 F.2d 36 (D.C. Cir. 1992); *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976); Sydney Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819 (describing many environmental statutes as reducing EPA to a largely "ministerial" role).

²³⁴*Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Balt. Gas & Elec. Co. v. N.R.D.C.*, 462 U.S. 87, 97 (1983); *Stryker's Bay*; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Kleppe*.

²³⁵LAZARUS, at 177.

²³⁶See JAY E. AUSTIN, ENVIRONMENTAL LAW INST., JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION-MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 8 (2004)(finding environmental plaintiffs winning three times as often before majority Democratic circuit court panels than before majority Republican ones during 2001-2004).

rights deal with forgetfulness; proceduralism deals with carelessness. Both are persistent problems in society's treatment of low-income people. The episodic nature of public awareness of the plight of low-income people makes substantive rights' memory function crucial; the pervasive tendency to stereotype and trivialize them creates a need for reliable procedures. Proceduralism can substitute for substantive rights only if claimants have the means to present a cogent case if given the chance and if office holders can be relied upon to respond appropriately once they understand the circumstances. Any thought before Katrina that either of these conditions was met surely must have been removed by now.

The ideal time to have adopted such a model of anti-poverty law was the early 1970s. Elite and public opinion, although problematic in many regards, still generally accepted some pivotal norms that since have become hotly contested. On the other hand, the very presence of that partial consensus likely lulled advocates and courts into believing it was sufficiently robust that it could assure appropriate decisions if issues received proper consideration.

This section considers how anti-poverty advocates can, belatedly, achieve the kind of balance between procedural and substantive norms that environmentalists have maintained. Subsection 1 suggests that procedural rules for making decisions concerning public benefit programs should be assessed based on the substantive merits of the results they achieve rather than their participatory character. Subsection 2 sketches how adapting existing concepts of property law might provide a new structure for anti-poverty law. It also surveys the obstacles that current, highly procedural, property rights theories have encountered to date. Finally, to demonstrate the potential of extending property rights to protect low-income people's fundamental interests, subsection 3 offers several examples of how that could have aided Hurricane Katrina's survivors.

1. A Substance-Oriented Proceduralism

Goldberg v. Kelly's vision of individual welfare recipients holding administrators accountable for callous decisions has inspired generations of legal scholars. That vision, however, rested on several key assumptions. Perhaps most important of these was that free legal services would be sufficiently available to low-income people to pursue all meritorious cases – or at least enough that eligibility workers could not assume their actions would go unreviewed. With civil legal services undergoing a historic expansion in the years leading up to *Goldberg*, this was not an unreasonable assumption. In fact, however, both funding for legal services and their willingness and ability to take public benefits cases has declined dramatically in the years since. Today, only a trivial fraction of public benefits claimants have access to legal services, with whole states effectively having no representation available.²³⁷

With claimants left alone to identify when agencies have violated the voluminous, complex legal rules governing public benefit programs, to assert those

²³⁷Super, *Efficient Rights*, *supra* note 105, at 1093-95.

rights against eligibility workers with sweeping discretion over their lives, and to make out their cases to overworked hearing officers, it should come as little surprise that only a tiny fraction of those with legitimate claims sought fair hearings and that most of those lost.²³⁸ Moreover, even those rare victories had little effect on program administration: whatever modest psychological effect losing a fair hearing might have was more than counterbalanced by the very tangible effects that flowed from counter-entitlements, audit systems designed to discourage overpayments of benefits.²³⁹

Were the goal maximizing the provision of aid to eligible, needy people rather than maximizing participation, such heavy reliance on unrepresented claimants would be unlikely. Advocates and administrators in Tennessee demonstrated something better was possible in creating Customer Service Reviews (CSRs). The CSR system employed masters level social workers to review the case files of every cash assistance recipient proposed for termination for non-financial reasons. They also attempted to contact those recipients by telephone – calling both during the day and at hours when working recipients might more likely be home – to learn more about the circumstances of the alleged procedural or behavioral violation leading to the proposed closure. These reviews found approximately one-third of all proposed terminations facially unsupportable and prevented the recipients from being terminated. Although they only reached half of the affected recipients, they found additional errors, or were able to secure compliance, in another third of those cases, leaving the overall reversal rate at roughly fifty percent.²⁴⁰

Although offering far superior substantive results to fair hearings, CSRs have no legal standing. Indeed, a subsequent Tennessee administration eliminated them to save money. With two-thirds of their reversals coming in cases in which no one reached the claimant, they are a poor fit with the procedural model's participatory emphasis.

On the other hand, their appeal is not limited to liberals. Conservative Republican Governor Don Sundquist established CSRs; moderate Democratic Governor Phil Bredenson terminated them to help pay for other social initiatives. They operated within the framework of the behavioral rules the state established for cash assistance recipients, and a large fraction of the resolutions they achieved was by obtaining compliance: for example, when the state was sanctioning a recipient for failing to attend a series of meetings for which she had no child care, CSR workers would authorize child care subsidies and reschedule the meetings. By reducing the number of erroneous procedural denials resulting from behavioral requirements, CSRs ameliorate one of anti-poverty advocates' major concerns about those requirements, bringing the positions of the moderate left and moderate right closer.

²³⁸*Id.*, at 1086-89.

²³⁹*Id.*, at 1097-117.

²⁴⁰*Super, Invisible Hand, supra* note 49, at 882-83.

2. Beyond Proceduralism: Toward a New New Property

More than three decades later, commentators and law school casebooks continue to regard the Court's recognition of the "new property" as a pivotal blow against poverty.²⁴¹ The Court had prohibited federal and state governments from conditioning voting rights,²⁴² some crucial elements of a criminal defense,²⁴³ and certain family rights²⁴⁴ on the ability to pay. In other respects, however, it imposed no duty on the government to protect low-income individuals' access to basic services, even where the results were either particularly sweeping²⁴⁵ or particularly ironic.²⁴⁶ The Court also largely applied its lowest level of scrutiny to inequities in programs targeting low-income people.²⁴⁷ *Goldberg v. Kelly*,²⁴⁸ and the new property generally, were seen as a compromise, preserving the policy-making control of the political branches while improving the quality of adjudications to shield low-income people from particularly capricious withdrawals of aid. Conceived more grandly, it afforded low-income people's dependence on government employment and benefits some of the same respect that the law long had afforded more affluent people's dependence on real estate, stocks, bank accounts, and other interests held in the private sector.²⁴⁹

a. The Promise of Property Rights

The appeal of pursuing this parallelism with the affluent is obvious. Conceiving of low-income people's claims on society as property rights, albeit of a non-traditional form, fits better with the federal constitution's emphasis on negative rights²⁵⁰ and avoids some difficult line-drawing problems that would result from treating these claims as some form of personal rights. Property rights, and their constitutional protection, insulate the affluent from the effects of occasional electoral setbacks. Low-income people dependent on public benefits lack that

²⁴¹See, e.g., PETER L. STRAUSS, ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 731-38 (10th ed. 2002)(collecting commentators on pivotal role of *Goldberg*).

²⁴²*Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

²⁴³*Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁴⁴*Boddie v. Connecticut*, 401 U.S. 371 (1971)(striking down filing fees for persons seeking divorce).

²⁴⁵*San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)(upholding dramatic inequalities between rich and poor districts in school financing).

²⁴⁶*U.S. v. Kras*, (1974)(upholding the denial of bankruptcy relief to petitioner too impoverished to pay a filing fee).

²⁴⁷*Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding arbitrary cap on the number of people in a family whose needs could be considered in determining the amount of aid provided).

²⁴⁸397 U.S. 254 (1970).

²⁴⁹William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOKLYN L. REV. 777, 787 (1990); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Charles Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

²⁵⁰See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1144-53 (1999) (arguing against extending the federal constitution's emphasis on negative rights to state constitutions).

protection: immediately after winning an election, these programs' critics can implement deep cuts, putting the basic necessities of life out of reach for many.²⁵¹ That these programs may someday be restored is cold comfort for those trying to house, feed, and obtain medical care for their families in the short run.

Many would argue that this disparity is acceptable, even desirable, because dependence on traditional property rights is normatively superior to dependence on public benefits. Even if one accepts this view, however, the on-going vulnerability of a large segment of the population has significant political and economic consequences. Lacking the independence from the state's whims that Locke describes as a key attribute of property ownership, low-income people can less afford to vote on non-economic issues, be it social policy or the integrity of parties or candidates. Moreover, advocates for low-income people have sought to lock government into providing assistance to replicate some of the stability that comes with true property rights. This explains much of the political appeal of public housing projects over housing vouchers despite persistent maintenance problems and frequent isolation from jobs: the elimination of tens of thousands of vouchers is but an appropriations bill away, while bricks and mortar persist.²⁵²

This dichotomy between discretionary and durable public benefits can be seen in the disaster context as well. When legislatures and administrations want to lock in the rights of the affluent, they can do so by contract. Because affluent people can easily afford to evacuate, their greatest risk in hurricane is damage to their physical property. Heavily subsidized flood insurance contracts ensure that homeowners need not depend on the political process for help rebuilding. Low-income people face both personal peril and property damage in a disaster yet neither help evacuating nor restoration of lost homes and property are covered by contracts: low-income people are entirely dependent on the political process to protect their interests after a disaster. One might argue that low-income people's interests are not the kind the market ordinarily insures. Yet the private market also will not insure homeowners in coastal areas against floods; the political process has decided both to assume much of the cost of their rebuilding and to lock that commitment into contract.

For more than a decade, people concerned about poverty across the political spectrum have been enamored with asset-building strategies as an alternative to income maintenance for fighting poverty. After Hurricane Katrina, President Bush declared that "that ownership is a way to counter poverty."²⁵³ These plans actual accomplishments have been quite modest: not surprisingly, those poor enough to have trouble affording the basic necessities lack the surplus income to

²⁵¹*Cf.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970)(citing such deprivation as the basis for imposing procedural rights around the termination of welfare).

²⁵²See Robert C. Ellickson, *The Irony of "Inclusionary Zoning,"* 54 S. CAL. L. REV. 1167 (1981)(decrying inefficiency of in-kind housing subsidies). A somewhat similar rationale can support inefficient subsidies for businesses in low-income areas.

²⁵³41 WEEKLY COMP. PRES. DOC. 1463 (Sept. 26, 2005).

save much. Nor do they represent the break with public subsidies that many conservatives seek. These schemes' popularity, instead, can be traced to their borrowing the form, and some of the substance, of property rights.

b. The Failure of Proceduralism's Approach to Property Rights

On neither a functional nor a theoretical level has the current, highly procedural, version of property rights for low-income people proven terribly successful. These failings are on-going,²⁵⁴ but they become particularly acute in the wake of a disaster. Although government may succeed in providing emergency shelter to displaced persons, it typically does little to help restore them to permanent housing, much less permanent housing with the intangible benefits of community they had before the disaster.²⁵⁵

First, the proceduralism of the new property is more a vehicle for transmuting one form of capital into another than it is a means of increasing the net well-being of low-income people. Those with sufficient human capital to navigate public benefit programs' application processes successfully on their own and to advocate for themselves effectively in a fair hearing could prevent terminations of benefits that contravened programs' stated rules. Overall, however, lack of information and advocacy skills prevented all but the tiniest fraction of low-income people from challenging questionable terminations of their public benefits.²⁵⁶ The *Goldberg* system's relative disuse, the lack of consequences for eligibility workers found to have denied benefits improperly, and the growth of elaborate audit systems imposing very real consequences for errors in the other direction sapped it of any meaningful deterrent effect.²⁵⁷ The right to a pre-termination hearing did not apply to many of the most vulnerable low-income people: those with no aid making initial applications.²⁵⁸ Nor could it confront policymakers with so much as a speed bump when they stripped away en masse the benefits upon which low-income people depend.²⁵⁹ Yet most of the same factors that render the political process incapable of protecting low-income people from unfair deprivations of individual property also inhibit the creation of such interests and their preservation for all low-income people. Although

²⁵⁴Questions about the wisdom of this substance-for-procedure trade are not new. *See, e.g.*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1257-58 (1982) (finding little more subjectivity in establishing minimum substantive standards for public benefit programs than in determining what is a protected property interest under current doctrine).

²⁵⁵TIERNEY, ET AL., *supra* note 59, at 100-03.

²⁵⁶*Super, Efficient Rights*, *supra* note 105, at 1093-97.

²⁵⁷*Id.*, at 1107.

²⁵⁸*Id.*, at 1102; *Holman v. Block*, 749 F.2d (4th Cir. 1986); *Banks v. Block*, 700 F.2d (6th Cir. 1983); *but see Griffith v. Detrich*, 603 F.2d 118 (9th Cir. 1979)(finding property interest in applicants for general relief).

²⁵⁹*See Atkins v. Parker*, 472 U.S. 115 (1985)(finding right to notice and pre-termination hearing inapplicable to implementation of mass changes in programs' rules); *Weinberger v. Salfi*, 422 U.S. 749 (1975) (recognizing no due process right to a hearing on individual's motives when Congress has conclusively presumed those motives to be improper).

Goldberg's implicit assumption that the political branches would ensure the availability of subsistence benefits of some type was reasonably given the expansion of those programs in the preceding thirty-five years, subsequent events have demonstrated its fallacy.²⁶⁰

Because disaster relief is, by definition, a new benefit for those affected, conventional procedural due process analysis is of little help to those seeking it. They thus dramatize the general point that the importance of program creation, design, application processing, and preservation far outweighs that of individual terminations. Individual terminations of disaster relief would be subject to procedural constraints, but by far the largest number of terminations come when the government closes relief programs down, a process immune to due process scrutiny. The initial round of sympathy that follows disasters likely will assure that some benefits are offered, but low-income people's lack of political capital is likely to cause these programs to end before the need for them is fully met. Even while the programs operate, to the extent that they provide administrative flexibility,²⁶¹ the benefits any individual or family receives often will depend on advocacy skills.

Second, efforts to protect what low-income people have as property often collides with the resistance of more affluent legislators, administrators, and judges to adjudicating seeming trifles.²⁶² Spending more on litigation than the value of the property under dispute seems irrational, yet the value of most low-income people's property will not approach those costs. *Goldberg* explicitly relied on welfare benefits' importance to recipients in requiring fair hearings; six years later, *Mathews v. Eldridge*²⁶³ purported to consider the relative importance of disability benefits to recipients in determining the scope of due process protection to apply, although it was far too optimistic about the availability of alternative benefits. On the other hand, assessing a deprivation in terms of its practical importance to the particular individuals upon whom it is inflicted may seem inconsistent with the concept of property, which presupposes a monetary value.

Overall, low-income people have faced an uphill struggle getting judges, who may spend more on a single suit than the monthly poverty line for a family of four, to appreciate that seemingly insignificant property becomes vital when it constitutes a large share of what an individual or family has.²⁶⁴ The neglect of

²⁶⁰See, e.g., Super, *Quiet Revolution*, *supra* note 16, at 1274-85 (describing the circumstances leading to the 1996 welfare law's sweeping withdrawals of aid from low-income people); Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471 (1997) (same).

²⁶¹See, e.g., 7 U.S.C. § 2014(h)(1) (2000) (authorizing policy-making for disaster relief that does not comply with the Administrative Procedure Act).

²⁶²See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984)(declining to find deprivation of prisoner's personal property); *Parratt v. Taylor*, 451 U.S. 527 (1981)(same).

²⁶³424 U.S. 319 (1976).

²⁶⁴See, e.g., *U.S. v. Kras*, 409 U.S. 434 (1973) (assuming that low-income people have substantial amounts of discretionary income with which to pay bankruptcy filing fees).

low-income people's interest in their former rented residences, and of the difference in value between FEMA trailers remote from sources of value and displaced persons' former homes, however decrepit, exemplifies this difficulty. The Court's treatment of the social context of property has been similarly selective, failing to recognize the inchoate values of living in a socially agreeable community²⁶⁵ and being respected in that community,²⁶⁶ both goals that it has recognized are important aspects of more affluent people seek to accomplish through property ownership.²⁶⁷

Finally, without a clear substantive theory of the role property rights might play in the protection of low-income people, courts have been inconsistent in when they recognize the economic context of property rights. Courts have invoked a private business's economic ties to the surrounding community – particularly the inevitability that it would employ large numbers of people – to justify governments' exercise of eminent domain powers on behalf of that business²⁶⁸ and to permit uses that otherwise would be nuisances.²⁶⁹ On the other hand, they have ignored the economic symbiosis between landlords in low-income areas and their tenants, treating the value of the landlords' property as independent of the tenants whose inability to afford better housing is essential to making the landlords' rental of decrepit buildings economically viable.

3. How Stronger Property Rights Could Help Katrina's Survivors

Property rights could protect many kinds of interests. Any particular regime's distributional impact depends in significant part on whose holdings fall most heavily within the zone it seeks to protect. For example, rules allowing exclusive ownership of land but not of bodies of water protect farmers, but not fishers, from the tragedy of the commons, benefiting entrenched farmers and interloping fishers. Thus, recognizing legal rights in government employment and public benefit programs redistributed wealth toward those people that depend for large fractions of their incomes from those sources.

Low-income people have less financial wealth. As a result, non-economic wealth, particularly that from community, is proportionately more important. An affluent parent may rely on its wallet for child care while a low-income parent may depend on a network of nearby family and friends for the same service.

²⁶⁵See *Berman v. Parker*, 348 U.S. 26 (1954) (upholding condemnation of low-income communities to make way for private businesses in urban renewal project).

²⁶⁶See *Paul v. Davis*, 424 U.S. 693 (1976) (finding no liberty interest in one's reputation).

²⁶⁷See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding single-family zoning that effectively barred college student renters to preserve the placid community homeowners desired). Anyone doubting the fervor of middle-class people's devotion to the value of community as an incident to property ownership need look no further than the outpouring of anger that followed the Court's extension of *Berman v. Parker* to the condemnation of middle-income communities in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

²⁶⁸*Kelo*; *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

²⁶⁹*Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

Emptying the affluent parent's bank account and removing the low-income parent from her or his community thus may have equivalent effects in depriving them of this and other important services. The fact that our regime of property law guards against the former far more zealously than the latter raises serious questions of distributive justice. The same sorts of arguments *Goldberg* relied upon to give low-income people procedural rights more nearly approaching those of the affluent could justify expanding substantive rights to provide more comparable protections in this manner.

This subsection identifies five ways in which concepts already present in property law could be expanded to help low-income people wrenched from their communities in the wake of Katrina recover some of what they lost. With the possible exception of the final proposal, none of these are subject to the standard objection that recognizing sweeping property rights for low-income people will sap work incentives: they simply are not that sweeping.

A second common objection to creating property rights in existing arrangements is that they tend to ossify policy: they obstruct necessary cutbacks in current rules and deter policymakers from creating new ones that they may not be prepared to set into stone. This may be true to a point, but it hardly differs from the common law property regime, which can punish kind-hearted lenience with prescriptive rights and which can increase the transaction costs of removing a valuable asset from an inefficient user. In both cases, the values of security and stability that the rights protect can fairly be argued to outweigh any problematic incentives.

a. Recognizing Weak Property Interests

Even in procedural due process, the definition of which property rights are protected has proven continuously problematic. Part of this results from the Court's difficulty in ridding itself of the distinction between rights and privileges.²⁷⁰ Perhaps even more importantly, however, the courts have had great difficulty deciding how much of the legal, social, and economic context that gives rights their meaning should be included in the definitions of rights. Although the Court separates procedural constraints from substantive rights when analyzing the property interests of middle-income government employees,²⁷¹ lower courts have allowed legislatures to avoid creating property rights in public benefit programs with limitations that are substantive in name only.²⁷² The courts also have recognized value in relatively fragmentary interests in property when ownership is divided.²⁷³ Yet the law largely ignores the leaseholds of low-

²⁷⁰Patricia M. Wald, *Government Benefits: A New Look at the Old Gifthorse*, 65 N.Y.U. L. REV. 247, 260 (1990).

²⁷¹*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

²⁷²*See, e.g., Holman v. Block*, 749 F.2d (4th Cir. 1986) (accepting congressional designation of a requirement of periodic reapplications for food stamps as creating distinct entitlements); Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 436-38 (1987).

²⁷³*City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859 (Cal. App. 1999); *Ink v.*

income families.

In various settings, we recognize weak property interests that some parties may be empowered to defeat but that others still must respect. Finders of lost property must yield to the original owner but have rights sufficient to make claims against third parties. Although a party to a contract at will has no right to continue the relationship once the other party wishes to end it, but she may nonetheless sue third parties for tortiously interfering with that relationship.²⁷⁴ Employees at will who may be fired for no reason at all may not be discharged for asserting collective rights; tenants at will similarly may not be evicted in retaliation for asserting their legal rights.²⁷⁵ Therefore, the fact that tenants at will and those on short leases generally might not have been able to protect their homes against their landlords' desire to evict them does not mean that they lack interests that should have sway against third parties, including the government.

A federal statute in a somewhat related field provides a useful framework for thinking about how such interests might be understood. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 makes most renters eligible for assistance when they move "as a direct result of" a federally-funded project involving land acquisition.²⁷⁶ Certainly, the position of Katrina evacuees highlights the need for "fair, uniform, and equitable treatment of all affected persons," one of the Act's key concerns.²⁷⁷ The Act also rejects federal disaster relief's overwhelming focus on bricks-and-mortar, valuing a community's fabric as well as its edifices: "minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities."²⁷⁸ In stark contrast to the proceduralist model of poverty relief, the Act defines a humanitarian minimum standard for housing:

(A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.²⁷⁹

Whether the Act's literal terms offer a basis of relief for displaced renters is an open question. In New Orleans and other Gulf Coast communities, federally funded rebuilding initiatives did not force most people to move initially, but those initiatives are preventing low-income tenants from returning.²⁸⁰ These

City of Canton, 212 N.E.2d 574 (Ohio 1965).

²⁷⁴Restatement (Second) of Torts § 766 (1979); *Huffmaster v. Exxon Co.*, 170 F.3d 499, 504 (5th Cir. 1999); *Imperial Ice Co. v. Rossier*, 112 P.2d 631 (Cal. 1941)(Traynor, J.).

²⁷⁵*Edwards v. Habib*, 397 F.2d 687, 690-98 (D.C. Cir. 1968).

²⁷⁶42 U.S.C. § 4601(6)(A)(i)(II) (2000).

²⁷⁷42 U.S.C. § 4621(a)(2) (2000).

²⁷⁸*Id.* § 4621(a)(4).

²⁷⁹*Id.* § 4601(7).

²⁸⁰In some cases, residents rode out the storm and then were compelled to move by federally aided

tenants might argue that the storm caused them to leave temporarily but that they were compelled to “move[their] personal property from” their homes due to federally aided rebuilding plans, qualifying on that basis.²⁸¹ The Act’s requirement that tenants be given sufficient time to find safe, affordable housing does not apply in the case of natural disasters.²⁸²

The implications of a special rule protecting tenants’ continuity in their homes only after a disaster would differ considerably from a general rule applying in ordinary times. Imposing general restraints on landlords’ removal of incumbent tenants likely would face challenges on takings grounds; in the disaster context, acceptance of such a rule could be made a condition on receiving subsidized disaster insurance coverage. In ordinary times, such a rule could create an inefficient market for side payments from those wishing to turn the property to a more lucrative usage.²⁸³ In the disaster context, however, giving tenants such marketable rights might be an efficient way of valuing the interests they have lost. It might, however, function better as a means of compensating individual tenants than of preserving the inchoate benefits of on-going communities.

b. Reexamining Exclusionary Housing Policies

Hurricane Katrina’s aftermath should give pause to those that reflexively call for a stronger public role in ordering the economy, particularly land use. Scholars long have warned that land use planning typically is not only inefficient but also regressive.²⁸⁴ The classic justification for public land use planning is the management of externalities.²⁸⁵ Political and economic forces tend to commoditize low-income people in a highly negative manner, justifying their exclusion on just this principle. James Buchanan conceptualized low-income people primarily as fiscal burdens and posited that rational localities will endeavor to minimize the number of net service users in their populations.²⁸⁶ Excluding low-income people allows a municipality to increase its consumption in the form of higher services, lower taxes, or both. Thus, standard Euclidian zoning’s emphasis on segregating uses all too easily converts into segregating populations.²⁸⁷

This vision, of course, considers only the well-being of the locality. Seen from a broader societal perspective, it is the exclusionary policies, not the excluded people, that create externalities. In practice, exclusion is a form of public

evacuation orders.

²⁸¹To be sure, the Act is generally tied to acquisition of real property, either the displaced person’s former home or some other property. Arguably, the rebuilding effort is one large, integrated project involving substantial real estate acquisitions.

²⁸²*Id.* § 4625(c)(3)(A).

²⁸³STEVEN N.S. CHEUNG, *THE THEORY OF SHARE TENANCY* 90-91 (1969).

²⁸⁴Paul Cheshire & Stephen Sheppard, *The Welfare Economics of Land Use Planning*, 52 *J. URB. ECON.* 242 (2002).

²⁸⁵*See, e.g.*, A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932); *but see* Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960)(finding that markets can produce more efficient allocations of costs).

²⁸⁶James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 *PUB. CHOICE* 1, 7 (1971).

²⁸⁷JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 3 (1961).

good that states allow each locality to consume without regard to the costs imposed on others.²⁸⁸ This is inefficient for the state and nation as a whole.

The U.S. Supreme Court has largely kept federal courts away from this problem.²⁸⁹ State courts that have attempted to fashion remedies for this problem have found it a daunting one.²⁹⁰ Even if one accepts that localities have a duty to include a “fair share” of low-income people,²⁹¹ quantifying and enforcing that obligation is very difficult.²⁹² The standard response to over-consumption of public goods is to give someone property rights in that good that allows a market to develop.²⁹³ The ultimate remedy in New Jersey’s *Mt. Laurel* litigation, which allowed affluent suburbs to buy out of their “fair share” with payments to disproportionately poor cities, is an example of this approach.²⁹⁴ In most of the country, however, affluent municipalities remain free to adopt zoning and related rules to shift the costs of services for low-income people onto central cities. All that prevents a complete race to the bottom – and that preserves some place for low-income people to live – is central cities’ frequent inability to join in the adoption of exclusionary policies: a critical mass of low-income people that would oppose efforts to drive them out, demand for housing in the central city is too slack to ensure a viable alternative to population by low-income people, and the city has too little undeveloped land for zoning to shape much of the physical environment. The result appears stable, if hardly just.

Major economic or political changes affecting the central city can rapidly destabilize this arrangement. A sudden increase in the demand for land in the central city – induced by the federal government in the Urban Renewal of the 1960s, by the Olympics in Atlanta of the early 1990s, or by changes in the local economy that give affluent people new incentives to “gentrify” the city – can cause low-income people to be pushed out with few plausible options.

The aftermath of Hurricane Katrina is a far more extreme case. It simultaneously lifted all of the constraints on central cities’ exclusionary behavior: it removed most of the low-income voters who would have opposed exclusionary policies before the storm, it destroyed so much housing to radically increase the demand for land, and it presented the city with a physical blank slate far more susceptible to its zoning powers. The zeal with which city officials have exercised these newfound powers to prevent large numbers of low-income people’s return is vivid vindication of Buchanan’s model and stark evidence of how little low-income people can rely on the political system to protect their interests. It

²⁸⁸Alchian & Demsetz, at 19-22.

²⁸⁹*Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *James v. Valtierra*, 402 U.S. 137 (1971).

²⁹⁰*See, e.g., Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991); J. Peter Byrne, *Book Review: Are Suburbs Unconstitutional?* 85 *GEO. L.J.* 2265 (1997).

²⁹¹*S. Burlington County NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

²⁹²*S. Burlington County NAACP v. Twp. of Mt. Laurel*, 456 A.2d 390 (N.J. 1983).

²⁹³Alchian & Demsetz, at 21-23.

²⁹⁴*Hills Dev. Co. v. Bernards Twp.*, 510 A.2d 621 (N.J. 1986).

raises questions about the wisdom of empowering central cities to act for them, as the *Mt. Laurel* remedy implicitly does.

From a purely economic perspective, it makes the externality problem significantly more severe. Although Baton Rouge and other northern Louisiana cities absorbed some displaced people, the vast majority went to cities in other states, such as Houston, Memphis, and Atlanta. Whatever the merits of arguments that the inequities of exclusionary policies can be worked out within the state political systems that authorize these policies, those arguments have no application across state lines.²⁹⁵ Moreover, should cities and states that took in disaster victims suffer long-term fiscal ill-effects, people throughout the country can expect more halting welcomes should they need refuge after a disaster.²⁹⁶

Courts have been reluctant to intervene in these matters because doing so would take authority from the political bodies. Yet even more literal takings – those of property – generally do not require compensation where they are undertaken to restrain externalities.²⁹⁷ More broadly, a higher standard of legitimacy may be required for major decisions,²⁹⁸ particularly for ones setting the very nature of the community.²⁹⁹

c. Vulnerable Communities as Public Trusts

President Bush declared that “When communities are rebuilt, they must be even better and stronger than before the storm. Within the gulf region are some of the most beautiful and historic places in America.”³⁰⁰ Elaborating, he identified some physical landmarks but recognized that human communities are what made the stricken areas truly special: “The streets of Biloxi and Gulfport will again be filled with lovely homes and the sound of children playing. The churches of Alabama will have their broken steeples mended and their congregations whole. And here in New Orleans, the streetcars will once again rumble down St. Charles, and the passionate soul of a great city will return.”³⁰¹ He went on to hold up New Orleans’s uplifting funereal traditions as a model to the nation.

This suggests a broad public interest in the affected communities that goes far beyond the private concerns of particular residents and property owners. In recent years, courts increasingly have turned to the public trust doctrine to

²⁹⁵Of course, exclusionary policies long have had substantial interstate effects; *Mt. Laurel*’s policies likely affected Philadelphia as much as they did Camden.

²⁹⁶President Bush recognized that the nation has a moral duty “to ensure that States are reimbursed for these extra expenses.” 41 WEEKLY COMP. PRES. DOC. 1406 (Sept. 15, 2005).

²⁹⁷Joseph Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149 (1971).

²⁹⁸Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. L. REV. 1155 (1985).

²⁹⁹*See, e.g.*, In re. Incorporation of Borough of Chilton (Pa Commw. 1994)(rejecting incorporation petition whose sole purpose was to create luxury resort); In re. Incorporation of Borough of Bridgewater (Pa. Commw. 1985)(rejecting incorporation petition to carve out affluent, predominately white, enclave).

³⁰⁰41 WEEKLY COMP. PRES. DOC. 1407 (Sept. 15, 2005).

³⁰¹*Id.*, at 1409.

reconcile such broad public interests with private ownership.

In *Illinois Central Railroad v. Illinois*, the Court held that grants of property on the shore of Lake Michigan were necessarily revocable because it was unthinkable that “a subject of concern to the whole people of the state – should thus be placed elsewhere than in the state itself.”³⁰² “[T]rusts connected with public property, or property of a special character ... cannot be placed entirely beyond the direction and control of the state.”³⁰³ Professor Joseph Sax triggered a modern renaissance of the public trust doctrine by suggesting that public trusts could be impressed on privately owned property to respond to a externalities other than the navigable waterways that were its initial object.³⁰⁴

Many states, including Louisiana, have responded by expanding the public trust concept to support a wide range of environmental regulation.³⁰⁵ More broadly, the Louisiana Constitution declares that the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished” to advance the “health, safety, and welfare of the people.”³⁰⁶ Numerous states already have extended it to cover social needs, notably beech recreation.³⁰⁷ The public trust concept has protected native communities’ performance of social customs.³⁰⁸ The doctrine now protects social interests as well as purely natural ones.

Social ties are crucial to cities’ prosperity.³⁰⁹ Interactions over time build social capital of value to the community as a whole and very difficult to re-place.³¹⁰ Conversely, other communities around the region have an interest in preserving these communities as an alternative to having to accommodate impoverished refugees with deep needs and few ties to, or desire to join, their communities.

Finding irreplaceable communities such as the Lower Ninth Ward and East Biloxi are impressed with a public trust would not affect most incidents of private ownership or owners’ ability to profit from their properties.³¹¹ It would

³⁰²146 U.S. 387, 407 (1892).

³⁰³*Id.*

³⁰⁴Joseph L. Sax, *The Public-Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

³⁰⁵*Save Ourselves v. La. Envtl. Control Comm’n*, 452 So.2d 1152 (La. 1984).

³⁰⁶LA. CONST. art. 9, § 1 (2006).

³⁰⁷*E.g.*, *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). Other courts have accomplished essentially the same thing by finding easements in favor of the public. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969); *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App. 1986).

³⁰⁸*Public Access Shoreline Hawaii v. Hawaii County Planning Comm’n*, 903 P.2d 1246 (Haw. 1995).

³⁰⁹Sheila R. Foaster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006).

³¹⁰James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S98-99 (1988)

³¹¹*See* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev 269, 315 (1980) (criticizing the doctrine in other contexts for undermining property rights).

not even prevent removal of some properties from the rental market. It would, however, prevent the wholesale replacement of low-income communities with commercial development or housing for the affluent. These restrictions could hardly be seen as a taking: they would allow owners to continue to reap the same returns they did before the disaster but prevent a post-disaster windfall – financed in large part by taxpayer-subsidized flood insurance and disaster relief.

To be sure, this would represent a major expansion of the public trust concept.³¹² On the other hand, “[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”³¹³ More broadly, Carol Rose has argued for the recognition of a type of property so inherently public as to create rights “independent of and indeed superior to the claims of any purported governmental manager.”³¹⁴ “In the absence of the socializing and sociable activities that are performed on ‘inherently public property,’ the public is a shapeless mob whose members neither trade nor converse nor play but only fight.”³¹⁵ Low-income Gulf Coast residents’ diaspora in strange cities and isolated trailer parks fits this dismal image all too well.

d. Recognizing the Value of Community

President Bush declared that the “reconstruction vision ought to be a local vision.”³¹⁶ Not only low-income neighborhoods in New Orleans but also areas around Gulfport, Biloxi, and Mobile that had provided low-cost (albeit low-quality) housing are being rebuilt to cater to tourists, gamblers, and others able to pay more. The result is likely to be the destruction of former residents’ communal ties (including friends, religious congregations, sources of informal child care, and much more) as well as their displacement further from sources of low-skilled employment.³¹⁷ The economic context of low-income displaced persons’ former residences has similarly been ignored: with their former landlords freed from economic dependence on them, these now-displaced former tenants will be forced to double-up or otherwise bid up the rents of the remaining stock of lower-cost housing.

Anglo-American property law long has recognized the value of neighborly communities. Through conditions on conveyances of realty, restrictive covenants, reciprocal easements, and other devices, we allow property owners to pre-

³¹²But see Mary W. Blackford, *Putting the Public’s Trust Back in Zoning: How the Implementation of the Public Trust Doctrine Will Benefit Land Use Regulation*, 43 HOUS. L. REV. 1211, 1223 (2006); Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683 (2001).

³¹³Leydon v. Town of Greenwich, 750 A.2d 1122 (Conn. App. 2000), *aff’d on other grounds*, 777 A.2d 552 (Conn. 2001).

³¹⁴Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986).

³¹⁵*Id.*, at 781.

³¹⁶41 WEEKLY COMP. PRES. DOC. 1464 (Sept. 23, 2005).

³¹⁷Michael Powell, *In Miss., Time Now Stands Still*, WASH. POST, Sept. 25, 2005, at A1.

serve valuable characteristics of their immediate communities. Indeed, the breadth of modern zoning law, and its responsiveness to the preferences of local landowners, effectively provides another means for property owners to preserve characteristics of their communities that they value.

Two key factors make these tools largely unavailable to protect communities of low-income people. First, they are limited to owners of fees in land. And second, they generally depend on formal, written declarations affecting particular people or plots of land. The limitation of rights to fee-holders should not have been a serious obstacle to protecting low-income communities. Beginning in the late 1960s, landlord-tenant law began to broaden the concept of enforceable rights. *Goldberg* itself found property rights in future welfare payments that recipients did not “own” in any traditional sense. And traditional property law dispensed with explicit writings where tradition clearly established relationships. Recognizing new kinds of protected customary relationships would not have required any major conceptual leaps.

International law is well ahead of domestic U.S. law in protecting low-income communities. Indigenous communities long have enjoyed protection against displacement, even when their land is acquired in compliance with the country’s property law. These are group, not individual rights. For example, Article 21 of the American Convention on Human Rights protects “members of [...] indigenous communities within the framework of communal property.”³¹⁸ These rights, however, had been limited to groups antedating contact with Europeans and hence had little application to most low-income communities.

In 2005, however, the Inter-American Court of Human Rights ruled in *Moiwana Village v. Suriname* that the N’djuka Maroon – a community originally formed by escaped slaves – could assert rights as an indigenous people.³¹⁹ The Court noted that the N’djuka were not indigenous to the area, having settled it only in the late nineteenth century but found “their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighboring N’djuka clans and indigenous communities over the years – should suffice to obtain State recognition of their ownership.”³²⁰ As a result, “the Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory.”

These rights are not limited to fee-holders: “indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership.”³²¹ The harm the Court

³¹⁸Case of the Moiwana Community v. Suriname, Inter-Americna Court of Human Rights Series C No. 124, at 52 (June 15, 2005), *available at* <http://www.corteidh.or.cr/casos.cfm>.

³¹⁹*Id.*

³²⁰*Id.*

³²¹*Id.*, at 54.

recognized was identical to that experienced by low-income people uprooted from Gulf Coast communities: “their forced displacement has severed ... fundamental ties” to the community and kin and “deprived them of a fundamental aspect of their identity and sense of well being.”³²² A more substantive model of U.S. anti-poverty law could well have recognized their interests as well.

e. Extending the New Property to the Rest of the Fifth Amendment

The new property failed to recognize in low-income people more than the barest trace of the rights more affluent people derive from their property. Most obviously, the Court’s treatment of public benefits and employment as “property” did not even encompass the whole of the Fifth Amendment: to obtain protection under the Takings Clause, the Court still required that rights be “vested,” defining that term to exclude most of the new property.³²³

The standard argument against extending New Property concepts from the Due Process Clause to the Takings Clause is that doing so would freeze into place any social welfare program ever enacted. This obviously would be undesirable as some programs prove ineffectual; others prove overgenerous; still others are designed to meet needs that fade. Indeed, a rigid prohibition on diminution or repeal of social programs might make legislatures reluctant to enact them in the first place.

This argument that the term “property” should mean different things in adjacent clauses of the Fifth Amendment relies on a caricature of takings jurisprudence. The Court long has accepted that deprivations of much or even most of a property right may not be a compensable taking.³²⁴ Eight years after the Court accepted a New Property view of the Due Process Clause, it adopted a broad formula for identifying takings that considers offsetting measures.³²⁵ Thus, even deep cuts in entitlement benefits would not necessarily be proscribed even if such benefits were considered “property” under both clauses, particularly if the legislature made some alternative provision, even a relatively modest one. The merits of extending the new property to the Takings Clause therefore should be analyzed in light of the policies underlying that clause.

Takings law exists in part to prevent harsh forms of redistribution in favor of a transient political majority.³²⁶ Absent the Takings Clause, political minorities could face devastation, and a majority could wield the threat of divestiture of

³²²*Id.*

³²³*Cf.*, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) (“No licensee obtains any vested interest in any frequency”).

³²⁴*Miller v. Schoene*, 276 U.S. 272 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 118-90 (1985); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747-48 (1997)(Scalia, J., conc.).

³²⁵*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (finding no taking in land use regulation that sharply reduced the value of property when owner received transferable development rights worth far less than the value lost).

³²⁶RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 24.3, at 685 (7th ed. 2007).

property on which the minority depends to compel the minority to accept other oppressive measures.³²⁷ The Takings Clause also exists to prevent the burden of fiscal crises from being visited disproportionately on a small group rather than through tax increases or service cuts affecting a broader swath of society.³²⁸

Frank Michelman finds much of the justification of just compensation law in the “demoralization costs” that will occur if members of society suffer uncompensated takings. He defines these costs in terms of lost economic productivity by victims of takings and their sympathizers.³²⁹ He notes that capricious takings by the political majority are more likely to produce these costs than are random events.³³⁰ A similar analysis could be applied to community-building.

Routine modifications to, or even reformulations of, social welfare programs do not implicate these policies. They may be implicated, however, by the wholesale elimination of an individual’s only means of affording life’s essentials,³³¹ particularly as part of “reconciliation” bills as the means of financing tax reductions. *Penn Central* identified “the economic impact ... on the claimant” as a key factor in determining whether a taking had taken place;³³² this closely parallels the “individual interest” prong of its due process analysis in *Mathews v. Eldridge* two years before. This could have provided the basis for recognizing a very bare humanitarian minimum; instead, the Court professed its faith in the welter of ad hoc accommodations made for low-income people.³³³ The Takings Clause’s policies also suggest a flaw in the Court’s habit of comparing any challenged restrictions – even those having the effect of pressing a parent to violate federal law or court orders – with the hypothetical elimination of programs:³³⁴ allowing a majority to tell a minority that it must accept an otherwise-troubling deprivation of rights on pain of losing vital interests on which it depends does very much the same kind of damage to a free society that the Takings Clause was designed to counter. Indeed, in more traditional contexts, the Court has condemned this approach as an exaction.³³⁵ Unfortunately, the Court’s current tra-

³²⁷*Id.*, at 684; § 3.7, at 58.

³²⁸*Id.* § 3.7, at 57.

³²⁹Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

³³⁰*Id.*, at 1214-17.

³³¹*Cf.*, *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992) (finding a taking in regulation that wholly destroyed value of property).

³³²438 U.S., at 124.

³³³*See, e.g.*, *Dandridge v. Williams*, 397 U.S. 271, 291 (1970) (noting that all members of a family effectively received some aid); *Mathews v. Eldridge*, 424 U.S. 319, 339 n. 12 (1976) (allowing pre-hearing terminations of benefits because other aid might be available to terminated recipients).

³³⁴*See Bowen v. Gilliard*, 483 U.S. 587 (1987) (finding no taking in the denial of welfare to siblings and parent of child receiving support payments limited to her or his use despite practical certainty that those payments would be diverted to meet needs of other members of the family); *Flemming v. Nestor*, 363 U.S. 603 (1960) (finding no taking in the elimination of river pilots’ jobs).

³³⁵*Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Calif. Coastal Comm’n*, 483 U.S. 825

jectory is to increase the separation between its Due Process and Takings analyses.³³⁶

V. Conclusion: Disasters as a Measure of a Society

“One of the most telling applications of the fundamental values of a society can be found in how that society responds to risk, particularly risk that may result in major losses of human life and/or property.”³³⁷ As with so much else in contemporary society, the signs here are distinctly mixed. We have developed a wealth of positive devices for promoting cooperation prospectively; the norms they have established are strong enough to maintain remarkably high levels of pro-social behavior even under horrific post-disaster conditions. Yet we instinctively cling to clumsy, retributive retrospective adjudicatory systems, all the more so after a disaster.

We understand disasters and disaster response better now than at any time in our history. That knowledge has yielded a host of opportunities to prevent and ameliorate human suffering. Yet our budgetary process is so consumed with ideological warfare as to be incapable of funding these initiatives.

We embrace efficiency and flexibility in government that seem ideal for responding to the unexpected challenges of disasters. Yet we so indiscriminately postpone decision-making that many agencies become overwhelmed with options at the crucial moment. Moreover, the very privatization and devolution that is heralded as promoting efficient and responsive government turn out to deprive government of the resources needed to respond expeditiously to a disaster.

Finally, disasters bring out the kindest, most altruistic impulses in people across the country. They transcend divisions in society and suspend political rules that otherwise hobble our responses to poverty. Yet our policy models are so defective, and the legal structure of anti-poverty law is so limited, that we are unable to take advantage of these opportunities. Our on-going inability to settle on a viable division of responsibility between levels of government and between public and charitable relief compounds this problem, to the detriment of the most vulnerable people in and out of the disaster area.

The inescapable fact is that “disasters are inherently social and political events linked to who we are, how we live, and how we structure and maintain our society. ... What happens in a disaster has larger implications for our understanding of the social world and social interactions.”³³⁸ For the sake of those in the paths of future disasters, as well as vulnerable people throughout our society, we must heed the lessons that Hurricane Katrina taught us at such a dear price.

(1987).

³³⁶Lingle v. Chevron, 544 U.S. 528, 540-42 (2005)(criticizing earlier Supreme Court decisions that had commingled analyses under the Due Process and Takings Clauses).

³³⁷William L. Waugh, Jr. & Ronald John Hy, *Introduction to Emergency Management*, in HANDBOOK OF EMERGENCY MANAGEMENT: PROGRAMS AND POLICIES DEALING WITH MAJOR HAZARDS AND DISASTERS 1 (William L. Waugh, Jr., & Ronald John Hy, eds. 1990).

³³⁸FOTHERGILL, *supra* note 58, at 27.