

---

## Total Disaster and Total Justice: Responses to Man-Made Tragedy

Lawrence M. Friedman

Joseph Thompson

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DePaul L. Rev. 251 (2013)

Available at: <https://via.library.depaul.edu/law-review/vol53/iss2/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# TOTAL DISASTER AND TOTAL JUSTICE: RESPONSES TO MAN-MADE TRAGEDY

*Lawrence M. Friedman\**  
*Joseph Thompson\*\**

## INTRODUCTION

This Article is an essay on legal culture, and specifically, on the social and legal responses to disaster. Disasters are, alas, a constant in human history. Some are man-made; some are called “natural.” Yet, in a certain sense, all disasters are man-made. Of course, human beings are not responsible for earthquakes, floods, forest fires, and the like. But they are responsible for whatever it was that put human beings in the way of harm. Nobody caused Vesuvius to erupt; but if there was no Pompeii in its shadow, the eruption would have been a harmless show—nothing more serious than a display of fireworks in the evening sky. Hence the distinction between man-made disasters and others is artificial or, perhaps more accurately, a matter of degree.

The title of this Article refers to an idea developed by one of the co-authors. The general notion is something along these lines: over the last century-and-a-half or so, attitudes toward calamity have changed dramatically. What was once accepted or reviled as inevitable, or fate, came to be seen as somehow anomalous and (more importantly) as giving rise to a claim for relief or payment. In our times, doctors are supposed to cure patients. If they fail, something must have gone wrong; perhaps it was medical malpractice. Accidents must be somebody’s fault; and somebody should pay. Or, if nobody was at fault, government or some insurance program must take care of the problem. The age of the poor house turned into the age of social security. Life, health, and accident insurance became commonplace. So did auto insurance. Compensation became normal; and the more normal it became, the more it became expected.

We will take a look at a series of disasters, spread over a period of about a century, and ending with the tragedy of September 11th, to see how notions of fault, blame, and compensation changed with changing times. These disasters are, of course, not a random sample

---

\* Marian Rice Kirkwood Professor, Stanford Law School.

\*\* J.D., 2004, Stanford Law School.

of calamitous events—there is no way to create such a sample. But they are among the more important and illustrative catastrophes in American experience.

## II. THE JOHNSTOWN FLOOD

The Johnstown flood occurred on May 30, 1889. The flood claimed 2,209 lives and captured the imagination of the general public. It was often portrayed as a classic Victorian story of rich against poor. The disaster was prominently featured in the newspapers, and it led to an important national (and private) relief effort—the first appearance on the national stage of a little known organization known as the American Red Cross.

In 1889, Johnstown, Pennsylvania was a bustling industrial center. The Cambria Iron Company had opened in the post-civil war period. This company was, during the 1880s, the largest producer of steel in the United States.<sup>1</sup> Johnstown sat on a level flood plain at the confluence of the Little Conemaugh and Stony Creek Rivers, which ran down from the mountains that surround the city on both sides. The population of Johnstown was about 10,000. It was ringed with smaller boroughs up and down the valley; these brought the area's population closer to 30,000.<sup>2</sup> Most of the working population were employees of the Cambria Iron Company.<sup>3</sup>

The South Fork Dam was located fourteen miles up the valley from Johnstown, and 450 feet above the town, on the western slope of Allegheny Mountain. The state legislature conceived of the dam project in 1836. The dam and resulting reservoir were intended to provide extra water for the new canal system between Johnstown and Pittsburgh. This was an earth dam, 930 feet long, rising seventy-two feet above the valley floor. The dam was twenty feet wide at the top and 270 feet at its base. When full, the reservoir behind it covered about 450 acres and was nearly seventy feet deep in spots.<sup>4</sup> The South Fork Dam was

---

1. DAVID G. McCULLOUGH, *THE JOHNSTOWN FLOOD* 69 (1968); HOWARD MUSON ET AL., *THE TRIUMPH OF THE AMERICAN SPIRIT: JOHNSTOWN, PENNSYLVANIA* 65 (1989).

2. The towns (East Conemaugh, Woodvale, Conemaugh, Cambria City, Prospect, Millville, Morrellville, Grubbtown, Moxham, and Johnstown) were "clustered between the hills, packed in so tight that there was scarcely room to build anything more." McCULLOUGH, *supra* note 1, at 28. For a map of the valley from the South Fork Reservoir to Pittsburgh, see *Map of the Conemaugh Valley, Showing the Ruined Towns and Their Relative Locations*, N.Y. TIMES, June 5, 1889, at 1.

3. McCULLOUGH, *supra* note 1, at 28.

4. *Id.* at 41. Interestingly, newspaper coverage during the aftermath of the flood described the lake as much larger than it actually was. For example, the *New York Times* described the lake as "eight miles long and three miles wide." *Hundreds of Lives Lost*, N.Y. TIMES, June 1, 1889, at 1. See McCULLOUGH, *supra* note 1, at 219-24; MUSON ET AL., *supra* note 1, at 106-12.

completed in the summer of 1852, six months before the Pennsylvania Railroad put in place the final section of the Philadelphia to Pittsburgh line, running between Johnstown and Pittsburgh. The completion of this final section proved disastrous to the canal system and made the dam useless.<sup>5</sup> The railroad took possession of the South Fork Dam in 1857 and nobody maintained it, until the South Fork Hunting and Fishing Club bought it in 1879.

The South Fork Hunting and Fishing Club was formed in 1879 by a group of wealthy and influential Pittsburgh businessmen who wanted a way to enjoy the clean air of the mountains. The club was “unostentatious” in comparison to contemporary resorts such as Newport or Tuxedo Park, but its membership rolls included some of the most powerful men in the country—men like Andrew Carnegie, Henry Clay Frick, Andrew Mellon, and future Secretary of State and Attorney General Philander C. Knox.<sup>6</sup> The club set about to renovate and rebuild the dam, which had given way in 1862, probably because vandals stole lead from the outflow pipes and weakened the foundation.<sup>7</sup> The dam was rebuilt at a cost of \$17,000 in 1880; the rebuilt dam, however, had no discharge pipe to control the water levels. The club had also added a screen of iron rods across the spillway to prevent fish from escaping the reservoir into South Fork Creek.<sup>8</sup>

The storm started on the Great Plains on May 28, 1889, washing out roads and delaying trains throughout the Midwest. By the time it reached Pennsylvania, the storm was the worst ever recorded in that area.<sup>9</sup> By May 31, the Little Conemaugh and Stony Creek rivers were swelling, and water, from two to ten feet deep, spread across Johnstown.<sup>10</sup> As the citizens of Johnstown tried to save their personal belongings, the South Fork Reservoir continued to fill with water from the mountains above. Staff members attempted to cut a new spillway through the rocky hillside next to the dam, in order to drop the water level without risking a breach in the vulnerable center of the dam, but their efforts were in vain, as were efforts to sandbag the top of the dam.<sup>11</sup> When it became clear that the reservoir was going to break, telegrams were sent from the club down the valley, warning of the

---

5. McCULLOUGH, *supra* note 1, at 54.

6. *Id.* at 56-57.

7. *Scene of the Disaster*, N.Y. TIMES, June 1, 1889, at 1; McCULLOUGH, *supra* note 1, at 54.

8. McCULLOUGH, *supra* note 1, at 76.

9. *Thousands Were Lost*, N.Y. TIMES, June 2, 1889, at 1; McCULLOUGH, *supra* note 1, at 21.

10. McCULLOUGH, *supra* note 1, at 82.

11. *The Dam Which Gave Way*, N.Y. TIMES, June 4, 1889, at 1; McCULLOUGH, *supra* note 1, at 90-92.

danger. But the message was not taken seriously in Johnstown; no general warning was given.<sup>12</sup>

When the flooded reservoir finally breached the South Fork Dam on the afternoon of May 31, the water "cut through like a knife."<sup>13</sup> It made a "sound like tremendous and continued peals of thunder"<sup>14</sup> as the water rushed down into the valley. The water then "swept onward to the Conemaugh like a tidal wave, over twenty feet in height, to Johnstown . . . gathering force as it tore along through the wider channel and quickly swept everything before it."<sup>15</sup> The water destroyed all but the sturdiest of the buildings in the valley in the ten minutes that it took to rush through the fourteen miles to Johnstown. Those who were unable to make it to the higher ground of the valley walls died in the massive waters. The death toll was put—officially—at 2,209. The last bodies were not found until 1906.<sup>16</sup>

The Johnstown flood was front-page news. Headlines shrieked, "Bodies are Everywhere,"<sup>17</sup> "Fifteen Thousand Corpses,"<sup>18</sup> and "Ominous Silence in the Conemaugh Valley."<sup>19</sup> Press coverage helped generate an enormous level of sympathy and charity, greater, perhaps, than for any previous natural disaster. Just days after the flood, relief funds began pouring into Pennsylvania from every single state and fourteen different countries.<sup>20</sup> In early June, a special Flood Relief Commission was formed to handle and distribute the contributions for the flood victims. The most pressing concern for the Commission was to provide adequate food, clothing, and shelter for the survivors in the valley.<sup>21</sup> After these and other essentials were provided, the Commission set about to distribute cash relief to the surviving victims of the flood. The first distribution was a ten-dollar cash payment to each person "who had in any way suffered loss from the flood, and without

12. McCULLOUGH, *supra* note 1, at 87.

13. *Id.* at 100.

14. *The Dam Which Gave Way*, *supra* note 11, at 1 (quoting eyewitnesses to the breach).

15. *Hundreds of Lives Lost*, *supra* note 4, at 1.

16. McCULLOUGH, *supra* note 1, at 196.

17. W.I. Kenny, *Bodies Are Everywhere*, N.Y. TIMES, June 4, 1889, at 1.

18. McCULLOUGH, *supra* note 1, at 219.

19. *Thousands Were Lost*, *supra* note 9, at 1; *see also* McCULLOUGH, *supra* note 1, at 205-24 (surveying the hysterical reaction to the flood).

20. *Sad Work in Johnstown*, N.Y. TIMES, June 5, 1889, at 1; *The Work of Relief*, N.Y. TIMES June 6, 1889, at 5; *Relief Funds Still Grow*, N.Y. TIMES, June 8, 1889, at 5; McCULLOUGH, *supra* note 1, at 224-26; REPORT OF THE SECRETARY OF THE FLOOD RELIEF COMMISSION 107-08 (1890) [hereinafter RELIEF COMMISSION REPORT].

21. The newly organized American Red Cross and its founder, Clara Barton, played a key role in the relief effort, erecting two large tent hospitals and six Red Cross hotels; this was the organization's first major disaster relief effort. *See* FAIRFAX DOWNEY, DISASTER FIGHTERS 44-45 (1938); McCULLOUGH, *supra* note 1, at 229-31; MUSON ET AL., *supra* note 1, at 108.

regard to the amount of loss."<sup>22</sup> When the Commission made its final cash distribution, it was wary of providing any victim with a windfall; funds were allocated on the basis of need and degree of loss, and victims with small children got the most money.<sup>23</sup> In all, the Commission collected and distributed \$3,742,818.78 to the victims of the Johnstown flood.<sup>24</sup>

As the relief process got under way, public attention focused on the question of blame. Newspaper reports began to turn up evidence that some experts had questioned the safety of the dam long before the flood.<sup>25</sup> In Johnstown and its neighboring boroughs, relations between the blue-collar communities and the elite club had always been strained; now, at this point, "feelings were running very strong against the club."<sup>26</sup> Anti-club sentiments were bolstered by the verdict of the coroner's jury in Johnstown announced on July 7, 1889. The jury found that the death of one Ellen Hite was caused by the breaking of the South Fork Dam, and then went on to condemn the owners of the dam:

We further find . . . the dam [was not] constructed sufficiently strong, nor of the proper material to withstand the overflow, and here we find that the owners of the said dam were culpable in not making it as secure as should have been done; especially in view of the fact that a population of many thousands was in the valley below. We hold the owners are responsible for the fearful loss of life and property resulting from the breaking of the dam.<sup>27</sup>

This scathing denunciation of the South Fork Hunting and Fishing Club helped fuel public outrage against the club. Newspapers condemned the club as a playground for the rich. Harrisburg journalist J.J. McLaurin summarized the anger directed at the club when he wrote "50,000 lives in Pennsylvania were jeopardized for eight years [so] that a club of rich pleasure-seekers might fish and sail and revel in luxurious ease during the heated term."<sup>28</sup>

In the wake of this public outrage, several lawsuits were filed against the club. On July 27, 1889, a suit was brought by the widow and eight children of John A. Little, who died in the flood. The plaintiffs asked \$50,000 in damages, and named "half a hundred iron, steel, and glass barons" as defendants, including Andrew Carnegie. The suit

---

22. RELIEF COMMISSION REPORT, *supra* note 20, at 39.

23. *Id.* at 38, 41-43; *The Johnstown Verdict*, N.Y. TIMES, July 7, 1889, at 2.

24. MUSON ET AL., *supra* note 1, at 108.

25. *The Dam Which Gave Way*, *supra* note 11, at 1; McCULLOUGH, *supra* note 1, at 242-43.

26. McCULLOUGH, *supra* note 1, at 243.

27. *The Johnstown Verdict*, *supra* note 23, at 2.

28. McCULLOUGH, *supra* note 1, at 249.

charged that "the lake was dammed to an unusual and useless height for pleasure purposes, not the public good, [and] that the exits were insufficient . . . [and] the construction was faulty."<sup>29</sup> The club entered a not-guilty plea. It claimed the disaster had been a "visitation of providence."<sup>30</sup> The plaintiffs lost the case. Other victims of the flood sued the club, but always without success.<sup>31</sup> None of the cases were reported. But there were other lawsuits arising out of the flood, and they shed some light on the kind of reasoning and argument that courts found persuasive. In one of the cases, the plaintiff sued the Pennsylvania Railroad to recover the value of goods destroyed by the flood during shipment. At the trial, defense witnesses described "the great rain-storm that preceded the bursting of the South Fork dam . . . the rapidly rising river, spreading beyond its banks, and inundating portions of the city of Johnstown" and "the appalling wall of water that came moving down the narrow valley, sweeping away whatever was in its path."<sup>32</sup> Citing this and similar testimony, the judge held that the railroad was not responsible for the loss of any baggage or packages and called the flood "an inevitable accident, properly described as '*actus Dei*.'"<sup>33</sup> Criminal charges were never filed against the members of the club.

The reaction to this disaster was, in short, typical of the late nineteenth century (and earlier). Relief was the responsibility of private charities. The "accident" was attributed to natural forces and they were, thus, nobody's fault. If there was blame—and many people thought there was, or should be—the remedy, if any, lay in punishing the guilty. The tort system hardly entered into the picture. Clearly, the era of "total justice" still lay in the future.

### III. THE TRIANGLE SHIRTWAIST FIRE

The Triangle Shirtwaist Fire took place on March 25, 1911. One hundred and forty-six women, mostly young immigrants, died in the fire. The fire came to symbolize an age of exploitation of workers, and the hard life of immigrants who toiled away in factories and mines. The fire was a tremendous and tragic urban drama. Crowds of

29. *The Johnstown Disaster*, N.Y. TIMES, July 28, 1889, at 2.

30. See generally *Fishing Club Pleads Not Guilty*, N.Y. TIMES, Aug. 18, 1889, at 1; McCULLOUGH, *supra* note 1, at 258.

31. *Seeking Damages*, N.Y. TIMES, Sept. 7, 1889, at 5; McCULLOUGH, *supra* note 1, at 258-62.

32. *Long v. Pa. R.R. Co.*, 23 A. 459, 459 (Pa. 1892).

33. *Id.* at 460; cf. *Brown v. Pine Creek Ry. Co.*, 38 A. 401, 402-03 (Pa. 1897). This case upheld a jury determination that the Johnstown flood was "such a flood as residents of that neighborhood might, from their observation, expect, and therefore was not extraordinary"; this precluded the defendant from escaping liability with an "act of god" defense.

people in the streets watched in horror, helplessly, as the young women in their white skirts jumped to their death nine or ten stories below, choosing this quick way to die over the agony of death by fire. The disaster helped to galvanize support for reforms in labor and safety conditions. It was a critical event in the history of the movement to curb the most raw and brutal aspects of industrial life.

The Triangle Shirtwaist Company manufactured shirtwaists—inexpensive lightweight bodices made of cotton or linen that were popular with women at the time. The company had already had its share of notoriety; a strike of its workers grew into a general strike of shirtwaist workers in New York City known as the “uprising of twenty thousand.”<sup>34</sup> The company occupied the top three floors of the ten-story Asch building, located just off Washington Square Park in Lower Manhattan. This was a typical loft building of the period, and it was in fact considered safer than most. The building was “fire-proof,” and indeed the fire did little structural damage to the building.<sup>35</sup> Still, the building did not have a sprinkler system. These systems were required in textile mills, but not in buildings like the Asch building. Instead, the factory had fire pails on each floor, to be used to put out any fires that might break out.

The shop floors at the factory were arranged with long sewing tables stretching nearly from wall to wall, with narrow aisles in between, where the workers sat. The New York labor code mandated 250 cubic feet of air per worker; but the company was able to pack workers in very tightly because the building was a loft with high ceilings and thus had enough air space to meet the ventilation requirements.<sup>36</sup> Under the existing law, a building of its size required three staircases on each floor. The Asch building had just two, located on opposite corners of the building. The staircases were narrow, measuring just two feet, nine inches in width, and were tapered at the turns. Even worse, the doors to the staircases opened inward, in violation of existing state law.<sup>37</sup> Each staircase was paired with a small, slow moving elevator that could carry a few people at a time. In addition, the building had a

---

34. *Waist Strike On; 18,000 Women Out*, N.Y. TIMES, Nov. 24, 1909, at 1.

35. JOHN F. McCLYMER, *THE TRIANGLE STRIKE AND FIRE* 86 (1998); *141 Men and Girls Die in Waist Factory Fire*, N.Y. TIMES, Mar. 26, 1911, at 1.

36. LEON STEIN, *THE TRIANGLE FIRE* 23 (1962). Much of the following account of March 25 is adapted from his work, which, in turn, relied heavily on contemporary newspaper and periodical accounts. The Triangle Shirtwaist fire has been much written and commented on. See Eric G. Behrens, *The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation*, 62 TEX. L. REV. 361 (1983); Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 LAW & SOC. INQUIRY 621 (1995).

37. STEIN, *supra* note 36, at 22-24.



fire escape, although it was only wide enough to allow one person to escape at a time and ended on the second floor.<sup>38</sup>

The fire broke out on a Saturday. It was the busy season and the factory was operating at nearly full strength. Normally, the factory employed 225 workers on the eighth floor and 350 on the ninth; sixty workers, mostly clerical staff, were on the tenth floor. Most of the workers were young Jewish and Italian women; many were recent immigrants who spoke little or no English. About fifty of the more religious Jewish workers were at home because of the Jewish Sabbath, but most of the workers were the breadwinners in their families and worked whatever hours they could get.<sup>39</sup>

The fire began on the eighth floor. A cigarette tossed to the ground probably set fire to waste material left underneath the worktables. The waste material and the shirtwaists hanging above immediately burst into flames. Workers on the eighth floor tried to put out the fire with the fire pails; but they failed, and the fire soon spread to the ninth floor through the open windows. Many workers on the eighth floor were able to escape through the elevators and staircases. On the tenth floor, nearly all of the sixty workers were able to escape to the roof. The owners of the Triangle Shirtwaist Company, Max Blanck and Isaac Harris, later reviled as villains, acted bravely to help workers on the tenth floor reach the roof; from there, law students from New York University helped them to safety.<sup>40</sup> Most of the victims were working on the ninth floor when the fire broke out. The fire caught them by surprise; and the entire floor was soon a fiery inferno.<sup>41</sup> According to survivors, the door to one of the stairways was locked and could not be opened by the women inside.<sup>42</sup> This forced the women to try to escape by the other staircase, which was soon engulfed in flames.

The fire department arrived soon after the fire began, but it was of little help to the victims. The tallest fire ladder reached only to the sixth floor and the limited water pressure of the time only allowed fire hoses to reach the seventh floor. After flames cut off their escape

---

38. *Id.*; *Quick Grand Jury Fire Investigation*, N.Y. TIMES, Mar. 26, 1911, at 5.

39. STEIN, *supra* note 36, at 30-31; Arthur E. McFarlane, *Fire and the Skyscraper: The Problem of Protecting the Workers in New York's Tower Factories*, McCLURE'S MAG., Sept. 1911, at 473, 474.

40. STEIN, *supra* note 36, at 48-50; *Partners' Account of the Disaster*, N.Y. TIMES, Mar. 26, 1911, at 4; *Stories of Survivors*, N.Y. TIMES, Mar. 26, 1911, at 4; *Rescues by Law Students*, N.Y. TIMES, Mar. 27, 1911, at 4.

41. STEIN, *supra* note 36, at 54-55.

42. *Id.* at 58; *Locked in Factory, the Survivors Say, When Fire Started That Cost 141 Lives*, N.Y. TIMES, Mar. 27, 1911, at 1 [hereinafter *Locked in Factory*].

routes, many of the workers panicked. Some flung themselves down the empty elevator shafts, while many of the women jumped out of the windows, to death in the street below, on fire and in each other's arms.<sup>43</sup> Firefighters tried to catch the women by stretching out fire nets, but the force of the bodies was too much for the nets to bear.<sup>44</sup> Others died when the fire escape that they had crowded onto collapsed under their weight. When it was over, sixty-two of the 146 victims of the fire had jumped to their deaths. Firefighters found thirty dead in the elevator shaft and forty or fifty piled up against the ninth-floor doorways.<sup>45</sup>

Immediately after the fire, there was an outcry of support for the victims and horror over the great loss of life.<sup>46</sup> What had caused the tragedy? Discussion focused on such things as the lack of fire drills, the failure of the fire escapes, and the locked doors.<sup>47</sup> The locked door factor was particularly important; it fueled public anger and pointed the finger of blame at Max Blanck and Isaac Harris, the coowners of the Triangle Shirtwaist Company.<sup>48</sup> The story that emerged was that one of the doors on each floor was usually kept locked in order to control theft.<sup>49</sup>

Because of public outrage, the district attorney's office launched an immediate investigation into the possibility of bringing criminal charges. Charles Whitman, the District Attorney, promised to convene a grand jury as soon as possible.<sup>50</sup> The grand jury began investigating the fire in early April and returned an indictment against Harris and Blanck for first and second-degree manslaughter on April 11. The main basis for the charge was the evidence of the locked door, which "left no doubt as to the guilt of the partners," according to the District Attorney.<sup>51</sup> Harris and Blanck entered a plea of not guilty. A week later, on April 18, the coroner's jury likewise called the owners of the company responsible for the fire disaster.<sup>52</sup> Neither the grand jury nor the coroner's jury found any state or city officials responsible for the tragedy.

---

43. *Scenes at the Morgue*, N.Y. TIMES, Mar. 26, 1911, at 3; *Thrilling Incidents in Gotham Holocaust That Wiped Out One Hundred and Fifty Lives*, CHI. TRIB., Mar. 28, 1911, at 2.

44. *141 Men and Girls Die in Waist Factory Fire*, *supra* note 35, at 2.

45. *Id.*

46. *The Calamity*, N.Y. TIMES, Mar. 26, 1911, at 14.

47. *Lack of Fire Drill Held Responsible*, N.Y. TIMES, Mar. 26, 1911, at 5.

48. *Locked in Factory*, *supra* note 42, at 1.

49. STEIN, *supra* note 36, at 26-27; *Locked in Factory*, *supra* note 42, at 1.

50. *Whitman Men Seek To Fix Responsibility*, N.Y. TIMES, Mar. 27, 1911, at 4.

51. *Indict Owners of Burned Factory*, N.Y. TIMES, Apr. 12, 1911, at 1.

52. *Charge Girl's Death to Factory Owners*, N.Y. TIMES, Apr. 18, 1911, at 1.

Meanwhile, state and local politicians called for an assortment of political and legal stops to prevent future tragedies.<sup>53</sup> Within weeks of the fire, the state legislature was moving to enact tighter fire escape laws and to grant the state labor commissioner greater power to oversee factory buildings.<sup>54</sup> There was wide popular support for these new laws; many people were convinced that the true cause of the tragedy lay in feeble laws and feeble enforcement.<sup>55</sup> Local unions and socialists organized meetings to protest against unsafe work conditions.<sup>56</sup>

The New York Legislature created a Factory Investigating Commission on June 30, 1911. The Commission's charge was to investigate "the existing conditions under which manufacturing was carried on in so-called 'loft buildings'" and otherwise in order that "remedial legislation might be enacted to eliminate existing peril to life and health" of workers.<sup>57</sup> The Commission began with an inquiry into the fire hazard in loft buildings. Ultimately, laws were passed that became, in a sense, a lasting legacy of the fire.<sup>58</sup>

During the scramble to assign blame, there was strong popular sympathy for the victims and their families. Local unions rallied support for the cause. The climax was a parade of 120,000 working class women through Manhattan.<sup>59</sup> Both the local unions and the Red Cross began a relief fund for victims of the fire, which soon grew to the sizeable sum of \$120,000.<sup>60</sup> The Red Cross set up a committee to consider the appropriate compensation for the victims in each case "based on a consideration of the standard of living" of the family of the person killed or injured.<sup>61</sup> The committee made it clear that it was not attempting "to compensate for loss, in the sense of assigning a cash value to each life lost and reimbursing to the family that

53. *Blame Shifted on All Sides for Fire Horror*, N.Y. TIMES, Mar. 28, 1911, at 1.

54. *Fire-Escape Laws To Be Strengthened*, N.Y. TIMES, Mar. 28, 1911, at 3.

55. *Public Indifference Held Responsible*, N.Y. TIMES, Apr. 1, 1911, at 3.

56. McClymer, *supra* note 35, at 96-99; *Faint in a Frenzy over Tales of Fire*, N.Y. TIMES, Mar. 30, 1911, at 1; *Public Indifference Held Responsible*, *supra* note 55, at 3; *The Sunday Mass Meeting*, N.Y. TIMES, Apr. 4, 1911, at 10.

57. N.Y. FACTORY INVESTIGATING COMM., PRELIMINARY REPORT, S. 21-30, 135th Sess., pt. 1, at 14 (1912) [hereinafter FACTORY INVESTIGATING COMM.].

58. IRWIN YELLOWITZ, LABOR AND THE PROGRESSIVE MOVEMENT IN NEW YORK STATE: 1897-1916 94 (1965).

59. *120,000 Pay Tribute to the Fire Victims*, N.Y. TIMES, Apr. 6, 1911, at 1.

60. The Red Cross declared this amount to be "a larger amount, in proportion to the number of families and the situation caused by the fire, than has generally, if ever, been available for emergency relief." RED CROSS EMERGENCY RELIEF COMM., EMERGENCY RELIEF AFTER THE WASHINGTON PLACE FIRE, NEW YORK 7 (1912) [hereinafter 1912 RED CROSS REPORT]; see also STEIN, *supra* note 36, at 128 (calling the amount "a huge sum by contemporary standards").

61. 1912 RED CROSS REPORT, *supra* note 60, at 8.

amount.”<sup>62</sup> Rather, it adhered to the concept of “scientific philanthropy,” which involved helping the victims without encouraging them to become dependent on charity.<sup>63</sup> Using this case-by-case system, the Red Cross distributed some \$80,556.16 of the fund to 166 families who made claims.<sup>64</sup> In the ninety-four claims in which there had been one or more deaths, the aid ranged from \$50 to \$5,167.20 and in the seventy-two in which there had been no deaths, the aid ranged from \$10 to \$1,000.<sup>65</sup>

In addition to the Red Cross relief, the families of twenty-three victims instituted a lawsuit against the insurance company that underwrote the Triangle Shirtwaist Company. Although Harris and Blanck had recovered over \$200,000 from the company for their losses in the fire, the families settled with the insurance company for \$75 per death.<sup>66</sup> In a lawsuit brought by victims directly against Harris and Blanck, the jury returned a verdict for the defendant coowners.<sup>67</sup>

The criminal trial of Isaac Harris and Max Blanck finally began on December 5, 1911. The trial took place in a circus-like atmosphere, with a screaming mob attacking Harris and Blanck as they entered the courtroom for the first time.<sup>68</sup> The indictment, as we noted, rested on the locked door on the ninth floor that trapped the victims.<sup>69</sup> Under sections 80 and 94 of the state labor code, it was a misdemeanor to lock factory doors. The criminal law of New York also recognized the so-called felony manslaughter rule: causing a death while committing a misdemeanor was automatically felony manslaughter.<sup>70</sup> The trial itself focused on whether or not a door on the ninth floor was actually locked and, if so, whether Harris and Blanck knew this. The prosecution also had the burden of showing that the locked door was the cause of some deaths.

The prosecutor presented witnesses who testified that the door on the ninth floor was indeed locked on that day; and that this was stan-

---

62. *Id.*

63. McClymer, *supra* note 35, at 104.

64. 1912 RED CROSS REPORT, *supra* note 60, at 15.

65. *Id.*; Stein, *supra* note 36, at 129.

66. McClymer, *supra* note 35, at 109; Stein, *supra* note 36, at 207; *Lives at \$75*, LITERARY DIG., Mar. 28, 1914, at 685.

67. *Sues for Triangle Fire*, N.Y. TIMES, Feb. 27, 1913, at 7; *Jury Disagrees in Triangle Fire Suit*, N.Y. TIMES, Feb. 28, 1913, at 2.

68. *Enraged Women Mob Triangle Waist Men*, N.Y. TIMES, Dec. 6, 1911, at 24.

69. *People v. Harris*, 134 N.Y.S. 409 (Gen. Sess. 1911); *Indict Owners of Burned Factory*, *supra* note 51, at 1.

70. *Harris*, 134 N.Y.S. at 361-62.

dard anti-theft practice at the factory.<sup>71</sup> The prosecutor even succeeded in introducing into evidence the charred remains of a locked door, which was alleged to be the very door from the ninth floor.<sup>72</sup> Despite this vivid evidence, the jury voted to acquit Harris and Blanck of the charges on December 27, 1911.<sup>73</sup> This result—which came despite the physical evidence, and the overwhelming public sentiment against the defendants—has often been ascribed to the brilliant work of defense attorney Max Steuer, who successfully employed a now legendary strategy by having a key prosecution witness repeat her story twice on cross-examination.<sup>74</sup> The witness repeated the story nearly word for word and Steuer was able, subtly, to destroy the value of her testimony, because it became obvious that she had been coached by the prosecution and had simply memorized her account of what had happened.

There was a wave of indignation when the acquittal was announced. Jurors complained in the press that they felt hamstrung by the judge's instructions; he had told them that they had to find that Harris and Blanck knew about the locked door and that it directly resulted in some specific death.<sup>75</sup> Shortly afterwards, women's groups and unions lobbied the District Attorney to refile charges against the coowners of the factory for the deaths of other workers in the factory.<sup>76</sup> After the District Attorney refiled charges in March, a judge ordered the charges dismissed because the prosecution had no new evidence to present.<sup>77</sup> This order led to more protests; but the order stood and Harris and Blanck were never punished for the situation leading up to the fire.

What is striking, from our standpoint, about this story is how little a role the issue of compensation played—other than as a form of public charity. Public indignation led to criminal charges and law reform, but not to tort actions, and not to reforms in the rules relating to compensation. The failure of the tort system—failure from our standpoint, at

---

71. *Door Was Locked at Factory Fire*, N.Y. TIMES, Dec. 9, 1911, at 3; *Girls Fought Vainly at Triangle Doors*, N.Y. TIMES, Dec. 12, 1911, at 4; *Exits Shut Tight at Triangle Fire*, N.Y. TIMES, Dec. 14, 1911, at 3.

72. *Fatal Lock Let in Triangle Fire Case*, N.Y. TIMES, Dec. 16, 1911, at 8.

73. *Triangle Owners Acquitted by Jury*, N.Y. TIMES, Dec. 28, 1911, at 1.

74. STEIN, *supra* note 36, at 191-98. See also *People v. Lee*, 541 N.E.2d 747, 759 (Ill. App. Ct. 1989) (mentioning Steuer's "brilliant" cross examination in the Triangle Shirtwaist trial). See ARON STEUER & MAX D. STEUER, TRIAL LAW 83-100 (1950) (dealing with the technique and setting out verbatim Steuer's cross-examination of the witness, Kate Alterman).

75. *Regrets Voting for Triangle Acquittal*, N.Y. TIMES, Dec. 29, 1911, at 8.

76. *Women Urge Triangle Trial*, N.Y. TIMES, Jan. 2, 1912, at 18; *Mrs. Belmont Sees Whitman*, N.Y. TIMES, Jan. 6, 1912, at 10.

77. *Discharge Triangle Owners*, N.Y. TIMES, Mar. 22, 1912, at 3.

any rate—rested on notions of the inevitability of accident, and, as Arthur McEvoy has argued, on a “worldview premised on individual responsibility and exclusively contractual social relations.”<sup>78</sup> McEvoy also argues that there might have been some blaming of the victims— young girls, who reacted in panic, rather than in calm and responsible ways, which might have saved their lives.<sup>79</sup> Moreover, fear of encouraging welfare dependency helped keep the level of compensation through private charity down. The charitable gifts were doled out according to “standard of living.”<sup>80</sup> That is, the payments were meant to restore a balance, an equivalency; they were not meant to redistribute wealth or income in any way. No one was to gain a windfall because of the accident.

#### IV. THE SINKING OF THE *LUSITANIA*

A German U-Boat sank the steamship *Lusitania* on May 7, 1915 off the coast of Ireland. Of the 1,949 persons on board, of whom 702 were crew members, 1,198 died. Although the *Lusitania* was a British ship, there were 197 American citizens on board. One hundred twenty-eight of them died. The incident mobilized American public opinion against Germany and has been ever since commonly (but probably wrongly) cited as a key factor in bringing the United States to the point of war with Germany.<sup>81</sup>

When the *Lusitania* was built in 1907, it was the largest ship in the world. It could carry 552 passengers in first class, 460 in second class, and 1,186 in third class, along with a crew of 827. During its first years in service on the transatlantic route, it was wildly popular and was considered state of the art and declared by some to be “the world’s most magnificent ship.”<sup>82</sup> On its second voyage, the ship broke the transatlantic crossing record, averaging almost twenty-four knots on the trip and becoming the first ship to make the voyage in less than five days.<sup>83</sup>

In August 1914, Great Britain declared war against Imperial Germany and immediately instituted a naval blockade—a strategy that proved to be extremely effective. In February 1915, in response to the blockade, Germany announced it would treat the waters surrounding

---

78. McEvoy, *supra* note 36, at 637.

79. *Id.*

80. *Id.*

81. THOMAS A. BAILEY & PAUL B. RYAN, *THE LUSITANIA DISASTER: AN EPISODE IN MODERN WARFARE AND DIPLOMACY* 234-36 (1975); DAVID RAMSAY, *LUSITANIA: SAGA AND MYTH* 253-65 (2001).

82. RAMSAY, *supra* note 81, at 25.

83. *Id.* at 27-28.

the British Isles as a war zone, in which it was free to sink enemy ships. This decision—a program of unrestricted submarine warfare—brought a quick response from the United States. On February 10, 1915 President Woodrow Wilson sent a diplomatic note to Germany stating that if German submarines were to destroy “an American vessel or the lives of American citizens” it would be “an indefensible violation of neutral rights” for which Germany would be held “strictly accountable.”<sup>84</sup>

Despite President Wilson’s message, the danger from German submarines had a dramatic impact on transatlantic passenger traffic. Also, German-Americans lobbied to get the Wilson Administration to discourage Americans from traveling on Allied ships. When these efforts failed, a group of leading German-Americans (with the permission and endorsement of the German Embassy) took out advertisements on May 1 and May 8, 1915 in numerous newspapers along the eastern seaboard warning travelers not to embark on Allied ships. The ads told potential passengers that “a state of war” existed between Germany and Great Britain, and that “vessels flying the flag of Great Britain, or any of her allies, were liable to destruction.”<sup>85</sup> Finally, they warned: “[T]ravelers sailing in the war zone on ships of Great Britain or her allies do so at their own risk.”

Nevertheless, the *Lusitania* was crowded with travelers—partly because of cuts in fares—when it left New York City on the afternoon of May 1, 1915 at the beginning of the tourist season.<sup>86</sup> As the ship steamed towards the British Isles, it received a wire from the British Naval Centre at Queenstown, Ireland on the evening of May 6, warning “submarines active off south coast of Ireland.”<sup>87</sup> The following afternoon, May 7, a German U-boat torpedoed the ship approximately fourteen miles off the coast of Ireland. Twenty minutes later the *Lusitania* had gone to the bottom. In the cold water, with ill-equipped lifeboats, the passengers were in a desperate situation; sixty percent of them died.

The sinking of the *Lusitania* caused an uproar in the United States. Newspapers declared the sinking a “slaughter of neutrals and non-combatants,” an act of “unqualified piracy,” and a “crime against civi-

---

84. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1915 SUPPLEMENT 98-100 [hereinafter FOR. RELS., 1915 SUPP.].

85. See *Notice!*, N.Y. TIMES, May 1, 1915, at 19; *Notice!*, N.Y. TIMES, May 8, 1915, at 21; see also BAILEY & RYAN, *supra* note 81, at 74-75 (listing other newspapers in which the advertisement appeared).

86. BAILEY & RYAN, *supra* note 81, at 128.

87. *Id.* at 133; RAMSAY, *supra* note 81, at 51-69 (providing detailed descriptions of the final voyage of the *Lusitania*).

lization.”<sup>88</sup> Within days of the sinking, relief efforts were begun to collect funds for the victims and their families. On May 10, New York City Mayor McAneny created the *Lusitania* Survivor Relief Committee with the goal of collecting funds for the victims.<sup>89</sup> The Committee of Mercy immediately sent out a nationwide appeal for donations for the survivors and was “confident” that it could gather enough funds “to care for the destitute among those who were saved from the *Lusitania*, and to relieve the want of those who have been bereft of support.”<sup>90</sup> Within a month, the Committee of Mercy had collected over \$200,000 for the victims.<sup>91</sup>

Meanwhile, the American government was concerned with the German threat and what the attack meant for American neutrality. On May 12, 1915, President Wilson sent a note to Germany demanding financial reparations for the sinking, as well as recognition of the right of neutral citizens to travel on neutral or belligerent vessels and a guarantee that no future attacks on ships carrying noncombatants would occur.<sup>92</sup> Germany responded with its own diplomatic note denying responsibility for the disaster and accusing Britain of arming the ship with deck guns. Germany also alleged that the ship was carrying troops and munitions, and thus, that it was acting in “self-defense” in sinking the ship and destroying these war materials.<sup>93</sup> The German note also suggested that the rapid sinking of the *Lusitania* and the great loss of life were caused by ammunition in the ship’s cargo hold.<sup>94</sup> Germany also offered to submit the matter to The Hague Tribunal for independent investigation and adjudication and to pay compensation in all such cases where it was found to be in the wrong. After the United States entered the war in April 1917, however, it was obvious that the issue of compensation would have to wait until the end of the fighting.

The first legal responses to the *Lusitania* disaster occurred in Europe. On May 10, 1915, just three days after the sinking, a coroner’s jury in Kinsale, Ireland concluded an investigation into the deaths aboard the ship and charged the Kaiser and the officers of the subma-

---

88. *Press Calls Sinking of Lusitania Murder*, N.Y. TIMES, May 8, 1915, at 8.

89. *Relief Work Started, C.H. Dodge Heads It*, N.Y. TIMES, May 11, 1915, at 3.

90. *Nation-Wide Appeal To Aid Survivors*, N.Y. TIMES, May 12, 1915, at 4.

91. *Committee of Mercy Fund*, N.Y. TIMES, June 13, 1915, at 9.

92. *President Wilson’s Note to Germany*, N.Y. TIMES, May 14, 1915, at A1; AUGUST HECKSCHER, WOODROW WILSON 366-67 (1991).

93. FOR. RELS., 1915 SUPP., *supra* note 84, at 419-21; *Germany Says Lusitania Was Armed; No Promise To End Submarine War; Note’s Terms Surprise Washington*, N.Y. TIMES, May 30, 1915, at 1-2 [hereinafter *Germany Says Lusitania Was Armed*].

94. *Germany Says Lusitania Was Armed supra* note 93.



rine with "the crime of wholesale murder before the tribunal of the civilized world . . . committed contrary to international law and the conventions of civilized nations."<sup>95</sup> A more extended inquiry was conducted in London by the government's Board of Trade beginning on June 15 with Lord Mersey presiding over the proceedings.<sup>96</sup> The purpose of the inquiry was to determine who was responsible for the deaths on the *Lusitania* and much of the investigation focused on the Cunard Company and Captain William Turner.<sup>97</sup> After questioning Turner at length about his decision to operate at less than full speed, his apparent failure to follow British naval directives for ships operating in the war zone (specifically, his failure to keep well clear of the coast and to zigzag), and the crew's failure to save more lives after the sinking, Lord Mersey exonerated both the Captain and the Cunard Company.<sup>98</sup> The inquiry held that the ship had been carrying nothing more than ordinary cargo and that the captain acted within his discretion. The court concluded that the disaster was caused by the torpedoes fired by a German submarine "with the intention of destroying the lives of the people on board."<sup>99</sup>

The *Lusitania* disaster was, politically, an event of great significance; the fate of the victims and their families was a secondary issue. But on April 23, 1916, a group of survivors announced their intention to call a meeting of victims in order to solicit government support for relatives and dependents of the victims.<sup>100</sup> Shortly thereafter came the first lawsuit against the Cunard Company for damages, filed by a woman whose husband died in the disaster.<sup>101</sup> The plaintiff claimed the company was negligent in failing to take proper precautions when sailing into the war zone. Many more suits were filed in the next few weeks.<sup>102</sup> In total, sixty-seven lawsuits were filed against Cunard, claiming \$5,883,479 in damages for loss of life, personal injury, and

---

95. *Kaiser and His Officers Guilty of Murder, Says Inquest Report on Loss of the Lusitania*, N.Y. TIMES, May 11, 1915, at 1.

96. See BAILEY & RYAN, *supra* note 81.

97. *Id.*

98. *Id.*

99. BAILEY & RYAN, *supra* note 81, at 217-18 (quoting *Report of a Formal Investigation into the Circumstances Attending the Foundering of British Steamship "Lusitania."* [Cd. 8022] (London 1915), in *Parliament*, House of Commons Sessional Papers, 1914/1916, vol. XXVII); *Puts All Blame on The Germans*, N.Y. TIMES, June 18, 1915, at 1.

100. *Call Lusitania Survivors: Meeting Will Seek Government Help for Victims' Dependents*, N.Y. TIMES, Apr. 23, 1916, at 8.

101. *Lusitania Widow Sues for \$750,000*, N.Y. TIMES, Apr. 28, 1916, at 22.

102. *More Lusitania Suits*, N.Y. TIMES, May 5, 1916, at 14; *More Lusitania Suits*, N.Y. TIMES, May 6, 1916, at 20.

lost baggage. These suits were consolidated before Judge Mayer in the United States District Court in New York City.<sup>103</sup>

During the trial, evidence was introduced on Captain Turner's failure to follow instructions from the British Admiralty, on how to operate safely in the war zone.<sup>104</sup> In his decision handed down on April 23, 1918, Judge Mayer explained that the captain had acted within his discretion and that the threat of submarine warfare was not clear at the time of the voyage.<sup>105</sup> The Judge declared that fault "must be laid upon those who are responsible for the sinking of the vessel, in the legal as well as the moral sense."<sup>106</sup> The cause of the deaths "was the illegal act of the Imperial German government," which violated "a cherished and humane rule observed, until this war, by even the bitterest antagonists."<sup>107</sup> As for the victims, Judge Mayer stated that although there would be no recovery in this case, "it is not to be doubted that the United States of America and her Allies will well remember the rights of those affected by the sinking of the *Lusitania* and, when the time shall come, will see to it that reparation shall be made for one of the most indefensible acts of modern times."<sup>108</sup>

The press greeted Judge Mayer's decision warmly. The *New York Times* hailed the decision as "notably" contributing to "this great field of jurisprudence" and agreed with the Judge's suggestion: the peace table was the proper forum for talks of reparations and compensation.<sup>109</sup> According to the *Times*, there was "no escape" from the conclusion that Germany alone was responsible for the deaths.<sup>110</sup>

Three years had gone by since the sinking of the *Lusitania*. The final push for reparations began after the end of World War I in November 1918. In March 1919, a board was organized to represent the interests of the victims of the *Lusitania*.<sup>111</sup> The board, headed by none other than Judge Mayer, hoped to come up with a compensation figure and submit it to the peace conference in Paris. In the Treaty of Versailles, signed on June 28, 1919, Germany admitted liability for acts committed during the war.<sup>112</sup> The treaty also provided for the

---

103. *More Lusitania Suits*, N.Y. TIMES, May 5, 1916, *supra* note 102, *More Lusitania Suits*, N.Y. TIMES, May 6, 1916, *supra* note 102.

104. *The Lusitania*, 251 F. 715, 728-32 (S.D.N.Y. 1918).

105. *Id.*

106. *Id.* at 736.

107. *Id.*

108. *Id.*

109. *The Lusitania Crime*, N.Y. TIMES, Apr. 27, 1918, at 8.

110. *Id.*

111. *Call for Lusitania Claims*, N.Y. TIMES, Mar. 17, 1919, at 4.

112. Treaty of Peace with Germany, June 28, 1919, X, § VI, arts. 297-98, 2 Bevans 43.

establishment of a "mixed arbitral tribunal" between Germany and each of the Allied powers to determine and carry out a procedure for determining compensation for victims of the war.<sup>113</sup>

But the United States Senate failed to ratify the Treaty of Versailles. The United States did not resume diplomatic relations with Germany until it signed its own peace treaty in August 1921 (known as the Treaty of Berlin). This treaty incorporated those sections of the Treaty of Versailles that dealt with reparations.<sup>114</sup> The Mixed Claims Commission was established on August 10, 1922 to determine the amount of Germany's financial obligations under the Treaty of Berlin. The Commission included two National Commissioners (one from each government) with authority to decide liability in cases presented to them. In case of disagreement, an umpire then became the sole arbiter of liability.<sup>115</sup> When the Commission began its operations, it grouped claims together based on their common questions or facts so that they could handle the large workload in a reasonable period of time.<sup>116</sup>

The general principles governing the claims before the Mixed Claims Commission arising out of the sinking of the *Lusitania* were announced in a decision handed down on November 1, 1923. In death cases, the damages would depend on the loss sustained by the dependents of the deceased, not the loss or suffering of the deceased himself.<sup>117</sup> How much would the decedent have contributed to the claimant, in terms of money or personal services? This was the formula for compensation, plus a reasonable amount for "such mental suffering or shock, if any, caused by the violent severing of family ties."<sup>118</sup> The Commission held that no punitive damages would be available to claimants under the terms of the Treaty of Berlin.<sup>119</sup>

The first awards were handed down on February 21, 1924, nearly nine years after the *Lusitania* went to the bottom of the sea. About

---

113. *Id.*, X, § VI, art. 304; *Will Ask Germany for Claims Treaty*, N.Y. TIMES, Jan. 25, 1922, at 1.

114. Treaty Restoring Friendly Relations, Aug. 25, 1921 (Treaty of Berlin), 8 Bevans 145.

115. REPORT OF AMERICAN COMMISSIONER: MIXED CLAIMS COMMISSION UNITED STATES AND GERMANY 3-4 (1933).

116. *Id.* at 6.

117. *The Lusitania*, 2 ANN. DIG. 202 (United States and Germany: Mixed Claims Commission 1923); *Commission Backs Lusitania Claims*, N.Y. TIMES, Nov. 6, 1923, at 21; see also REPORT OF ROBERT W. BONYNGE, AGENT OF THE UNITED STATES BEFORE THE MIXED CLAIMS COMMISSION 14-19 (G.P.O. 1934) [hereinafter BONYNGE REPORT].

118. *The Lusitania*, *supra* note 117, at 203.

119. *Id.* at 209-10.

\$1,000,000 went to the first group of sixty-seven claims.<sup>120</sup> The Commission's criteria meant that wealthy survivors, in general, got more money than poor survivors. But the heirs of Albert G. Vanderbilt, whose estate was valued at \$15.6 million, received nothing. The Commission felt that Vanderbilt's will left the beneficiaries with a net gain, rather than a loss.<sup>121</sup>

The Mixed Claims Commission ended its labors and made final awards on December 6, 1925, ten and one-half years after the *Lusitania* went down. In all, \$2,531,685.35 was awarded for losses due to death, personal injury, or loss of property.<sup>122</sup> The largest award went to the widow of Albert C. Bilicke, a wealthy Los Angeles real estate developer; his widow and three children received \$140,000.<sup>123</sup> Most of the families received far less.

Here, too, there was little legal recourse for victims. And here, too, there were attempts to blame individuals (the Captain). But there was also the highly convenient presence of an enemy government. This made it easy to shift the blame (and the duty to compensate) on to the enemy government. Once again, the rich got more money than the poor. The aim was to restore the status quo—as it was before the disaster. And the government took no part in the compensation effort, except diplomatically.

#### V. 1927 MISSISSIPPI RIVER FLOOD

The great flood of 1927 on the Mississippi River left a total of 16,570,627 acres under water, an area stretching over parts of seven states and home to a population of 4,459,238 people.<sup>124</sup> In all, 162,017 homes were flooded, 41,487 buildings destroyed, and \$102,562,395 worth of crops lost.<sup>125</sup> Between 250 and 500 people were killed.<sup>126</sup> The Red Cross cared for over 600,000 flood victims, including over 300,000 in 154 refugee camps.<sup>127</sup> The Secretary of Commerce, Herbert Hoover, coordinated this gigantic relief effort. The publicity, and

---

120. MIXED CLAIMS COMMISSION: OPINIONS IN INDIVIDUAL *LUSITANIA* CLAIMS AND OTHER CASES 353-425 (G.P.O. 1925) [hereinafter *LUSITANIA OPINIONS*]; *Allows \$1,000,000 in Lusitania Claims*, N.Y. TIMES, Feb. 22, 1924, at 1.

121. *LUSITANIA OPINIONS*, *supra* note 120, at 593-95.

122. BONYNGE REPORT, *supra* note 117, at 17-18; *Lusitania Claims All Disposed of; \$2,409,413 Awarded*, N.Y. TIMES, Dec. 7, 1925, at 1.

123. *LUSITANIA OPINIONS*, *supra* note 120, at 435-38; BONYNGE REPORT, *supra* note 36, at 17.

124. AMER. NAT'L RED CROSS, *THE MISSISSIPPI VALLEY FLOOD DISASTER OF 1927: OFFICIAL REPORT OF RELIEF OPERATIONS OF THE AMER. NAT. RED CROSS*, 5 (1927) [hereinafter *1927 RED CROSS REPORT*].

125. *Id.* at 6.

126. PETE DANIEL, *DEEP'N AS IT COME: THE 1927 MISSISSIPPI RIVER FLOOD* 10 (1977).

127. *1927 RED CROSS REPORT*, *supra* note 124, at 45.

resulting popularity, served him as a springboard to the presidency. The flood also led to a landmark piece of legislation, the 1928 Flood Control Act. This was a law that brought about a level of state involvement in state and local affairs that was largely unprecedented.

Heavy rains began falling across the Midwest in late August 1926, and, that fall, water levels reached record highs. By Christmas, heavy flooding was occurring throughout the Mississippi Valley. The river hit flood stage at Cairo, Illinois on January 1, 1927, the earliest date on record, while Cincinnati and Pittsburgh flooded later that month.<sup>128</sup> By February 4, levees had broken along the White and Little Red Rivers in Arkansas, flooding over 100,000 acres and leaving 5,000 homeless. By March and April, men were working around the clock to strengthen the levees from Cairo to the Gulf, hoping to stave off the rising waters.<sup>129</sup> In Vicksburg, Mississippi, 1,500 full-time workers were employed to protect the levees that kept the river from flooding the Delta region.<sup>130</sup>

As the rains continued, these efforts failed. On April 18, 1927, levees broke at Mounds Landing, Mississippi and the river slowly poured through, flooding the entire Mississippi Delta region, an area fifty miles long and 100 miles wide and home to 185,000 people. The Delta was covered with water up to twenty feet deep, leaving hundreds of its residents "marooned on trees, on roofs and anything above water."<sup>131</sup> Thousands were rendered homeless in the Delta; nearly 70,000 left to live in refugee camps; the rest of the population lived in whatever makeshift shelter they could find.<sup>132</sup>

After the incident at Mounds Landing, the flood became a national story, but the flooding was far from over. The river soon poured through the delta and reentered the main channel near Vicksburg where the added force of the delta water caused levees to break on the Louisiana side of the river.<sup>133</sup> From this point south, the levees failed to hold back the water, and the flood covered much of eastern Louisiana. In New Orleans, a group of government and business lead-

---

128. JOHN M. BARRY, *RIISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* 179-81 (1997).

129. At this time, the Army Corps of Engineers and the Mississippi River Commission, which had jurisdiction over flood control efforts on the Mississippi, believed in a "levees-only" policy for flood control, sealing the river off from natural reservoirs and outlets. In response to earlier large floods on the River, the Corps had advocated the construction of larger and stronger levees. See *id.* at 156-60, 165-66; J.P. KEMPER, *REBELLIOUS RIVER* 95-110 (1949).

130. BARRY, *supra* note 128, at 183.

131. *Fliers Risk Lives in Flood Rescues*, N.Y. TIMES, Apr. 24, 1927, at 1.

132. BARRY, *supra* note 128, at 206.

133. *Big New Crevasse Opens in the Louisiana Levees; 25,000 People in Flight*, N.Y. TIMES, May 4, 1927, at 1.

ers decided to dynamite downstream levees in order to save the historic city, an action that promised to flood 100,000 acres and turn 10,000 people into refugees.<sup>134</sup> The city promised to provide reparations to those in the rural region and to create a \$150,000 fund to care for the refugees.<sup>135</sup> In the end, breaks in upstream levees made this step unnecessary, and those whose homes were destroyed in the flood received little in the way of reparations from the City of New Orleans and its business leaders.<sup>136</sup>

With the Mississippi Delta under water, the flood had become a major disaster. On April 22, 1927, just days after the break at Mounds Landing, President Calvin Coolidge made a national appeal for contributions to the Red Cross.<sup>137</sup> In a meeting with Red Cross officials on that day, it was decided that \$5 million would be needed to sustain the relief effort.<sup>138</sup> The President appealed for another \$5 million for flood relief on May 2.<sup>139</sup> Each of these goals was met, in part because newspapers rallied their readers to support the cause.<sup>140</sup> By May 11, the Red Cross had its second \$5 million. Ultimately, more than \$17 million was collected.<sup>141</sup> It was the largest fund built up during peacetime in the history of the organization and the "largest single disaster relief fund in the history of the world."<sup>142</sup> The Red Cross also collected an estimated \$4,538,000 worth of services and supplies from various federal and state government agencies and from railroad companies.

The Red Cross used these funds to set up 154 refugee camps in the seven states hit hardest by the flooding. These camps cared for 325,554 people; the camps included medical facilities, mess halls, rec-

---

134. *Louisiana Levee To Be Cut to Make New Orleans Safe; Wide Area to Be Evacuated*, N.Y. TIMES, Apr. 27, 1927, at 1; *New Orleans Awaits Big Explosion to Cut Levee Today at \$2,000,000 Cost; Many Refuse to Quit Area to be Flooded*, N.Y. TIMES, Apr. 29, 1927, at 1.

135. BARRY, *supra* note 128, at 234-59 (describing the backroom political dealing that led to this decision).

136. *Id.* at 346-60.

137. *Text of President Coolidge's Appeal for Funds to Help Red Cross in Aiding Flood Refugees*, N.Y. TIMES, Apr. 23, 1927, at 1.

138. 1927 RED CROSS REPORT, *supra* note 124, at 13.

139. *172,000 More Imperiled; Coolidge Calls on Nation To Double Flood Relief*, N.Y. TIMES, May 3, 1927, at 1.

140. *Flood Hit More Towns; 200,000 Are Now Destitute; \$1,234,000 Given for Relief*, N.Y. TIMES, Apr. 26, 1927, at 1; *President Appeals for \$5,000,000 More*, N.Y. TIMES, May 3, 1927, at 1. See also 1927 RED CROSS REPORT, *supra* note 124, at 12-17.

141. 1927 RED CROSS REPORT, *supra* note 124, at 18-19.

142. *Id.* at 11.

reation areas, and even extension classes.<sup>143</sup> In addition to the refugee camps, the Red Cross also gave relief to another 311,922 people who were able to find shelter in their own communities, often on the upper floors of larger buildings.<sup>144</sup>

On the same day that he made his first appeal for contributions, President Coolidge also created a special cabinet committee to coordinate rescue and relief efforts. The committee was to be headed by the Secretary of Commerce, Herbert Hoover.<sup>145</sup> Hoover immediately took charge of the relief effort. From headquarters in Memphis, Tennessee, he worked to coordinate the efforts of the local Red Cross chapters. Together with James Fieser, the acting Commissioner of the American National Red Cross, Hoover allocated funds to each county and local chapter and became the public face of the relief effort.<sup>146</sup>

Hoover was also instrumental in developing and coordinating the Red Cross's rehabilitation program for the flooded region that began soon after the waters receded.<sup>147</sup> He and Fieser distributed a list of goods to be given to families on the basis of need, including: seed, a temporary supply of food and livestock, farm implements, and simple household furniture.<sup>148</sup> The reconstruction plan, however, was more ambitious than a simple provision of goods. Hoover tried to end the dependence of the region on cotton and sugar by distributing soybean and other vegetable seeds, which he believed would "lift the entire region out of squalor."<sup>149</sup> The reconstruction effort was (in Hoover's view) not purely an act of charity. Rather, the project was, Hoover felt, "based on self-help, credit, employment and relief."<sup>150</sup> Hoover set up credit organizations to aid farmers in the flood regions. Largely by force of his own personality, Hoover was able to raise \$13 million in credit to be loaned out to farmers in the affected region; however,

143. L.C. Speers, *The Red Cross Takes Up a Titanic Task*, N.Y. TIMES, May 8, 1927, at 1; 1927 RED CROSS REPORT, *supra* note 124, at 38-44. See also DANIEL, *supra* note 126, at 91-104 (reporting on life in the refugee camps).

144. 1927 RED CROSS REPORT, *supra* note 124, at 45.

145. Also appointed to the committee was Secretary of Treasury Andrew Mellon, who in 1889 was a member of the South Fork Hunting and Fishing Club.

146. 1927 RED CROSS REPORT, *supra* note 124, at 25-26; BARRY, *supra* note 128, at 287-89, 374-75.

147. 1927 RED CROSS REPORT, *supra* note 124, at 61 ("The work of reconstruction was personally directed by Secretary Hoover and Vice Chairman Fieser.").

148. *Id.* at 59-60.

149. BARRY, *supra* note 128, at 365.

150. 1927 RED CROSS REPORT, *supra* note 124, at 60.

in the end, the lack of available collateral and the overall poverty in the region thwarted his efforts.<sup>151</sup>

While Hoover was campaigning for and implementing his rehabilitation program, many people called for President Coolidge to convene a special session of Congress to discuss the appropriation of federal relief funds for the flood victims. Newspapers throughout the country ran editorials pleading with the President to call on Congress to meet and provide relief<sup>152</sup>—a special session that would respond to the “grave crisis” facing victims.<sup>153</sup> Senator Robert M. La Follette, Jr. of Wisconsin referred to “many great disasters, not only in this country, but abroad, that have been the occasions for appropriations by Congress,” and called for immediate action.<sup>154</sup> President Coolidge resisted these calls; he insisted that Red Cross funds would be sufficient to care for the victims. In his annual message to Congress, the President made clear his opposition to federal relief to individual victims:

The Government is not an insurer of its citizens against the hazard of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave, which are all too constant in their afflictions. The Government does not undertake to reimburse its citizens for loss and damage incurred under such circumstances. It is chargeable, however, with the rebuilding of public works and the humanitarian duty of relieving its citizens of distress.<sup>155</sup>

Coolidge persisted in his refusal to call Congress together and to insist that relief was not an activity the federal government should carry out.<sup>156</sup> Eventually, calls for an extra session of Congress died down. By the time Congress reconvened in January 1928, the Red Cross rehabilitation project was well under way and the flood was no longer front-page news. The idea of federal relief quietly evaporated.

---

151. *Move To Restore Flooded Regions*, N.Y. TIMES, May 24, 1927, at 6; BARRY, *supra* note 128, at 365-69; DANIEL, *supra* note 126, at 133-37. See also Bruce A. Lohof, *Herbert Hoover, Spokesman of Humane Efficiency: The Mississippi Flood of 1927*, 22 AM. Q. 690 (1970), discussing Hoover's reconstruction plan and how it related to his overall political philosophy.

152. BARRY, *supra* note 128, at 372-75. A notable exception to this trend was the *New York Times*, which consistently applauded the President's refusal to reconvene Congress, agreeing that the Red Cross relief funds were sufficient to care for the victims. *Getting Ready for Congress*, N.Y. TIMES, June 2, 1927, at 24.

153. *Urge Extra Session for Flood Victims*, N.Y. TIMES, May 5, 1927, at 2; *Finds South Wants Congress Called*, N.Y. TIMES, May 13, 1927, at 9; *Calls on Coolidge for Flood Action*, N.Y. TIMES, May 19, 1927, at 10; *Ask Extra Session One Month Earlier*, N.Y. TIMES, May 21, 1927, at 20.

154. *Urge Extra Session for Flood Victims*, *supra* note 153, at 2.

155. 69 CONG. REC. 7126 (1928).

156. *Coolidge Orders Mississippi Survey*, N.Y. TIMES, May 4, 1927, at 1; *Coolidge Won't Call Congress for Flood*, N.Y. TIMES, May 18, 1927, at 2.



But both Coolidge and Congress were ready to take far broader action—though of a different nature.

Throughout 1927, along with calls for federal relief funds for flood victims, there were calls for federal flood control measures on the Mississippi and its tributaries. There seemed to be a growing national consensus that flooding on the river was a national problem and that the federal government should assume control of flood control projects.<sup>157</sup> As Senator James E. Watson asked rhetorically, "If thirty-one states drain into the Mississippi and if more than 600,000 of our own people in these great river States are rendered homeless and destitute by the flood, due largely to that cause, does not that make it a national problem?"<sup>158</sup> Even Hoover, known for his advocacy of rugged individualism, supported a federal flood control program, coming up with his own plan that would cost Congress \$15 to \$20 million a year for ten years.<sup>159</sup>

Despite the consensus that something had to be done, questions remained about the relative roles of the national and local government.<sup>160</sup> President Coolidge promised to oppose any legislation that did not require state and local governments to match federal contributions.<sup>161</sup> Coolidge was worried about the federal budget; he told Congress that the federal government "should bear the portion of the cost of engineering structures for flood control that is justified by the national aspects of the problem and the national benefits."<sup>162</sup> The states, however, "should share with the Federal Government the burden of assisting the levee districts and individual property owners, especially in view of the fact that the States benefit directly by the increased taxes from land made more valuable by reason of its protection."<sup>163</sup> It would be "revolutionary" and "unwise" for the federal government to assume all the costs of the program.<sup>164</sup> Yet much of the flooded region was poor and devastated; making matching contributions would

---

157. See *Congress To Act on Flood Perils*, N.Y. TIMES, May 1, 1927, § 9, at 13; *Urge Coolidge Call for Flood Parley*, N.Y. TIMES, June 5, 1927, at 24; *Hoover Flood Plan Asks \$200,000,000*, N.Y. TIMES, June 21, 1927, at 1; BARRY, *supra* note 5, at 399.

158. *Urge Coolidge Call for Flood Parley*, N.Y. TIMES, June 5, 1927, at 24.

159. *Mr. Hoover's Plans For Flood Control*, LITERARY DIG., Aug. 6, 1927, at 10; *Hoover Flood Plan Asks \$200,000,000*, N.Y. TIMES, June 21, 1927, at 1.

160. In Congress, there was also debate and controversy about the extent to which a possible federal program would cover tributaries of the Mississippi and other rivers prone to flooding. See, e.g., 69 CONG. REC. 5485-91(1928).

161. *Holds Flood Bill Is 'Log Rolling'*, N.Y. TIMES, Apr. 11, 1928, at 11; *Coolidge Takes Up Flood Bill Changes*, N.Y. TIMES, Apr. 20, 1928, at 25.

162. 69 CONG. REC. 7126 (1928).

163. *Id.*

164. *Id.*

hit these areas hard. And a flood control system is only as good as its weakest link.

After some debate, a compromise was finally reached. State and local governments would get credit for past expenditures on flood control, estimated at \$300 million. This would be counted as their share of the cost.<sup>165</sup> On May 15, 1928, President Coolidge signed the Jones-Reid Flood Control Act, which provided \$325 million for the construction of a national flood control program on the lower Mississippi.<sup>166</sup> Upon its passage, Congressman Frank Reid declared it “the greatest piece of legislation ever enacted by Congress.”<sup>167</sup> Although nothing in the Flood Control Act provided any money for victims, it was nonetheless an unprecedented federal response to a natural disaster. Even before the bill passed, it was thought that three hundred million dollars was a low estimate of the real cost. Many people believed the final costs would be as much as \$1 billion.<sup>168</sup> In the opinion of some, the law “set a precedent of direct, comprehensive, and vastly expanded federal involvement in local affairs,” and perhaps even a “major shift in what Americans considered the proper role and obligations of national government.”<sup>169</sup>

Flood control looks to the future; compensation to victims looks to the past. As in the other cases, private charity bore the main burden of relief. Race and class were important factors in the relief effort. Blacks were victimized by the flood, and also by the white establishment, which forced many black men to labor on levees under a system that came suspiciously close to slavery.<sup>170</sup> It is significant in the flood story that there were also calls for direct federal intervention. A very conservative President helped block any such moves. Unlike other disasters, the sheer scale of this one, geographically speaking, made it national in a way that, say, the Johnstown flood was not. A flood is, of course, an “act of God” and obviously nobody sues God. But there was no shortage of people and institutions to blame, if that had been the tenor of the times. The immediate cause of the disaster, for example, was not the heavy rains or the flood stage of the river, but the failure of man-made levees.

---

165. 69 CONG. REC. 5486 (1928) (statements of Senators Simeon D. Fess and Wesley L. Jones).

166. Jones-Reid Flood Control Act, S. 3740, 70th Cong. (1928).

167. BARRY, *supra* note 128, at 406.

168. L.C. Speers, *Flood Control Nears Crucial Test*, N.Y. TIMES, Apr. 29, 1928, at 4.

169. BARRY, *supra* note 128, at 407.

170. *Id.*

## VI. THE COCOANUT GROVE FIRE

The Cocoanut Grove was a popular Boston nightclub during the 1930s and 40s. It was owned, first by Charles "King" Solomon, a member of the mob, in the early 1930s, and then by his attorney, Barney Welansky, after Solomon died in 1933. When Prohibition ended, and later during World War II, Cocoanut Grove became one of the most notable nightspots in Boston. Well-known show-business people performed there; and the master of ceremonies, Mickey Alpert, and his band, became stars.<sup>171</sup> During the war, scores of servicemen flocked to the nightclub, along with many college students. In the late 1930s and early 1940s, the club expanded; it became a maze of bars and dance floors. The main entrance on Piedmont Street led into a lobby, beyond which was the "swank" main dining room.<sup>172</sup> This main room featured, in addition to a dining area, a bandstand and large dance floor, a bar, and a small VIP section known as the Terrace overlooking the dance floor. Surrounding the dance floor were large imitation palm trees, which gave the club its South Seas atmosphere (hence the name, Cocoanut Grove). Directly underneath the main dining room, the basement had been converted into what was called the Melody Lounge, a dimly lit piano lounge next to the kitchen. On the main level, directly behind the band stage, another bar had recently been added, known as the "New Cocoanut Grove Lounge."<sup>173</sup>

The Cocoanut Grove fire broke out on the night of November 28, 1942. The club was as full as it had ever been that night, with fans from a football game between Holy Cross and Boston College joining the usual crowds.<sup>174</sup> Although the official capacity was only 600, there were more than 1,000 people in the club that night. The fire began downstairs in the Melody Lounge when a sixteen-year-old bus boy, Stanley Tomaszewski, lit a match in order to replace a light bulb in the dimly lit bar. The match set fire to one of the highly flammable artificial palm trees. The fire spread quickly throughout the lounge and, within a few minutes, it had spread to the main dining room upstairs.<sup>175</sup> With screams of "fire," the large crowd broke into panic. Some peo-

---

171. EDWARD KEYES, *COCOANUT GROVE* 181-88 (1984). Very little has been written about the Cocoanut Grove fire. Much of the following narrative has been derived from Keyes' account, as well as that of Paul Benzaquin, which seem to be the only existing historical accounts. PAUL BENZAQUIN, *HOLOCAUST!* (1959).

172. KEYES, *supra* note 171, at 18-19. Both Keyes' and Benzaquin's narratives include layouts of the club's interior.

173. *Id.*

174. *300 Killed by Fire, Smoke and Panic in Boston Resort*, N.Y. TIMES, Nov. 29, 1942, at 1.

175. *Id.* at 35; Meyer Berger, *Throng Seared by Flame in Spread of 15 Seconds*, N.Y. TIMES, Nov. 30, 1942, at 1.

ple in the Melody Lounge found a concealed door that led to the kitchen; from there, a number of them were able to make it upstairs to the main dining room. As the fire reached the main floor, there was total pandemonium. Throngs of people rushed to the main entrance, a revolving door. The wine steward attempted to uncouple the cables on the revolving door, but the crush of people prevented this.<sup>176</sup> Other doors leading out of the main dining room were concealed or locked. From the "New Coconut Grove Lounge," located behind the main dining room, patrons rushed to escape through a door that led to a small vestibule and then to the street. Unfortunately, this door, although unlocked, opened inward; only a few people were able to get through before the mob pressed it shut. In all, the fire claimed 492 lives, with bodies piled up against the revolving and inward-opening doors, hundreds of people who had been trapped by their own desire to escape.<sup>177</sup>

On Sunday morning, the Fire Commissioner, William Reilly, began an investigation into the cause of the fire. The Commissioner held public hearings that week; victims testified about the lack of exits from the building and the general panic that accompanied the fire.<sup>178</sup> Stanley Tomaszewski, the bus boy whose match started the fire, was also called to testify, which he did with amazing candor.<sup>179</sup> The public hearings lasted through December. There was much evidence given about the fire, and the nightclub's operations in general. Some of this evidence bore on official negligence. Lieutenant Frank Linney, of the Fire Prevention Division of the fire department, was called to the stand; he had inspected the nightclub just eight days before the fire.<sup>180</sup> Linney defended his report, which declared the club in "good" condition with a "sufficient number of exits" and extinguishers.<sup>181</sup>

At the hearings, too, there were suggestions that the owner, Barney Welansky, had used his political influence and his ties with organized crime to get special favors for the club from public officials.<sup>182</sup> Police captain Joseph Buccigross had been at the club, in street clothes, the night of the fire. He had escaped. There were rumors of police impropriety.<sup>183</sup> Henry Weene, an electrician who had done work at the

---

176. BENZAQUIN, *supra* note 171, at 40-41.

177. *Catastrophe: Boston's Worst*, TIME, Dec. 7, 1942, at 26.

178. BENZAQUIN, *supra* note 171, at 187; KEYES, *supra* note 171, at 165-67; Frank S. Adams, *Fire Deaths at 487; Grand Jury To Act*, N.Y. TIMES, Dec. 1, 1942, at 1.

179. KEYES, *supra* note 171, at 167-68; Adams, *supra* note 178.

180. BENZAQUIN, *supra* note 171, at 187-90; KEYES, *supra* note 171, at 146-47.

181. BENZAQUIN, *supra* note 171, at 188-90; KEYES, *supra* note 171, at 146-47.

182. BENZAQUIN, *supra* note 171, at 203; KEYES, *supra* note 171, at 144-45

183. BENZAQUIN, *supra* note 171, at 192-93.

club, told a disturbing story. He had suggested to Welansky that they needed a permit for the job. Welansky supposedly replied, "You won't have to get a permit because [Mayor] Tobin and I fit. They owe me plenty down there."<sup>184</sup>

As always after great disasters, there was considerable public outrage. The stories of people trapped by revolving doors, and the gruesome fate of the burn victims, made this almost inevitable.<sup>185</sup> There was a demand to do something about the city officials who had allowed the tragedy to happen.<sup>186</sup> In an editorial just a few days after the disaster, the *New York Times* declared that the blame rested not on the bus boy whose match lit the fire, but rather "on the proprietors of the establishment and on the city officials of Boston."<sup>187</sup>

The Massachusetts Attorney General and the local District Attorney began their own joint inquiry into possible criminal negligence a week following the fire. In the meantime, the Governor ordered the suspension of all entertainment licenses in Boston pending inspection of premises by the Fire and Building Departments.<sup>188</sup> The investigation soon began to center on city officials who were responsible for ensuring that the night club was up to code, as well as on Barney Welansky, who had apparently used his political influence to avoid compliance with safety laws. The Attorney General and District Attorney convened a grand jury on December 7. The grand jury returned indictments against ten people on December 31, 1942, barely a month after the fatal fire took place: Barney Welansky; his brother James Welansky, who was running the club at the time of the fire (Barney was recovering from a heart attack); and Jacob Goldfine, the wine steward who had tried to uncouple the revolving door, were charged with thirty-two counts of manslaughter.<sup>189</sup> Four city officials were indicted for neglect of duty: Building Commissioner James Mooney, Building Inspector Theodore Eldracher, Fire Lieutenant Frank Linney, and Police Captain Joseph Buccigross.<sup>190</sup> Finally, five men were charged with "conspiracy to violate the building laws": Barney and

---

184. *Id.* at 201; *Says Club Operator Boasted of Influence*, N.Y. TIMES, Dec. 9, 1942, at 12.

185. *Victims Describe Fire Horror Scene*, N.Y. TIMES, Nov. 30, 1942, at 1.

186. BENZAQUIN, *supra* note 171, at 203; KEYES, *supra* note 171, at 144-45.

187. *It Needn't Have Happened*, N.Y. TIMES, Dec. 1, 1942, at 24.

188. Frank S. Adams, *Boston Shuts Clubs and Begins Inquiry*, N.Y. TIMES, Dec. 2, 1942, at 52.

189. BENZAQUIN, *supra* note 171, at 206-07; KEYES, *supra* note 171, at 204-05; *Ten Are Indicted in Night Club Fire*, N.Y. TIMES, Jan. 1, 1943, at 1.

190. BENZAQUIN, *supra* note 171, at 206; KEYES, *supra* note 171, at 204-05.

James Welansky, architect Reuben Bodenhorn, contractor Samuel Rudnick, and his foreman David Gilbert.<sup>191</sup>

The manslaughter trial against the Welansky brothers and the steward Goldfine began on March 15, 1943. The trial lasted about a month, during which the state accused the defendants of wanton and reckless operation of the club through the installation of defective wiring and flammable decorations, the absence of fire doors and sufficient exits, and overcrowding.<sup>192</sup> On April 11, the jury acquitted James Welansky and Jack Goldfine of all counts.<sup>193</sup> Barney Welansky, however, was found guilty of nineteen counts of manslaughter and sentenced to twelve to fifteen years' imprisonment.<sup>194</sup> Welansky later appealed that decision on the grounds that he had not been present at the club the night of the fire; in fact, he had not been there for at least two weeks because of his heart attack.<sup>195</sup> The court upheld the conviction, holding that, as the owner of the club, Welansky had a duty of care and that, in failing to exercise that duty, he had exhibited a "wanton" and "reckless failure to care for the safety of patrons."<sup>196</sup>

The second trial for conspiracy to violate building laws resulted in a single guilty verdict against Samuel Rudnick, the building contractor for the Coconut Grove. Rudnick was sentenced to a two-year prison term, but appealed immediately, arguing that one person alone cannot be guilty of conspiracy.<sup>197</sup> The verdict was upheld on appeal on the grounds that Rudnick was found guilty of conspiring with Welansky, though not with his codefendants (Welansky, however, had not been charged with conspiracy).<sup>198</sup>

The courts proved much kinder to the city officials charged with negligence as a result of the fire. Fire Lieutenant Linney went on trial in November 1943, charged with willful neglect for pronouncing the nightclub in "good" condition in his inspection just eight days before the fire.<sup>199</sup> Linney was acquitted of the charges.<sup>200</sup> The charges

---

191. BENZAQUIN, *supra* note 171, at 205-07; *Ten Are Indicted in Night Club Fire*, *supra* note 189.

192. *Commonwealth v. Welansky*, 55 N.E.2d 902, 907 (Mass. App. Ct. 1944).

193. BENZAQUIN, *supra* note 171, at 210; KEYES, *supra* note 171, at 242.

194. BENZAQUIN, *supra* note 171, at 208-09; KEYES, *supra* note 171, at 230; *Night Club Owner Guilty in Boston*, N.Y. TIMES, Apr. 11, 1943, at 28; *Gets 12 to 15 Years in Night Club Deaths*, N.Y. TIMES, Apr. 16, 1943, at 23.

195. *Welansky*, 55 N.E.2d at 908.

196. *Id.* at 912.

197. *Commonwealth v. Rudnick*, 60 N.E.2d 353 (Mass. App. Ct. 1945); *Guilty in Night Club Fire*, N.Y. TIMES, July 24, 1943, at 15.

198. *Rudnick*, 60 N.E.2d at 355.

199. BENZAQUIN, *supra* note 171, at 210; KEYES, *supra* note 171, at 242.

against Building Commissioner Mooney and Police Captain Bucigross were dropped with little fanfare in 1944.<sup>201</sup>

As for reparations, in the first few months after the fire, more than 500 claims were filed for over \$8 million in damages.<sup>202</sup> These claims went nowhere, however, because the club was not legally required to carry liability insurance on its patrons. Furthermore, the total amount of fire insurance on the building came to a paltry \$22,000.<sup>203</sup> The Grove's precarious financial situation frustrated any potential civil suits. Moreover, Welansky was indicted by a federal grand jury for evasion of federal income and profit taxes, an action that threatened to wipe out any potential recovery.<sup>204</sup>

In the face of this financial mess, the court appointed two attorneys to act as receiver and trustee of the Cocoanut Grove and to handle possible reparations.<sup>205</sup> Although initial claims amounted to over \$8 million, by 1945 there were only about \$200,000 left in assets from the club to be divided among the 500 claimants, and much of this money was tied up in tax liens against Welansky.<sup>206</sup> The attorneys finally were able to negotiate a settlement with the Treasury department, and eventually, each claimant received about \$160.<sup>207</sup>

It is not clear whether the victims got anything more. One source claims that "private insurance firms paid" about two million dollars to beneficiaries of Grove victims, in addition to \$80,000 in fire insurance on the Grove and its contents.<sup>208</sup> But this could not be confirmed, and the financial troubles of the nightclub would seem to have been a major obstacle to recovery.<sup>209</sup>

The Cocoanut Grove tragedy came at a time when the "liability explosion" was just getting underway. The urge to pin the blame on somebody, however, manifested itself chiefly in the criminal charges that were brought. The victims and their families apparently got little or nothing by way of compensation. Even the criminal trials were, for the most part, failures.

---

200. BENZAQUIN, *supra* note 171, at 210; KEYES, *supra* note 171, at 242; *Fire Officer Not Guilty*, N.Y. TIMES, Nov. 5, 1943, at 21.

201. BENZAQUIN, *supra* note 171, at 210-11; KEYES, *supra* note 171, at 242-43.

202. KEYES, *supra* note 171, at 212.

203. *Id.* at 254-55.

204. *Welansky v. Commissioner*, 15 T.C.M. (P-H) 46, 186 (1946).

205. KEYES, *supra* note 171, at 254.

206. *Id.* at 254-55.

207. *Id.* at 255.

208. BENZAQUIN, *supra* note 171, at 230.

209. *Id.* at 197-98.

## VII. THE TEXAS CITY DISASTER OF 1947

On April 16, 1947, the French freighter S.S. *Grandchamp* exploded in the port of Texas City. The ship was being loaded with ammonium nitrate fertilizer. The fertilizer had been manufactured in a government plant and was being sent to France as part of the post-war aid program. The explosion was so powerful that it registered on seismographs 900 miles away in Denver.<sup>210</sup> It set off a fire that led to the explosion of another ship shortly afterwards; and it ignited the nearby Monsanto petrochemical plant. The town of Texas City was decimated. Nearly 600 people died, and 3,500 were injured.

The victims filed hundreds of lawsuits against the United States government under the recently passed Federal Tort Claims Act.<sup>211</sup> Beginning in April 1948, 273 suits were brought by 8,485 victims. Of these, there were 1,510 death claims, 988 claims for personal injury, and an additional 5,987 claims for property damage.<sup>212</sup> These claims were consolidated into a single test case examining the possible liability of the federal government for losses in this disaster.<sup>213</sup>

The plaintiffs charged that the government had been negligent in manufacturing, shipping, handling, and labeling the ammonium nitrate fertilizer. The fertilizer, they claimed, was known to be highly explosive and very dangerous, and was shipped without labels identifying it as such.<sup>214</sup> Two years later, after a long trial (the transcript ran to some thirty-nine volumes and nearly 20,000 pages), the district court judge found in favor of the plaintiffs.<sup>215</sup> In his findings of fact, the judge held that “[the federal government], its servants, agents, and employees were fully aware that such Fertilizer was a fire hazard and an inherently dangerous explosive, and Defendant was guilty of negligence . . . [which was] a proximate cause of the fire and explosions and the injuries of which Plaintiffs complain.”<sup>216</sup> The court awarded \$75,000 to the surviving wife and son of Henry Dalehite, a sea captain

---

210. BILL MINUTAGLIO, *CITY ON FIRE: THE FORGOTTEN DISASTER THAT DEVASTATED A TOWN AND IGNITED A LANDMARK LEGAL BATTLE* 110-11 (2003). For more on the disaster and the Red Cross relief effort, see AM. NAT’L RED CROSS, *TEXAS CITY EXPLOSION, APRIL 16, 1947: OFFICIAL REPORT OF RELIEF OPERATIONS* (1948).

211. 28 U.S.C. §§ 1346(b), 2671-2680 (1946).

212. *In re Tex. City Disaster Litig.*, 197 F.2d 771, 772 (5th Cir. 1952). See MINUTAGLIO, *supra* note 210, at 224-57, for a general outline of the litigation from beginning to end.

213. *In re Tex. City Disaster Litig.*, 197 F.2d at 772.

214. *Id.* at 772-73.

215. *Texas City Disaster: Hearings on H.R. 296 Before a Spec. Subcomm. of the House Judiciary Comm.*, 83d Cong. 248-76 (1954).

216. This statement summarized the findings of fact and conclusions of law of the district court judge in *Dalehite v. United States*, 346 U.S. 15 (1953). *Id.* at 248-76 [hereinafter *1954 House Judiciary Hearings*].



who perished in the explosion.<sup>217</sup> This amount was based on his expected future earnings.<sup>218</sup>

The ruling was immediately appealed and two years later, in June 1952, the United States Court of Appeals for the Fifth Circuit reversed the decision. The court held that the suit did not fall within the scope of the Federal Tort Claims Act.<sup>219</sup> The court interpreted the new act very narrowly; under it, the court said the government could not be held liable for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not" that discretion has been abused.<sup>220</sup> In its opinion, the appellate court said the decision to use and ship the explosive fertilizer was a "calculated risk" within the discretion of the government.<sup>221</sup> A year later, the United States Supreme Court upheld the Fifth Circuit's narrow construction of the FTCA in a "controversial"<sup>222</sup> four to three decision.<sup>223</sup>

After the Supreme Court decision, U.S. Congressman Clark Thompson, who represented Texas City and the surrounding area, sponsored a resolution that would set up a special subcommittee to "make a full and complete investigation and study of the merits of the claims against the United States for compensation for property damages, personal injuries, and death alleged to have been caused by the explosions in Texas City."<sup>224</sup> Interestingly, the subcommittee went to special lengths to disclaim any intention of challenging the legality of the "controversial opinion" of the Supreme Court, although there was much discussion on that very point.<sup>225</sup> In fact, Congress seemed clearly uncomfortable with the decision, and the holding of the Supreme Court seems to have been one major reason why Congress was willing to consider granting direct aid to the victims. Both the House and the Senate took up various proposals for victim compensation

---

217. *Id.* at 269.

218. *Id.* at 268.

219. *In re Tex. City Disaster Litig.*, 197 F.2d at 781.

220. *Id.* at 778.

221. *Id.*

222. 1954 *House Judiciary Hearings*, *supra* note 216, at 2.

223. *Dalehite v. United States*, 346 U.S. 15 (1953). Two Justices, Douglas and Clark, took no part in the case for undisclosed reasons.

224. 1954 *House Judiciary Hearings*, *supra* note 216, at 2-5; *see also* MINUTAGLIO, *supra* note 210, at 258-62 (detailing plaintiff's attorney, Russell Markwell's, efforts promoting relief legislation).

225. *See, e.g.*, 1954 *House Judiciary Hearings*, *supra* note 216 at 7-16; *Texas City Disaster: Hearings on H.R. 9785 Before a Spec. Subcomm. of the Senate Comm. On the Judiciary*, 83d Cong. 12-27 (1954) [hereinafter 1954 *Senate Judiciary Hearings*].

over the next two years. During the debates and subcommittee meetings, much was made of the fact that the fertilizer that caused the explosion in Texas City was being shipped to France as part of a program to assist that nation in its post-war redevelopment.<sup>226</sup> Senator Marion Daniel described it as "an ironical situation if we cannot grant relief to those American citizens who were injured and damaged, and their families killed, by reason of the humanitarian act that we were trying to perform for foreign citizens."<sup>227</sup> It was also suggested that Congress would have been quick to offer disaster relief, if the disaster had happened overseas.<sup>228</sup>

On August 12, 1955, President Dwight D. Eisenhower signed the Texas City Claims Act into law.<sup>229</sup> The Act directed the Secretary of the Army to investigate and settle all claims against the United States stemming from the explosion.<sup>230</sup> The Act set a cap of \$25,000 on all death, personal injury, and property claims.<sup>231</sup> Awards granted would be reduced by the amount of any insurance payments already received for the loss or injury, and the awards would not include any amount for reimbursement of insurance companies that had made payments on account of the disaster.<sup>232</sup> In addition, only those who had filed suit against the government prior to April 1950 were eligible for compensation.<sup>233</sup>

The Army reviewed and investigated claims in Texas City for the next two years. In all, 1,394 awards were made, and some \$17 million was paid out to victims of the explosion.<sup>234</sup> The average award came to \$12,195.21.<sup>235</sup>

### VIII. LIABILITY: NEW AND OLD

Tort law has had a tangled and complicated history, but the general line of development, with regard to rules of liability, is fairly clear.<sup>236</sup>

---

226. See, e.g., *Texas City Disaster: Hearings on S. 1077 Before a Spec. Subcomm. of the Senate Judiciary Comm.*, 84th Cong. 3, 96 (1955) [hereinafter *1955 Senate Judiciary Hearings*]; *1954 Senate Judiciary Hearings*, *supra* note 225, at 15.

227. *1954 Senate Judiciary Hearings*, *supra* note 225, at 61.

228. *1955 Senate Judiciary Hearings*, *supra* note 226, at 33-34; 101 CONG. REC. 12,470 (1955).

229. S. 1077, 84th Cong. (1955); 101 CONG. REC. 12,966 (1955).

230. *Texas City Claims Act: Hearings on H.R. 4045 Before a Spec. Subcomm. of the House Judiciary Comm.*, 84th Cong. 241-42 (1956).

231. *Id.*

232. *Id.*

233. *Id.*

234. MINUTAGLIO, *supra* note 210, at 264.

235. *Id.*

236. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 229-302, 467-87 (2d ed., 1985).

The nineteenth century rules of tort law were, in general, rules that limited liability. They were rules about fault, cause, contributory negligence, assumption of risk, and so on. They were rules that tried to put a cap on tort liability, not monetarily, but in terms of type-situations. Some scholars argue that the rules were deliberately framed to help business in a time of rapid development. Others are not so sure. The trend of decisions and doctrines seems to have tilted consistently in favor of enterprise; and this can hardly be dismissed as a coincidence. Underlying the rules, however, was a definite ideology—a way of looking at the world. And the world was, after all, a dangerous, crafty, and unpredictable place. In such a world, accidents happen; they happen all the time; they are an inevitable part of life, and basically nobody is to blame.

These rules applied mostly to “ordinary” accidents. The story of their decline and fall is a familiar one, and it belongs largely to the twentieth century. It is the story of the so-called “liability explosion.”<sup>237</sup> Extraordinary accidents—disasters—are another matter. Here there seems to be a crucial distinction between those disasters that are the result of “natural” causes and those for which somebody was responsible—or was arguably responsible. With regard to these, there was, and continued to be, a strong punitive element in the legal and social reaction. Criminal justice was a key player. The stories told here are typical in that regard: there was often a search for some evil, grasping, careless men, whose callous behavior lay at the root of the disaster. In cases where nobody could be blamed—where the event was an “act of God”—perhaps yet another distinction might be made. In some cases, which we might call “pure” acts of God, there was a long tradition of federal disaster relief—a rather surprising and buried history that Michele Landis Dauber has rediscovered.<sup>238</sup> There are many state instances, too, dating quite far back—relief for Kansas farmers, for example, suffering from drought or from locusts.<sup>239</sup>

In other situations, in which the disaster was an act of God, but human agency could have mitigated it or could prevent future occurrences, the policy of choice was to search for ways to avoid future harm. We used flood control as an example. There are other examples, such as reform of zoning or architectural rules after major earthquakes. Or there can be a combination of a search for scapegoats, and

---

237. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 349-76 (2002).

238. Michele L. Landis, *Fate, Responsibility, and 'Natural' Disaster Relief: Narrating the American Welfare State*, 33 *LAW & SOC'Y REV.* 255 (1999).

239. GRACE A. BROWNING, *THE DEVELOPMENT OF POOR RELIEF LEGISLATION IN KANSAS* 77-81 (1935).

a search for structures to reduce danger of recurrence: mine inspection laws and fire and factory reform. Until quite recently, what did *not* follow these blamable disasters, curiously enough, was a torrent of (successful) law suits. Disasters had the unfortunate tendency to bankrupt the guilty and leave the innocent high and dry. Disasters gave rise, not to individual claims, either against the state or against particular wrongdoers, but to collective claims—claims for prevention or reform. Relief was not ignored but it was primarily the responsibility of private charity.

Disasters of all sorts, however, have not been immune from the ethos of total justice. As was true of tort law generally, reactions to disaster underwent change in the late twentieth century. The Texas City disaster was, perhaps, a straw in the wind. There was a demand—and a successful one—for *government* compensation. Federal disaster relief, as we said, has a much longer tradition that has been usually recognized.<sup>240</sup> And such relief is now taken for granted—for floods, earthquakes, tornados, and the like. Since 1970, there has been a federal disaster relief law; and since 1978, a government agency, the Federal Emergency Management Agency (FEMA), which administers the program.

“Compensation” is a general term. There are all sorts of compensation. Victims can receive, for example, a flat sum; or the amount paid out can vary greatly. In theory, if a person is injured in an accident, recovery could depend entirely on the physical harm the person suffered—the costs of medical care, the pain and suffering. In practice, there is another variable: the person’s earning power. This last aspect means that a rich, young person would collect more than a poor, old person. Damages are supposed to return the victim to the status the victim had before the accident. Status refers not only to health and the body, but to position in society. This last aspect of damages is secondary in many cases of, say, medical malpractice; but it is primary in disaster relief. It was also primary in many relief aspects of the New Deal. Quite a few New Deal programs were designed for what one might call the submerged middle class. In the Work’s Progress Administration (WPA) program, for example, writers were put to work writing, and painters were given jobs painting. A destitute writer was treated differently, in other words, from a destitute ditch-digger. In dealing with programs that shovel out money to victims, it

---

240. See Michele L. Landis, *Let Me Next Time Be Tried by Fire: Disaster Relief and the Origins of the American Welfare State: 1789-1874*, 92 *Nw. U. L. Rev.* 967 (1998).

is important to distinguish between these two aspects of compensation.

#### IX. SEPTEMBER 11, 2001

The disaster of September 11th was, of course, a severe shock to the country; it dominated the press and the media for weeks. Over and over again, millions of people watched the graphic images of death and destruction so prominently displayed on television. In short order, Congress passed laws that provided for compensation to individual victims. The Air Transportation Safety and System Stabilization Act of 2001 set up a program to pay money to victims of September 11th; it created a federal cause of action for damages and made this cause of action the exclusive remedy for loss arising out of the incident.<sup>241</sup> Other laws dealt with tax relief and unemployment compensation.

It is often said that the reaction to September 11th was unprecedented; that the programs enacted were a sharp break with tradition and experience. It is far from clear that this is the case. Of course, the aim of the compensation laws, in part, was to insulate the airlines and other possible defendants from *private* lawsuits. Federalizing claims was thus a two-edged sword. It provided a fund but cut off alternative routes to compensation. In this sense, the program was broadly continuous with past experience: as in other disasters, there was to be little or no room for individual lawsuits against wrongdoers, or against people and companies whose alleged negligence might have contributed to the disaster. Massive lawsuits against the two airlines, or against the owners of the World Trade Center, were to be precluded. Certainly, a good tort lawyer could have argued that the airlines had lax security measures, or that the buildings were improperly designed, or that they had architectural or engineering flaws. Why else did they crumble into dust?

One big difference between the reaction to September 11th and some of the response to disasters of the past was that the government itself undertook to do the compensating instead of leaving it to private charities or insurance. Not that private charities were excluded; in fact, there was a tremendous outpouring of private donation, so big that it threatened to overwhelm some of the agencies that received it.<sup>242</sup> The move to federalization was foreshadowed, of course, in the

---

241. The Air Transportation Safety and System Stabilization Act, Pub.L. No. 107-42, 115 Stat 230 (2001).

242. Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251 (2003).

Texas City disaster. After September 11th, the federal government was anxious to show how seriously it took the events of the day; the government declared a “war” on terrorism and took steps to prosecute this “war.” It was an occasion, or an excuse, for a huge increase in the state security apparatus, and (not insignificantly) a political windfall for the government.

The public accepted the concept of a “war on terrorism” for all sorts of reasons. But the public also expected some sort of compensation scheme—and not only for the victims. Billions were at least promised for New York. As far as the victims were concerned, because other avenues were shut off, some sort of plan to pay victims was probably a political necessity. In the age of the ideology of total justice, this is only to be expected.

But this is not only the age of total justice; it is also the age of the imperial presidency. And the age (not coincidentally) of television. Power, and responsibility, have gravitated to Washington. The whole country watched September 11th on TV. It was therefore a *national* event; and a national event invokes the national cast of characters—the President, above all—and a national program of action. This is also the age of FEMA; and FEMA fits in neatly with contemporary legal culture. FEMA is an expression of the ideology of total justice. It is also a *federal* program, in a period when the President appears every night on TV, and in which Washington dominates prime time news. The reaction to September 11th is, thus, both continuous and discontinuous. The events are new, and hence, the reactions; but they grow out of trends and social forces that had been germinating in the national soil for decades.

