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WHAT DOES JUSTICE REQUIRE FOR THE VICTIMS OF KATRINA AND SEPTEMBER 11?

*John G. Culhane**

I. INTRODUCTION

What do we owe the victims of misfortune? Perhaps because the question seems too difficult to answer when asked so generally, most discussions concerning the obligation to assist such victims focus on specific events (such as terrorism, crime, or natural disasters)¹ or more narrowly defined social problems (such as lack of access to health care and insurance).² Thus, the responses are similarly constrained and often fail to take account of broader issues of overall fairness.

Although this impulse is understandable and perhaps even politically necessary, we should not settle for the results of such a “practical” approach. In earlier works, I have argued for separating the harms caused by social risks—those borne by everyone in a society, such as terrorism³ and contagious diseases—from harms resulting from

* Professor of Law, Widener University School of Law; Lecturer, Yale University School of Public Health. Thanks, as always, to Jean Eggen; this time for her insights on the immunity issues, among other things. I would also like to thank Michele Goodwin for organizing the symposium that produced this paper, and for inviting me to participate. Janine Hochberg’s research effort was outstanding, both substantively and in terms of sheer speed. This article would have been much the poorer without her. Thanks to David Girasole for his patience and support. This article was supported by a research grant from Widener University School of Law, for which I also give thanks.

¹ For example, many articles and symposia have been dedicated to analyzing the events of September 11 and our obligation to compensate its victims. *See, e.g.*, Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205-830 (2003); Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573 (2001).

² *See, e.g.*, BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 473-475 (5th ed. 2004) (succinctly defining the problem and providing useful list of sources further discussing the issue).

³ One might question the conclusion that terrorism is a social risk, because the terrorists themselves are of course culpable actors of the worst sort. And if these terrorists had survived and could be made to pay, full compensation would indeed be appropriate. Calling terrorism a “social risk” is a way of highlighting the public safety and health issue that it presents, because even a fully competent government cannot prevent all terrorist attacks any more than it can, even if vigilant, stop the spread of infectious diseases. On the ineffectiveness of suits against foreign governments that sponsor terrorism, *see generally* Jennifer Elise Plaster, *Cold Comfort and a Paper*

what might broadly be called wrongful conduct.⁴ Such separation is necessary because justice imposes different requirements on compensation in the two cases. Inasmuch as social risks are those shared by all, compensating those who suffer harm from them is constrained by the requirements of distributive justice, which mandates that the needs and resources of the entire society be taken into account. On the other hand, when injury is caused by a private actor's fault-based conduct, the person harmed can call upon the full resources of the culpable party for compensation.

A particularly dramatic example of what can happen when this division is insufficiently respected is the September 11 Victim Compensation Fund.⁵ Driven by the need to do something for those whose family members were killed by the tragic events of that day, Congress compensated those afflicted by the terrorist attacks almost as fully as though it was compensating tort victims.⁶ Payouts to aggrieved families went as high as \$7 million,⁷ and the overall cost to taxpayers—because the “fund” was such in name only—was just over \$7 billion.⁸ Singling out this class of victims for tort-like compensation served no principle of distributional fairness.

Hurricane Katrina and its aftermath stand in stark contrast. Although the hurricane itself was not a preventable event, the

Tiger: The (Un)Availability of Tort Compensation for Victims of International Terrorism, 82 WASH. U. L.Q. 533 (2004).

⁴ John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1027 (2003); John G. Culhane, *Sandbags Full of Money: Victim Compensation after 9/11*, DISSENT, Fall 2003, at 40.

⁵ The September 11th Victim Compensation Fund of 2001 is codified in Title IV of the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 401-409, 115 Stat. 230, 237-241 (codified at 49 U.S.C. § 40101).

⁶ As discussed in Part II., payments did not in fact reach those provided by tort law, but they were still far in excess of what might be justified under principles of distributive justice. See Culhane, *Two Kinds of Justice*, *supra* note 4, at 1039-43 (discussing payments under the Fund).

⁷ See September 11th Victim Compensation Fund of 2001, Compensation for Deceased Victims, available at http://www.usdoj.gov/archive/victimcompensation/payments_deceased.html (last visited Sept. 1, 2006) (illustrating that up to \$7.1 million was given to surviving family members). Personal injury awards went higher still; September 11th Victim Compensation Fund of 2001, Compensation for Personal Injury Victims, available at http://www.usdoj.gov/archive/victimcompensation/payments_injury.html (last visited Sept. 1, 2006) (showing awards up to \$8.6 million).

⁸ KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11 VICTIM COMPENSATION FUND OF 2001 109, available at http://www.usdoj.gov/final_report.pdf (last visited Sept. 1, 2006).

devastation of New Orleans could have been averted had government on all levels not failed miserably in a host of ways: construction and maintenance of the levee system;⁹ planning for evacuation;¹⁰ and communication and rapid-response efforts once evacuation became necessary.¹¹ Yet the federal government has come up with no compensation system on the order of the Victim Compensation Fund, even though the federal government's fault is clear and perhaps even conceded in this case.¹²

This Article explores the differences between our responses to Katrina and to the events of September 11, and makes the argument that Katrina victims have a much stronger claim to governmental compensation than did those affected by the events of September 11. Yet our national response is likely to remain unsatisfactory.

In Part II, I discuss the distinctions between corrective and distributive justice, arguing that the creation of the Victim Compensation Fund, for all of its admirable intentions, constituted a failure to appreciate those differences. The victims of September 11, as far as was known at the time the Fund was established, had no legitimate claim to generous government payouts.

But what of the victims of Katrina? The simplest conclusion here—that government, through its ineptitude, caused much unnecessary suffering and must therefore pay damages as would any defendant in a private suit (for tort)—is not necessarily the best one. Part III begins by making the case that the federal government was indeed negligent (or worse) in allowing Katrina to flood New Orleans. I then discuss both the practical and more theoretical implications of these findings for government's obligation to compensate. For even when government negligently performs a task that results in personal injury, death, or property damage, it *is* different from other actors. I

⁹ See *infra* Part III.A.

¹⁰ Congressional testimony, memoranda and e-mails released months after Katrina struck, and conflicting accounts offer a complex but undoubtedly dismal picture of the evacuation effort on all levels. See, e.g., Bill Walsh, *Panelists Assail gaps in Evacuation*, DAILY TIMES-PICAYUNE, Dec. 15, 2005, at 1; Joby Warrick et al., *Katrina Documents Released – Louisiana Governor Did Seek Help Early*, FORT WAYNE J. GAZETTE, Dec. 5, 2005, at A9; Spencer S. Hsu et al., *Documents Highlight Bush-Blanco Standoff*, WASH. POST, Dec. 5, 2005, at A10-11.

¹¹ See Hsu et al., *supra* note 10, at A10 (discussing this issue); Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at A1, A28 (discussing same).

¹² See *infra* Part III.A.

argue that those differences counsel caution in applying principles of tort law to government's actions.

Part IV picks up from this recognition of the limits of theorizing in these cases, and sketches out a program for dealing sympathetically and humanely with the Katrina victims while respecting the claims that others have on government funding. In this Part, I encourage a flexibility of response that works towards allowing the survivors to flourish, in the best sense of that word. One practical advantage of compensation over tort here is that compensation systems continue to attend to facts as they change; tort, by contrast, has done with the parties once the suit is over.¹³ So changing facts, post-judgment, seldom lead to changed outcomes. Plaintiffs are usually overcompensated or undercompensated when the injuries continue past trial. At least, then, government payouts should not provide funds for injuries not suffered, but may be justified in continuing for as long as necessary.

Part IV concludes by noting that political and practical difficulties combine with theoretical problems to make a tight fit between injury and payment unlikely. Therefore, planning and prevention assume heightened importance as ways of avoiding these problems in the first place. If Katrina's human cost leads to increased governmental accountability, perhaps that accountability will translate into greater efforts to avert tragedies like these in the first place. Events since Katrina, though, do not provide much cause for optimism.

¹³ The statement in the text is oversimplified, as recent developments in tort payment structures now sometimes mean that courts may continue to be involved in supervising, say, periodic payments. Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659, 672-73 (2003). But periodic payment statutes typically do not allow courts to revisit the underlying decision regarding the overall amount of money to be collected by the plaintiff. See, e.g., FLA. STAT. ANN. § 768.78 (2005); IDAHO CODE § 6-1602 (2004). Family law matters, such as custody, visitation, and support obligations, are among the examples of law's willingness to attend to changing facts. This Article suggests a similarly flexible approach to compensating (in the broadest sense of that term) the victims of Katrina.

II. TWO KINDS OF JUSTICE

Aristotle was the first to recognize that what is called “justice” is in reality two different concepts, each applicable to a different sphere.¹⁴ “Distributive justice” refers to the overall allocation of goods in a particular society, while the subject of “corrective justice” is the assignment of rights and liabilities among private persons. Each of these will be described briefly, in turn.

The work of distributive justice is done by government, which decides how much and to whom goods shall be allocated. However vast the overall resources of a society are, they are not limitless. Therefore, distributions of necessity involve proportion; more to some means less to others. But who is entitled to what? These decisions are matters of substantial and legitimate discussion and debate. Aristotle had this to say: “[E]veryone agrees that justice in distribution must be in accordance with some kind of merit, but not everyone means the same by merit....”¹⁵

Today, the nub of the debate might be captured by comparing libertarianism and social liberalism. While libertarians believe that well-functioning markets are the best determinants of overall wealth, social liberals favor a degree of “engineering” to ensure that all citizens share (to some unagreed-upon extent) the goods that society produces.¹⁶ Neutrality on this fundamental issue is impossible; letting the market “decide” on distributions is just as value-laden as making those decisions through government. Thus, government may decide that victims of terrorism, nuclear accident, or illness are entitled to compensation, but these decisions are in principle always subject to scrutiny for overall fairness. Because all distributions are potentially in play, good reasons are needed for compensating those who suffer misfortune.

The typical federal approach to disaster relief (leaving aside Katrina for the moment) provides a good model for imitation. Under

¹⁴ The concept of justice encompasses a wide area in ethics and political theory, including the notions of retributive justice (as a theory of punishment), social justice (concerning issues of access to historically disenfranchised groups such as racial and sexual minorities and women), and the two areas of justice with which this article is concerned: distributive and corrective justice.

¹⁵ ARISTOTLE, *NICHOMACHEAN ETHICS*, BOOK V 86 (Roger Crisp ed. & trans., Cambridge University Press 2000).

¹⁶ These points are discussed more fully in Culhane, *Two Kinds of Justice*, *supra* note 4, at 1064-68.

the Robert T. Stafford Disaster Relief and Emergency Assistance Act,¹⁷ once a “major disaster” has been declared, federal assistance (housing and cash grants) become available, but only for those needs the victims are unable to meet through other sources—including private insurance—and only to a modest extent.¹⁸ Thus, the government shows the compassion to provide a basic safety net but avoids creating incentives for people to under-insure and impliedly recognizes the claims that other needs have on the treasury. Of course, it is always debatable just how much compensation should be awarded to meet such basic needs. For example, although housing is a “basic need,” large estates are not replaced; housing grants are limited to \$26,200 dollars.¹⁹

The Victim Compensation Fund, by contrast, ignored these overall distributional issues, instead treating the victims much as though they were successful tort plaintiffs (i.e., granting full recovery for economic loss). In addition to being unprecedented in their generosity, Fund payments did not count charitable compensation against recovery. Further, the legislation creating the Fund provided no upper limit on recovery. In practice, the awards were at least somewhat less inequitable. First, the Fund *did* count private insurance payments against recovery.²⁰ More centrally for present purposes, the Fund’s Special Master charged with implementation of the payouts simply decided to impose a *de facto* cap on payments; although the higher-end

¹⁷ 42 U.S.C. §§ 5121-5206 (2006).

¹⁸ *Id.* § 5133.

¹⁹ See Fed. Emergency Mgmt. Agency, Release HQ-05-236, *Nearly \$690 Million in Assistance Helping More Than 330,000 Families Displaced by Katrina*, Sept. 10, 2005, available at <http://www.fema.gov/news/newsrelease.fema?id=18765> (last visited Sept. 6, 2006). This amount “includes the \$2,000 immediate needs assistance and \$2,358 transitional housing assistance programs.” See Fed. Emergency Mgmt. Agency, Release HQ-05-316, *More Than \$2.3 Billion In Expedited FEMA Aid Already Delivered To Hurricane Katrina Victims*, (Oct. 2, 2005), at <http://www.fema.gov/news/newsrelease.fema?id=19342> (last visited Sept. 6, 2006). This is not to be confused with the amount that might be recovered under the National Flood Insurance Plan. This amount, which can reach \$250,000 in building coverage and \$100,000 in personal property coverage, is discussed *infra* at note 23 and accompanying text.

²⁰ This provision was especially important in the case of life insurance policies, which are generally not subject to subrogation claims. See generally Kenneth S. Abraham & Kyle D. Logue, *The Genie and the Bottle: Collateral Sources Under the September 11 Victim Compensation Fund*, 53 DEPAUL L. REV. 591, 599 (2003) (discussing this issue).

awards could have been in the scores of millions, no award exceeded \$8.6 million.²¹

Nonetheless, the creation of the Fund showed Congressional failure to understand the differences between distributive and corrective justice. Full tort payment would be appropriate against any party deemed to be sufficiently at fault for the events of September 11, possibly including: the terrorists (most obviously but least likely to be accountable in this case); those responsible for security at airports; and the designers and engineers of the World Trade Towers. But government, assuming it was not at fault, was not such a party and should not have volunteered to behave as one, especially since “it” has no funds of its own, only those entrusted to it by the governed.²² As we shall see, the government was indeed substantially at fault in connection with events pre-, during, and post-Katrina.

What justifies full compensation in torts cases? The complex and contested answer moves the discussion from distributive to corrective justice. But corrective justice itself is not the dominant justification for tort law today. Instead, most view tort in instrumental terms; i.e., justified to the extent that it serves some extrinsic purpose (although, of course, the injured party will be compensated in the process). Some instrumentalists believe those injured by the wrongful conduct of others are entitled to compensation because they, and others, will be deterred from similar actions in the future. Others prefer justifications based on overall economic efficiency. For example, a \$1,000 precaution that would save only \$500 in accident costs should not be undertaken, because doing so would be economically inefficient.

If instrumental goals are dominant, however, we should simply abandon tort law (which does a rather poor job at achieving any of the goals desired of it) in favor of a compensation system. Thus, tort is justified only to the extent that it gives priority to corrective justice.²³

²¹ See September 11th Victim Compensation Fund of 2001, Compensation for Deceased Victims, *supra* note 7. For a discussion of Feinberg’s view as to how much compensation should be awarded, see Elizabeth Kolbert, *The Calculator*, THE NEW YORKER, Nov. 25, 2002, at 44, 47.

²² There is an argument that the Fund was justified as a *quid pro quo*, because those who availed themselves of it gave up their right to sue. But the intent of the trade-off was to bail out the airline industry, not to protect government against suit. By “getting in the middle” of the transaction, the government made distributive decisions that seem difficult to justify. See Culhane, *Two Kinds of Justice*, *supra* note 4, at 1043-52, 1088-91 (discussing this point in detail).

²³ Pure corrective justice theorists believe that no departure from tort doctrine that compromises the intrinsic relationship between the plaintiff and the defendant is

Aristotle again provides the starting point for considering the proper realm of this form of justice; corrective justice does not “care” about the overall holdings of those within the society, nor, for that matter, the antecedent (pre-accident) holdings or character of the parties vis-a-vis each other: “[I]t makes no difference whether it is a good person who has defrauded a bad or a bad person a good . . . [t]he law looks only to the difference made by the injury, and treats the parties as equals, if one is committing injustice, and the other suffering it.”²⁴

This insight has been given greater content through the Kantian/Hegelian notion of the abstract equality of persons, most fully developed by Ernest Weinrib through a number of influential writings.²⁵ Whatever inequalities may exist between them, two people are equal *qua* holders of whatever they hold at the moment preceding their interaction. When the “defendant [chooses] to use up [the] plaintiff’s resources for his own ends[,]”²⁶ such conduct is wrongful, in the language of corrective justice. Typically, negligence (or worse) is the threshold of culpability required to force the defendant to compensate the plaintiff, thereby restoring the balance of holdings that existed before the harm was suffered.²⁷ Further, because no imbalance

justified. Ernest Weinrib is the staunchest defender of this position. *See, e.g.*, Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 449 (1987) (“Adjudication [cannot], therefore, properly be the mechanism for promotion of any collective goal aside from the disclosure and vindication of the normativity immanent to the interaction of persons”). But such doctrinal rigidity risks short-changing the very goal it sets for itself, which is (usually stated as) the restoration of the imbalance created when the “doer” (defendant) acts at least negligently towards the “sufferer” (plaintiff). Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 280 (1994). A lively question involves just how much manipulation to basic tort doctrine can be done before corrective justice becomes unrecognizable as such. *See* Culhane, *Two Kinds of Justice*, *supra* note 4, at 1073, 1074-76. I have taken the position, discussed further herein, that even well-designed compensation systems can serve corrective justice goals, if that term is understood broadly. *See id.* at 1084-88.

²⁴ ARISTOTLE, *supra* note 15, at 154.

²⁵ *See, e.g.*, ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Weinrib, *Causation and Wrongdoing*, *supra* note 23; Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 413 (1992); Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621 (2002); Weinrib, *Gains and Losses*, *supra* note 23; Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983). Weinrib’s work was the subject of a Symposium. *See* Symposium, *Legal Formalism*, 16 HARV. J.L. & PUB. POL’Y 579 (1993).

²⁶ James Gordley, *Tort Law in the Aristotelian Tradition*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 131, 157 (David G. Owen ed., 1995).

²⁷ Corrective justice “does not permit strict liability in general, because the absence of fault means that the defendant has not willfully acted to the detriment of the plaintiff’s interests; that the defendant has injured the plaintiff and not vice-versa is thus purely

has been created in the absence of actual harm to the plaintiff, wrongdoing *simpliciter* is insufficient for liability; only a showing that the defendant *caused* injury gives the plaintiff standing to pursue a claim.²⁸

Some commentators have recognized that a rigorous application of corrective justice, while perhaps theoretically attractive, can lead to unjust results, and have therefore supported modifications of liability rules in particular classes of cases.²⁹ For example, where defectively manufactured products result in personal injury, the overall goals of corrective justice are arguably well served by a strict liability rule rather than by requiring plaintiff to prove negligence. The opacity of the manufacturing process and the plaintiff's lack of access to information combine to create a situation where strict liability leads to a more just result over the run of cases.³⁰

But whatever modifications corrective justice proponents may or may not be willing to accept, it remains clear that the goals and animating principles of the two kinds of justice are distinct. For while corrective justice only comes into play where a specific act and actor are identified, distributive justice presses its case in every circumstance. Take away the suffering caused by the events of September 11, or by Katrina, and those who lived and worked in the World Trade Center, the Pentagon, and the Gulf Coast would yet have claims—different claims, to be sure, but claims nonetheless—to their share of the overall “goods” of society. To be pointed, does distributional fairness require the poor residents of New Orleans’ Ninth Ward to receive access to free health care? Inserting Katrina into the equation moves the facts and likely our sympathies in favor of providing such access, but the question of just distributions would exist whether or not the hurricane ever struck. This point again underscores the error of the September 11 Fund. To repeat the example: Were the victims of September 11 more deserving (however that term is meant) of multi-million dollar payouts than poor citizens are of basic health care? Given that the government was not the wrongful actor in the September 11 case, the question

coincidental and does not permit the plaintiff to call upon the defendant’s resources to restore what was lost.” Culhane, *Two Kinds of Justice*, *supra* note 4, at 1073.

²⁸ Weinrib, *Causation and Wrongdoing*, *supra* note 23, at 429.

²⁹ See Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 232-36 (Gerald J. Postema ed., 2001) (stating that nothing about the allocation of the burden of proof is intrinsic to corrective justice).

³⁰ See Culhane, *Two Kinds of Justice*, *supra* note 4, at 1077-82.

cannot be avoided; nor can the answer that this was not an occasion for corrective justice.

But what is the appropriate response when government *does* create or greatly magnify the suffering? This Article now moves to a discussion of that issue.

III. GOVERNMENTAL FAULT RELATED TO HURRICANE KATRINA

As has been exhaustively documented and discussed, government's incompetence (and worse) surrounding the events of Hurricane Katrina occurred at all levels—federal, state and local. According to reports at the time and efforts to explain the failures later, a large part of the problem was inaction and poor decision-making in the events immediately preceding and following the hurricane: failure to prepare for and execute the evacuation of New Orleans; delayed rescue efforts; and the maddening inability to deliver basic human services such as food, medical attention, and housing in a timely way. FEMA Director Michael Brown, Louisiana Governor Kathleen Blanco and New Orleans Mayor Ray Nagin engaged in a circular and dispiriting “blame game” that only strengthened the perception that all levels of government had failed miserably in the time of greatest crisis.³¹

Certainly a case could be made for liability against any and all of these entities. Of course, issues of sovereign immunity would arise, as would questions involving the duty *vel non* of government to individual citizens. Yet it is reasonable to suppose that recovery would be possible in at least some number of individual lawsuits.³² In this Part, though, I mostly ignore suits against the city and state governments to concentrate on claims against the United States. I

³¹ See *supra* notes 10-11 and accompanying text.

³² See, e.g., Complaint, *Peyroux v. United States*, No. 06-2317 (E.D. La. Apr. 28, 2006), 2006 WL 1327905 (showing recovery based on failure of levee system); Complaint for Damages Caused by the Design, Construction, Operation, and Maintenance of the Mississippi River Gulf Outlet, *Robinson v. United States*, No. 06-2268 (E.D. La. Apr. 25, 2006); *Post-Katrina Victim's Son Sues*, CHI. TRIBUNE, Aug. 18, 2006, at 7 (reporting on a wrongful death suit against New Orleans and Louisiana filed on behalf of 91-year-old Ethel Freeman, who died in her wheelchair during the 4-day wait for buses outside the convention); Sandy Davis, *Family Sues Acadian in Evacuation Failure*, BATON ROUGE ADVOCATE, Aug. 29, 2006 (describing a reliance- and contract-based suit against ambulance company and St. Bernard parish for failure to evacuate an 83-year-old woman and her quadriplegic son who were drowned in their home).

further narrow the discussion by focusing on the durable precautions (e.g., levee construction and maintenance) that were insufficient to prevent the flooding that changed New Orleans forever. These present perhaps the cleanest case of negligence (or worse) and therefore provide a good analytical model for assessing the claims that injured citizens have against government misfeasance.

I begin by presenting the case that the federal government was indeed at fault in the construction, design, and maintenance of both the hurricane protection levee system and the Mississippi River-Gulf Outlet (“MR-GO”).³³ This Article then briefly discusses some preliminary problems with suits by private parties affected by the hurricane before turning to a more detailed treatment of a deeper problem with holding government accountable for its misconduct, however intuitively appealing doing so might be.

A. Governmental Fault in the Construction, Design, and Maintenance of the Hurricane Protection System and the MR-GO

1. Sources

Currently, the major sources of information pertaining to engineering failures in the New Orleans hurricane protection system are a final draft report of the Army Corps of Engineers’ Interagency Performance Evaluation Taskforce (“IPET”) and a final report produced by the Independent Levee Investigation Team (“ILIT”). In the IPET report, the Corps claims responsibility for failure of the protection system while maintaining that it found “no evidence of government or contractor negligence or malfeasance.”³⁴ IPET avoids examination of

³³ Constructed by the Army Corps of Engineers, the MR-GO is a navigational channel that connects the Gulf of Mexico and the City of New Orleans. It is essentially a 66-mile short-cut that obviated the need to navigate the twists of the Mississippi River. Touted as an economic boon to the City of New Orleans, the MR-GO, completed in 1963, initially caused an uptick in local employment, but traffic on it has slowed over the years, and many question both its economic and environmental desirability. *See, e.g.,* LSU AgCenter.com,
<http://www.lsuagcenter.com/en/environment/conservation/wetlands/Closing+the+Mississippi+River+Gulf+Outlet+MRGO+Environmental+and+Economic+Considerations.htm> (last visited Aug. 31, 2006). The extent to which the environmental degradation wrought by the MR-GO may have contributed to the flooding of New Orleans is discussed in Part III.A.

³⁴ 1 U.S. ARMY CORPS OF ENG’RS, PERFORMANCE EVALUATION OF THE NEW ORLEANS AND SOUTHEAST LOUISIANA HURRICANE PROTECTION SYSTEM: DRAFT FINAL REPORT OF THE INTERAGENCY PERFORMANCE EVALUATION TASK FORCE 5

the Corps' decision-making processes that led to failures because a separate team is working on a Hurricane Katrina Decision Chronology Study for the Corps. The ILIT report, as well as newspaper accounts and Senate testimony from ILIT investigators, generally agree with IPET's technical conclusions but go into somewhat more detail about institutional failures within the Corps. The ILIT was headed by Dr. Raymond Seed, a civil engineer, and the University of California, Berkeley, and is the product of an exhaustive (and pro bono) effort by some thirty-four researchers and seventeen professional engineers, drawn from academia, private firms, and government agencies. The team had extensive forensic experience with earthquakes, hurricanes, dam and levee failures, as well as with completely man-made disasters such as the space shuttles Challenger and Columbia, and the ill-fated oil tanker Exxon Valdez.

The discussion that follows highlights some of the major statements and findings of both reports, supplemented with congressional testimony and other, less technical accounts. Neither the Corps' own assessment, nor the ILIT report, discusses issues relating to the MR-GO, however. Accordingly, this Article pieces together some of the allegations and assessments of how the breach of the MR-GO's own levees contributed to the flooding. In both cases, my goal is to provide a sense of the pervasiveness of the failures, as well as the complexity of sorting out such issues as responsibility for the devastation and the difficulty of proving causation.³⁵ These problems could present formidable obstacles for Katrina plaintiffs.

2. Describing the Failures of the Hurricane Protection System

IPET identified fifty "major breaches" where structural failure occurred in the hurricane protection system, and attributed four to failures at floodwall foundations (without overtopping), with the remainder caused by overtopping and resulting scour erosion on levee walls.³⁶

(2006), available at <http://ipet.wes.army.mil> (last visited Sept. 6, 2006) [hereinafter U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION]. This conclusion seems incredible on its face, given the factual findings made by the Army Corps itself (let alone the ILIT findings). While it may have been entirely appropriate to make no statement concerning fault, denying has the effect of suggesting the opposite conclusion.

³⁵ On a related note, the federal government's failures were a mix of policy, funding, and implementation decisions. On the immunity questions raised, see *infra* notes 96-108 and accompanying text.

³⁶ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 27.

Overtopping of certain levees led to breaches when waves gained two to three times their velocities traveling down the back (protected) sides of the levees and were then able to erode away the back walls.³⁷ The same effect caused failure of I-wall floodwalls³⁸ where the force of overtopping waves created trenches at the bases of walls' protected sides where they entered the levee fill, undermining support for wall structures.³⁹ The Corps determined that its I-wall design was simply unable to survive overtopping.⁴⁰

Several design and construction flaws contributed to erosion-associated failures. The Corps used a minimum factor of safety of 1.3 for levee design and stability, a standard, according to ILIT, that was created primarily for levees built in agricultural areas with small populations.⁴¹ ILIT considered the standard "far too low" for a system intended to protect a major metropolitan area.⁴² Choice of construction materials was a crucial factor in creating erosion breaches, as there was a strong correlation between erosion-associated breaches and the use of erodible levee materials such as hydraulic fill, which included significant sand and silt content.⁴³ By contrast, clay levees generally performed well, even where they were subject to overtopping.⁴⁴ Erodible levee materials were used at some locations because they

³⁷ R.B. SEED, ET AL., PRELIMINARY REPORT ON THE PERFORMANCE OF THE NEW ORLEANS LEVEE SYSTEMS IN HURRICANE KATRINA ON AUGUST 29, 2005, ch. 2, at 10; ch. 4 at 6 (2005), available at http://www.berkeley.edu/news/media/releases/2005/11/leveereport_prelim.pdf (last visited Sept. 6, 2006) [hereinafter PRELIMINARY REPORT]; R.B. SEED, ET AL., INDEPENDENT LEVEE INVESTIGATION TEAM, INVESTIGATION OF THE PERFORMANCE OF THE NEW ORLEANS FLOOD PROTECTION SYSTEMS IN HURRICANE KATRINA ON AUGUST 29, 2005: DRAFT FINAL REPORT (2006), available at http://www.ce.berkeley.edu/~new_orleans/ (last visited Sept. 6, 2006) [hereinafter ILIT, INVESTIGATION]. See also U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 28.

³⁸ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 19, fig.3. I-walls are straight sheet pilings driven vertically into a levee structure and capped with cement where the wall emerges above the levee.

³⁹ *Id.* at 31.

⁴⁰ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at vol. 5, p. 80.

⁴¹ ILIT, INVESTIGATION, *supra* note 37, at ch. 12, p. 14.

⁴² *Id.* at ch. 8, p. 34.

⁴³ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 28-29, 30 fig.15; vol. 5, p. 74; ILIT, INVESTIGATION, *supra* note 37, at ch. 15, p. 2.

⁴⁴ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at vol. 5, p. 72.

could be dredged near construction,⁴⁵ presumably at a lower cost than transporting materials to the site. Cost also appears to have played a role in the Corps' failure to take a sufficient number of boring samples to adequately evaluate the foundational soil. Such undersampling resulted in miscalculations of levee stability because subsurface conditions turned out to be less stable than assumed.⁴⁶ These findings were supported by testimony stating that, during the construction process, at least one outside contractor questioned the underlying soil softness and its effect on I-wall stability.⁴⁷

Investigators from ILIT suggested that "relatively inexpensive" upgrades to the levee and floodwall systems, including reinforcing protected sides with concrete or paving, could have improved performance and prevented at least some of the failures.⁴⁸ ILIT also found the use of compacted clay fill instead of highly erodible dredged materials to build levees, along with levee armoring in anticipation of the storm, could have avoided erosion-associated breaches and kept flooding below catastrophic levels.⁴⁹

Some I-walls failed even when overtopping did not occur. Pressure on the water side of I-walls pushed the above-ground sections towards the land side, creating a gap between the I-wall and the levee fill where water could seep underneath the implanted sheet piling.⁵⁰ The increased water loads on the walls, combined in some cases with movement of the levee's underlying sand layer and erosion of levee support caused by the entering water, separated levee structures and led to complete breaches.⁵¹

Further, the hurricane protection system was constructed below its originally authorized height as a result of miscalculations in the

⁴⁵ ILIT, INVESTIGATION, *supra* note 37, at ch. 15, p. 2.

⁴⁶ ILIT, INVESTIGATION, *supra* note 37, at ch. 8, pp. 28-30.

⁴⁷ *Hurricane Katrina: Why Did the Levees Fail?: Hearing Before the Comm. on Homeland Security and Governmental Affairs*, 109th Cong. 2 (2005) (written testimony of Ivor Ll. Van Heerden, Head, State of Louisiana Forensic Data Gathering Team) [hereinafter *Hearing*], available at http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Detail&HearingID=290 (last visited Sept. 20, 2006) (GPO has not yet printed hearing publication); Joby Warrick & Michael Grunwald, *Investigators Link Levee Failures to Design Flaws*, WASH. POST, Oct. 24 2005, at A1.

⁴⁸ *Hearing*, *supra* note 47, at 3 (written testimony of Raymond B. Seed on behalf of the NSF-Sponsored Levee Investigation Team); ILIT, INVESTIGATION, *supra* note 37, at ch. 15, pp. 3-4.

⁴⁹ ILIT, INVESTIGATION, *supra* note 37, at ch. 15, p. 3.

⁵⁰ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 30.

⁵¹ *Id.*

initial construction process, and it has been further lowered by rapid subsidence.⁵² However, it is unclear to what extent, if any, this loss of height and resulting elimination of design allowances contributed to the system's failure, given the height of Katrina's storm surges.⁵³

Additional localized problems affected certain areas, in particular the 17th Street Canal. I-wall sheet pilings at some breach sites were not driven deep enough at construction to prevent underseepage from the adjacent bodies of water they were intended to block,⁵⁴ which is particularly notable given the underflow failure mechanism.⁵⁵ Residents on the protected side of the 17th Street Canal reported ground wetness on dry days pre-Katrina.⁵⁶ In some locations, including the 17th Street Canal levee, the practice of taking relatively few, widely-spaced soil samples and extrapolating based upon their results (discussed above) resulted in inaccurate assessments of I-wall stability.⁵⁷ The sheet pilings of I-walls constructed along the 17th Street Canal during the 1990s were driven in, removed because of an oncoming storm, and then re-driven into their original positions, a process which weakened the underlying soils.⁵⁸ In at least one location (in St. Bernard Parish), sheet piling driven into the ground to form I-walls was never capped with concrete.⁵⁹

⁵² U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION *supra* note 34, at 17.

⁵³ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at vol. 2, p. 2.

⁵⁴ *Hearing, supra* note 47, at 2-5 (written testimony of Ivor Ll. Van Heerden, Head, State of Louisiana Forensic Data Gathering Team) (noting problems with inadequate sheet piling depth at the 17th Street Canal, London Avenue East and West, and Industrial Canal breaches); ILIT, INVESTIGATION, *supra* note 37, at ch. 15, p. 3.

⁵⁵ The IPET website includes several Corps Engineer Manuals, including the 1994 manual for Design of Sheet Pile Walls (EM 1110-2-2504), which indicates that the geotechnical investigation for wall systems should include information on underseepage for floodwalls, p. 3-1. See generally <http://ipet/wes.army.mil> (last visited Nov. 1, 2006).

⁵⁶ *Hearing, supra* note 47, at 2 (written testimony of Ivor Ll. Van Heerden, Head, State of Louisiana Forensic Data Gathering Team); Frank Langfitt, *Residents Say Levee Leaked Months Before Katrina*, NATIONAL PUBLIC RADIO, Nov. 22, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=5022074> (last visited Sept. 20, 2006).

⁵⁷ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 30. The Corps reports that this practice of averaging soil strengths based on few samples was not employed throughout the system. *Id.* at 5.

⁵⁸ *Hearing, supra* note 47, at 2 (written testimony of Ivor Ll. Van Heerden, Head, State of Louisiana Forensic Data Gathering Team).

⁵⁹ PRELIMINARY REPORT, *supra* note 37, at ch. 4, p. 6.

I-wall stability analyses undertaken in the design process did not account for the formation of gaps between the walls and the levee support or the effect of such gaps on floodwall strength⁶⁰—in examining the 17th Street Canal, for example, IPET found that assuming the formation of gaps would have lowered calculated factors of safety by approximately twenty-five percent.⁶¹ ILIT noted that fully researching and field-testing designs could have revealed occurrences of gap-formation when I-walls were put under heavy water loads.⁶² In fact, the Corps failed to take action in response to an internal study conducted in the 1980s and subsequent analysis in professional journals showing the I-wall structures would experience gap separations that allowed water to enter along and under the sheet piling.⁶³

In addition, particularly in New Orleans East, failures occurred at points in the system where there was a transition between different construction material or protection elevations.⁶⁴ ILIT found that failures in transition areas were “as much the result of design choices and/or engineering as the storm surge itself.”⁶⁵

3. Inadequacy of the Standard Project Hurricane

The hurricane protection system was designed to a Standard Project Hurricane that roughly approximated a fast-moving Category 3 storm passing close to the area.⁶⁶ ILIT indicated the Standard Project Hurricane became enshrined as a benchmark that was not updated to reflect developments in technology or the possibility of more intense hurricanes,⁶⁷ despite widespread concern about the probability of more severe storms and the risks of hurricane-related flooding despite the city’s existing system.⁶⁸ The Standard Project Hurricane did not keep pace with hurricane and flooding standards developed by private

⁶⁰ U.S. ARMY CORPS OF ENG’RS, PERFORMANCE EVALUATION *supra* note 34, at vol. 5, pp. 26-28, 55.

⁶¹ *Id.*

⁶² ILIT, INVESTIGATION, *supra* note 37, at ch. 15, p. 7.

⁶³ *Id.* at ch. 8, p. 13.

⁶⁴ PRELIMINARY REPORT, *supra* note 37, at ch. 3, p. 4.

⁶⁵ ILIT, INVESTIGATION, *supra* note 37, at ch. 15, p. 4.

⁶⁶ PRELIMINARY REPORT, *supra* note 37, at ch. 1, p. 3.

⁶⁷ ILIT, INVESTIGATION, *supra* note 37, at ch. 12, p. 13.

⁶⁸ U.S. H.R. SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, *Levees*, 89-91 (2006) [hereinafter H.R. REP. NO. 109-377], available at <http://www.gpoaccess.gov/serialset/creports/katrina.html> (last visited Sept. 20, 2006).

industries and foreign nations designing structures subject to storm damage.⁶⁹

Katrina's surge and wave generation potential greatly exceeded that of the Standard Project Hurricane,⁷⁰ but it was able to overwhelm the hurricane protection system while no more than a Category 3—as one expert put it, Katrina did not even amount to “the Big One” New Orleans had feared, yet the protection system had still proven wholly inadequate.⁷¹

4. Bureaucratic Issues

Although the errors detailed above were manifest, they do not convey the full story of the problem. The Army Corps of Engineers could only do as much as its funding and authority permitted. Substantial roles were played by funding shortages, as well as by the dysfunctions created by the diffusion of responsibility between the federal, state, and local governments. Some of the most significant of these are described below.

After construction, operation, and maintenance of Corps flood control projects is split among local organizations, which in the case of New Orleans included parish levee boards and water and sewer boards.⁷² Both lack of coordination and outright discord among the local authorities undermined maintenance of the system and likely prevented upgrades that could have strengthened critical sections.⁷³ Maintenance and inspection procedures were often lax⁷⁴ and did not address long-term problems such as tree growth on private property extending into levee embankments, which threatened levee stability in the event of storm-related uprootings.⁷⁵

Lack of authority to pursue using floodgates to close off several canals also had an effect. The surge from Lake Pontchartrain raised water levels in three drainage canals, including the 17th Street and London Avenue Canals, which led to major breaches into the

⁶⁹ ILIT, INVESTIGATION, *supra* note 37, at ch. 12, p. 12.

⁷⁰ U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 21.

⁷¹ Joby Warrick & Michael Grunwald, *Investigators Link Levee Failures to Design Flaws*, WASHINGTON POST, Oct. 24 2005, at A1.

⁷² H.R. REP. NO. 109-377, *supra* note 68, at 87.

⁷³ *Id.*

⁷⁴ Gordon Russell, *Levee Inspections Only Scratch the Surface*, NEW ORLEANS TIMES-PICAYUNE, Nov. 25, 2005, National at 1.

⁷⁵ ILIT, INVESTIGATION, *supra* note 37, at ch. 8, pp. 12, 33.

downtown basin.⁷⁶ ILIT found that floodgates—rather than lining them with levees and floodwalls—should have been used to close off those canals; this was a proposal the Corps pursued for years.⁷⁷ ILIT faulted “dysfunctional interaction” between the local levee board and the local water and sewerage board for preventing the floodgate plan.⁷⁸

There were also reports of deficiencies caused by the lack of coherent oversight of the system as a whole.⁷⁹ For example, ILIT noted an ungated opening where a railway bridge crossed the Inner Harbor Navigation Canal, which was ineffectively sandbagged before Hurricane Katrina arrived and admitted floodwaters during the storm. The opening was just adjacent to a secure gate and flood control structure that was maintained by the Corps and withstood the storm without breaching or overtopping.⁸⁰

Funding problems also contributed to the scope of the disaster. For example, incomplete construction was a factor in the failure of a section of levee along Lake Borgne in St. Bernard Parish; the Corps had requested funding for the final stage of construction along eleven miles of levee in the area, but the work was not completed and “large portions” of the levees had not yet been built up to final design height.⁸¹ The section suffered “catastrophic” erosion that exacerbated flooding in the area.⁸²

5. Purely Local Failure

Only sixteen percent of total pumping capacity was operational in the city, and those pumping stations that did function were distributed across four parishes and thus unable to concentrate their flood reduction impact.⁸³ Pump inoperability was attributed to “evacuation of operators, loss of power, loss of cooling water, and flooding.”⁸⁴ Some key pumping stations had been in operation since the early 1900s, and the pumps themselves were described by ILIT investigators as “very old.”⁸⁵ IPET concluded that the city’s pump stations, which

⁷⁶ *Id.* at ch. 15, p. 4.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ PRELIMINARY REPORT, *supra* note 37, at ch. 6, p. 2.

⁸⁰ *Id.* at 1.

⁸¹ ILIT, INVESTIGATION, *supra* note 37, at ch. 15, p. 2.

⁸² *Id.*

⁸³ U.S. ARMY CORPS OF ENG’RS, PERFORMANCE EVALUATION, *supra* note 34, at 8.

⁸⁴ *Id.*

⁸⁵ PRELIMINARY REPORT, *supra* note 37, at ch. 6, p. 2.

are not considered part of the hurricane protection system,⁸⁶ “were simply not designed to operate during major storms.”⁸⁷

6. Impact

IPET found that although flooding from rainfall and overtopping of the system alone would have been significant,⁸⁸ breaches in levees and floodwalls caused “[t]he majority, approximately two-thirds by volume, of the flooding and half of the economic losses” related to the storm.⁸⁹

By modeling mean estimated fatalities, IPET estimated fatality reductions in three different hypothetical scenarios as compared to model fatality estimates based on actual conditions:

- A resilient floodwalls system in which no floodwall foundation failures occurred (including erosion-associated failures from overtopping), given actual pump availability, reduced estimated fatalities by thirty-seven percent.
- A resilient levee system in which levees and floodwalls did not breach, given actual pump availability, reduced estimated fatalities by forty-eight percent.
- A resilient levees and pumps system in which no breaching occurred and full pump capacity was available reduced estimated fatalities by sixty-five percent.⁹⁰

7. Another Problem: The MR-GO

As flooding began during Hurricane Katrina, levees along the MR-GO were breached by Lake Borgne, sending water into St. Bernard Parish. The MR-GO also channeled floodwaters towards the Gulf Intracoastal Waterway, where breaches and overtopping inundated New Orleans East, and towards the Industrial Canal, which flooded the Ninth Ward.⁹¹ Both plaintiffs and some experts have alleged that the

⁸⁶ U.S. ARMY CORPS OF ENG’RS, PERFORMANCE EVALUATION, *supra* note 34, at vol 6, p. 28.

⁸⁷ *Id.* at vol. 1, p. 32.

⁸⁸ *Id.* at 7.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.* at vol. 7, pp. 9-10, 125 tbl. 43. All scenarios accounted for overtopping and pre-Katrina wall and levee elevations.

⁹¹ Bob Marshall, *City's Fate Sealed in Hours*, NEW ORLEANS TIMES-PICAYUNE, May 14, 2006, at 1. It is difficult to capture the flooding through a written description, especially for those unfamiliar with the local geography. Fortunately, the New

intersection of the MR-GO and the Gulf Intracoastal Waterway created a "funnel effect," greatly increasing the force and speed of water flow into the city and exacerbating the flooding in these areas.⁹² Claims have also been made that the MR-GO was negligently left "unarmored" against breaches or erosion and that construction and maintenance of the MR-GO illegally caused environmental damage, destroying wetlands that would have served the city as a natural buffer against the hurricane and hurricane-related flooding.⁹³ Because the government appears to lack immunity for its design, construction, and maintenance,⁹⁴ using the MR-GO to establish a chain of causation encompassing significant portions of most devastated areas of New Orleans appears to be the favored strategy in early suits.⁹⁵ These claims, however, do not yet enjoy the same advantage as claims based on the failure of the hurricane protection system—a devastating, independent report by a team of unimpeachable experts.

B. From Fault to Liability

Although the negligence or perhaps even recklessness of the federal government's involvement in the construction and maintenance of the levees seems clear, the path to recovery for those affected by the flooding caused by such negligence is fraught with pitfalls. I first discuss these obstacles, and demonstrate that they should not lead to a blanket denial of recovery. We must look beyond positive tort law,

Orleans Times-Picayune, which has done a heroic job of reporting on the hurricane from the beginning, provides a useful visual chronology that lays out the flooding as it occurred in various places along both the hurricane protection system and the MR-GO. Ultimately, all of the flood waters ran together. See Dan Swenson, *Flash Flood: Hurricane Katrina's Inundation of New Orleans, August 29, 2005*, NEW ORLEANS TIMES-PICAYUNE, <http://www.nola.com/katrina/graphics/flashflood.swf>. (last visited Sept. 20, 2006).

⁹² Complaint, *Peyroux v. United States*, *supra* note 32; Warrick & Grunwald, *supra* note 71, at A1. The Army Corps of Engineers has disputed accounts of the MR-GO acting as a funnel or "hurricane highway" during Katrina. U.S. ARMY CORPS OF ENG'RS, PERFORMANCE EVALUATION, *supra* note 34, at 6.

⁹³ Complaint, *Peyroux v. United States*, *supra* note 32.

⁹⁴ Case law specific to the MR-GO has found it to be a navigable waterway and not part of the flood protection system; therefore, the government's actions regarding the MR-GO are not immunized by the Flood Control Act. *Graci v. United States*, 456 F.2d 20, 26-28 (5th Cir. 1971).

⁹⁵ Complaint, *Peyroux v. United States*, *supra* note 32; Complaint for Damages Caused by the Design, Construction, Operation, and Maintenance of the Mississippi River Gulf Outlet, *Robinson v. United States*, *supra* note 32.

however, in deciding whether such recovery would be consonant with the principles of justice that inform this Article. In making this argument, I do not mean to suggest that Katrina's victims should not sue the government for their losses. They have already done so, can be expected to continue doing so, and—given the unlikelihood of a suitable legislative, compensatory response from Congress—should be encouraged to do so. The practical priority should be taking care of the victims, with the means of doing so coming in a distant second. My aim here is to suggest that a compensation scheme, properly thought through and funded, would be preferable for two reasons: It could potentially do a better job of compensating, while also avoiding troubling questions about the suitability of governmental tort liability even for harms it has wrongly caused.

1. Practical Issues

At the outset, any successful suit would have to overcome the argument from sovereign immunity. This ancient rule, stemming from the now-discarded perception that the “sovereign” (or king) can do no wrong, prohibits citizens from recovering against the government for its misdeeds. The federal government, however, has ceded some of its immunity through the Federal Tort Claims Act, which permits injured parties to bring suit against the government for the negligent acts of its employees.⁹⁶ A similar waiver of immunity is found in the Suits in Admiralty Act (“SAA”),⁹⁷ which likely applies to some of the claims

⁹⁶ The FTCA provides, in relevant part, that the government is liable “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1) (2006). The discussion that follows is based solely on claims against the federal government. Negligent state and local officials and policies also played a substantial role in the human suffering wrought by Katrina, both in preparing for hurricanes and in actions taken during and after the hurricane. See *supra* Part II.A.5 (discussing this issue).

⁹⁷ Much ink has already been spilled over whether the claims against the Army Corps sound in admiralty or in tort. One strategy has been to plead jurisdiction in the alternative. See Complaint, *Robinson v. United States*, No. 06-2268, Paragraph 7 (E.D. La. 2006), 2006 WL 1355628. The issue, simply stated, is whether the circumstances causing damage bear a significant relationship to traditional maritime activities. The question is extensively discussed in *Parfait Family v. United States*, No. 05-4237, Trial Motion, Memorandum and Affidavit (E.D. La. 2006), 2006 WL

that have been or may yet be brought. These waivers, however, contain an important limitation: Government is not liable when acting in a discretionary capacity.

Determining what counts as a discretionary act has proven difficult. Acts creating or grounded in policy are typically seen as discretionary. One court tried to capture the reach of the exception as follows:

Government actions can be classified along a spectrum, ranging from those "totally divorced from the sphere of policy analysis," such as driving a car, to those "fully grounded in regulatory policy," such as the regulation and oversight of a bank. But determining the appropriate place on the spectrum for any given government action can be a challenge.⁹⁸

Case law has established some guideposts, though, for determining whether a given government action qualifies for the exception. With particular application to the facts surrounding the Army Corps' actions respecting Katrina, one court had this to say: "[M]atters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy."⁹⁹

Although this language is heartening to those seeking recovery for allegedly negligent design and maintenance issues, plaintiffs face a more daunting obstacle. The federal government enjoys a broad grant of immunity for suits related to flood control systems and activities under the Flood Control Act of 1928 ("FCA").¹⁰⁰ In sweeping language, the FCA provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or

1034829. Because the immunity issues are essentially the same for whichever statute is ultimately held to apply, this Article does not attempt to resolve the issue.

⁹⁸ *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005) (citation omitted).

⁹⁹ *Id.* at 1181.

¹⁰⁰ The FTCA waiver did not repeal the FCA immunity provision. *See, e.g., Nat'l Mfg. Co. v. United States*, 210 F.2d 263, 274 (8th Cir. 1954) (finding no actual repeal or repeal under the FTCA, which contains a list of repealed statutes that does not include the FCA immunity provision). Plaintiffs proceeding under other statutory waivers of immunity, such as the Suits in Admiralty Act, will likely also have to contend with the immunity provision of the FCA. *See Columbia Gulf Transmission Co. v. United States*, 966 F. Supp. 1453, 1458 (S.D. Miss. 1997) (stating that FCA immunity analysis is identical whether suit lies under the FTCA or the SAA).

flood waters at any place."¹⁰¹ The FCA established a massive flood control project for the Mississippi River Valley in response to severe flooding in 1927, which killed two hundred people and displaced 700,000; as a kind of *quid pro quo* for entering the arena of flood control on such a significant scale, government made itself immune from damages.¹⁰² A long line of cases applies the FCA's broad wording to immunize the government against claims of negligence in the design, construction operation, and maintenance of flood control-related projects, as well as extending FCA immunity to cover situations involving both overland inundation and "underwater" problems, or seepage.¹⁰³ The major limitation on the FCA immunity provision is that it pertains to "flood or flood waters," construed as "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control."¹⁰⁴ The FCA therefore does not shield the government against tort claims pertaining to activities unconnected to flood control projects—although courts have split on how much, if any,

¹⁰¹ 33 U.S.C. § 702c. Under § 702c, immunity is waived "if . . . it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage . . . it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands..." Plaintiffs in at least one post-Katrina suit over the failure of levees and floodwalls have argued that the Corps knew or should have known that levee construction at the failure sites was "impracticable" within the meaning of § 702c and breached an affirmative duty to acquire ownership of threatened lands. Class Action Complaint, *Greer v. United States*, No. 05-5709 (E.D. La. Nov. 17, 2005), 2005 WL 3720564.

¹⁰² Kent C. Hoffman, *Enduring Anachronism: Arguments for the Repeal of the § 702c Immunity Provision of the Flood Control Act of 1928*, 79 TEX. L. REV. 791, 793 (2001); Sarah Juvan, *The Federal Flood Control Act: Congressional Development of a Modern-Day Ark*, 44 DRAKE L. REV. 303, 306 (1995).

¹⁰³ See, e.g., *United States v. James*, 478 U.S. 597, 604-608 (1986) (finding that § 702c was intended to provide broad immunity and barred suit involving concededly negligent failure to warn of dangers related to operation of flood control projects); *Aetna Ins. Co. v. United States*, 628 F.2d 1201, 1204-1205 (9th Cir. 1980) (noting that immunity for government negligence under the FCA does not depend upon whether natural conditions connected to flooding were unusual or not); *Morici Corp. v. United States*, 491 F. Supp. 466, 492-493 (E.D. Cal. 1980), *aff'd*, 681 F.2d 645 (9th Cir. 1982) (finding immunity for seepage related to operation of multi-purpose river project which was partially intended for flood control; FCA bars liability "even when...damages may have been caused by governmental negligence in...construction, maintenance, or operation").

¹⁰⁴ *United States v. James*, 478 U.S. at 605.

relation to flood control a system or activity can have before immunity applies.¹⁰⁵

Many of the plaintiffs in early Katrina-related lawsuits against the government have been shaping their complaints to avoid FCA immunity. In cases arising out of flooding in New Orleans during Hurricane Betsy, the Fifth Circuit in 1971 found that because the city's MR-GO was a navigable waterway and not part of the flood control system, the government was not immunized by the FCA against claims of negligence in its construction.¹⁰⁶ Because the government appears to lack immunity for its design, construction, and maintenance, using the MR-GO to establish a chain of causation encompassing significant portions of most devastated areas of New Orleans appears to be the favored strategy in early suits.¹⁰⁷ Arguments will probably be made for the inapplicability of the FCA to other navigable waterways that seem dissociated from the flood control system, such as the Gulf Intracoastal Waterway.¹⁰⁸

Even if the sovereign immunity hurdle is cleared, a related problem remains. Removing sovereign immunity simply clears the way for a negligence suit, for example, to be brought, subject to all of the requirements for a successful claim under the rules of that tort. Principal among the problems the plaintiffs would face is whether the government owed them a *duty* to protect them against the levees' collapse.¹⁰⁹ If a duty were found and negligent acts were established

¹⁰⁵ The Ninth Circuit, at the most extreme, has adopted the position that the government retains immunity under the FCA unless an activity or project is "wholly unrelated to any act of Congress authorizing expenditure of federal funds for flood control." *Morici Corp. v. United States*, 681 F.2d 645, 646 (9th Cir. 1982); *Aetna Ins. Co. v. United States*, 628 F.2d at 1203. By contrast, the Fifth Circuit takes a fact-specific approach which looks for a "sufficient association" between the activity and flood control. *Boudreau v. United States*, 53 F.3d 81, 83-84 (5th Cir. 1995) (describing circuit split and Fifth Circuit standard).

¹⁰⁶ *Graci v. United States*, 456 F.2d 20, 26-28 (5th Cir. 1971). In *Graci*, the government conceded the MR-GO's status as navigable waterway. *Id.*

¹⁰⁷ Complaint, *Peyroux v. United States*, *supra* note 32; Complaint for Damages Caused by the Design, Construction, Operation, and Maintenance of the Mississippi River Gulf Outlet, *Robinson v. United States*, *supra* note 32. See also *supra* Part III.A.7 (discussing this issue).

¹⁰⁸ The Gulf Intracoastal Waterway, authorized by Congress in 1919, is a commercial shipping corridor. ILIT, INVESTIGATION, *supra* note 37, at ch. 4, p. 26.

¹⁰⁹ Although the issues of duty and sovereign immunity are closely related (in a sense, a determination that the government enjoys such immunity is a ruling that there is no duty owed the plaintiff), they are not identical. See *Chenault v. Huie*, 989 S.W.2d 474, 476 (Tex. App. 1999) ("application of an immunity from liability and the

(as seems clear from the discussion in Part III.A., *supra*), causation would still need to be established; depending on the particular harms a plaintiff suffered, the causal link between misconduct and injury might be impossible to prove, or too attenuated.

Whether the defendant owes a given plaintiff, or a class of plaintiffs, a duty is a threshold question of law to be determined by a court. Duty limitations may be broadly stated as of two types. The first rule is that defendants generally have no positive duty to act to prevent harm, but only to conduct their affairs so as not to affirmatively cause harm.¹¹⁰ The second limitation is more difficult to state because it is unprincipled: Courts may, for a variety of reasons, decide that overall policy would be better served by not holding defendants liable for the injuries they cause. The first limitation presents a significant obstacle to recovery in a number of possible Katrina-related lawsuits, including the failure of cities or towns to rescue people or to provide them with medical care once they had suffered injury. Recovery in such cases might depend on the injured party's ability to show reasonable reliance on government's promise to take specific steps. But the rule of no liability for failing to act should not block claims based on negligence related to the levees, because as shown in Part III.A., *supra*, government did undertake this project; once it did so, it had an obligation, in principle enforceable in tort law,¹¹¹ to do so with due care. And those entities not immune from liability might end up shouldering a heavy burden if, as expected, the federal government is not held accountable.

As for the grab bag of policy reasons that might be used to deny recovery—too onerous a burden to impose on government, claims too difficult to sort out, the benefits of compensating victims through some other administrative mechanism—there is little to say besides repeating the point that such justifications are unprincipled. These concerns, however, need not be dismissed. They are better addressed somewhat less directly by focusing on the different issues that arise when government, as opposed to a private actor, is doing the compensating. This issue will be discussed presently.

recognition of a legal duty that is the prerequisite to a civil cause of action are two entirely separate issues”).

¹¹⁰ DAN B. DOBBS, *THE LAW OF TORTS* 853-857 (2000).

¹¹¹ This finding may be based on a theory of reliance, or on the principle that one who undertakes a task (even without initial obligation to do so) is liable for failing to exercise due care in the exercise of that task. *See id.* at 860-861 (“The general rule that undertakings can create a duty of care is often expressed by saying one who voluntarily assumes a duty must then perform that duty with reasonable care”).

Another potential obstacle to tort claims is establishing causation. Many of the harms suffered because of the government's negligence though would be easily established under prevailing notions of legal and factual causation. To take perhaps the paradigm case: Those whose homes were destroyed by the preventable breach of the levees would have a simple case in showing property loss or loss of life from the flood (both factually easy to demonstrate and eminently "foreseeable"), and might face only slightly more difficulty in tracing harms such as job loss, severe emotional distress, and mental illness to the devastation wrought by prolonged or permanent displacement.

Laying out the elements of a basic tort claim begs the important question, though: *Should* the government have the right or duty to compensate the victims of specific misfortune, even where its own actions cause the harm? And, if so, should such compensation be through the tort system or through a September 11-type compensation fund? To those questions this Article now turns.

2. Deeper Concerns with Tort Liability Against Government Actors

At the outset, I note the following discussion of the appropriateness of tort liability against the government for the events of Katrina focuses on non-instrumental arguments. There are two reasons for this approach. First, as noted earlier, tort needs to be theoretically supported by appeal to intrinsic arguments, or it should be abandoned in favor of a compensation system. But a second and more specifically applicable problem surfaces in applying deterrence or efficiency arguments to government actions: There is no good reason to suppose that government responds to internalization of cost pressures in the same way that private individuals or firms do. If tort law is thought to deter unduly risky conduct, market theory presumes that a firm forced to pay \$1,000 in tort damages to victims will avoid doing so if the cost of preventing this damage would be less than that amount. Shareholders, as owners of the firm, will exert pressure on its agents to avoid such behavior, so as to maximize their return on investment.¹¹² But, as exhaustively demonstrated by Daryl J. Levinson, this assumption has been little examined and is likely wrong. In an article

¹¹² This account is perhaps too simplistic, as it seems to assume shareholder monitoring of every firm action. But the underpinning of the explanation (at least under efficiency market theory) is that the market price, at least for publicly traded firms, will reflect the totality of material information about the firm.

focusing on constitutional torts and takings, he notes: “[C]itizens...are not uniquely interested in maximizing the profits, or total wealth, of the jurisdiction. Unlike owners of private firm equity, who generally receive a pro rata share of firm profits based on their ownership interest, citizens have no similar expectation of equal economic treatment.”¹¹³ Aside from expectations, citizens *qua* citizens have interests besides economic ones, including other kinds of self-interest and concern about the well-being of others.¹¹⁴ Perhaps more fatal to the assumption of fungibility between market and public sector forces is the difference in accountability. Again, Levinson: “[B]ecause control and selection mechanisms are much weaker in the political sphere than in economic markets, we should expect the actions of public agents as compared to private agent to diverge from their principals’ interests to a much greater extent.”¹¹⁵

We are thus brought back to corrective justice as the non-instrumentalist justification for compensating those injured by wrongful conduct. But the theory is much more problematic when applied to government action. First, note the lack of connection between wrongdoing and causation, on the one hand, and the burden of rectifying the imbalance, on the other. The wrongdoers are agents of the government, not the larger group of taxpayers who ultimately bear the burden of payment. It is of course possible to answer this criticism with the observation that taxpayers vote (or have the right to vote) into office those who commit the wrongful acts, just as shareholders can direct the governance of the corporations in which they hold financial interests, but this simple account fails to address the enormous agency problems and costs involved in government action. Often it is entrenched and politically unaccountable bureaucrats whose actions cause harm. Katrina is a case on point here. The negligent design and maintenance of the levee system was in part the fault of the Army Corps of Engineers, hardly a group capable of being voted out of office. Poor coordination among responsible parties and seeming intransigence of local bureaucrats, detailed above, also contributed to the disaster, but these parties may be similarly unaccountable.

¹¹³ Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355 (2000).

¹¹⁴ *Id.*

¹¹⁵ *Id.* Levinson has a great deal more to say on the topic, including a thorough discussion of how various explanations of government decision-making—models including pursuit of the public interest, majority rule, interest group analysis, and bureaucracy—only serve to highlight the difficulty of applying deterrence theory to government action. *Id.* at 362-387.

Even if this daunting agency problem could be solved, the difficulty of separating distributive justice from corrective justice is enormous here, because the government is responsible for “doing” both kinds of justice in cases of government misconduct. This need to serve dual purposes creates a tension because compensation for particular acts of governmental misconduct will not necessarily bring society closer to just distributions. Can government “suspend” distributive considerations while doing corrective justice, as is done in cases involving private actors? It is hard to see how this could be done because compensation to particular victims of the hurricane (whoever’s to blame for their misfortune) will *ipso facto* readjust the overall holdings of everyone.

One might attempt to address this problem by emphasizing the division of labor between public and private law. Looking at the event from a public law perspective: To the extent that Katrina *itself* caused a distributionally unjust situation, compensating the victims through taxpayer money is justified. This would be true as much for those also affected by government’s negligence as for those not so affected.¹¹⁶ Thus, existing and supplemental statutes and regulations, as well as any additional legislation thought necessary, would be the vehicles for recovery. The difference between those affected by negligence and those harmed only by Katrina itself (say, some of the residents of Mississippi) would surface once the question of compensation were addressed from a private law perspective. Those affected by negligence have legitimate claims in tort against only those parties who have caused the wrong. Thus, compensation would be justified in this corrective justice context only to the extent that negligence took something away from one party (the plaintiff) and “gave” it to the other (the defendant).

This move, though, submerges the problem without solving it. The difficulty lies at the heart of corrective justice. Aristotle’s formulation of corrective justice works best when dealing with commensurates: If *A* takes something from *B*, corrective justice requires its return, or, if the item is destroyed, payment of its fair market value. But most claims, and certainly most negligence claims,

¹¹⁶ Cf. Levinson, *supra* note 113, at 406-07 (noting the implausibility of any theory of distributive justice that would “single out” victims of governmental misconduct “as uniquely entitled to government wealth transfers. What about the countless others who suffer more severe losses as a result of other types of undeserved contingencies, whether caused by government or not – for example[,] economic recessions, illnesses or *hurricanes*?”) (emphasis added).

do not involve such simple exchanges. If *C*'s negligent driving causes harm to *D*, in what sense does making *C* pay *D*'s medical bills and (even more to the point) pain and suffering damages set right the balance? What did *C* gain that she must now account for? As suggested in Part II, *supra*, the gain is said to be in foregone precautions. By driving without due care, *C* failed to treat *D*'s interests as equal to her own. It is this decision by *C* to "use up" *D*'s resources that justifies separating the two kinds of justice; the prudential division of labor between public and private law is in a sense simply the administrative way of doing so.

But what are we to say when *government*, acting through its agents, acts in this self-regarding way? Whatever the gain (lack of time spent focusing on better construction sites; poor construction; lackadaisical maintenance, as examples), the "gainer" is the entire population because those costs did not have to be borne by taxpayers. And the victims are a subset of the tax-paying citizenry. So it seems impossible to wall off distributive considerations in a way that the private, bilateral tort system allows in other cases, where the imbalance negligence creates can be rectified without disturbing other holdings.

There is no neat way out of this difficulty. In an earlier article, I suggested that tort-like compensation for those injured by government actions might be justified by positing consent to repay those harmed through government's negligence, even though doing so affects the non-injured population financially, through higher taxes.¹¹⁷ Statutes that waive sovereign immunity, such as the Federal Torts Claims Act, seem to support this consent argument. Perhaps one answer to the difficulty of justifying tort liability when government is the defendant is simply that "we" have decided to allow such compensation. Given, though, that corrective justice is a poor fit for redressing harms caused by government misconduct, perhaps a more creative and ultimately better solution commends itself. In other words, we are not forced to choose between applying either kind of justice in its "pure" form. Drawing on recent scholarship that emphasizes tort law's practical limitations in achieving corrective justice, the remarks that follow sketch out a blueprint for doing the best we can for Katrina's victims—

¹¹⁷ See generally Culhane, *Two Kinds of Justice*, *supra* note 4. There could also be a referendum on the issue, but this seems an unlikely event. In a representative democracy, in principle whatever the government decides to spend on Katrina's victims is by consent. The intervention of a vast bureaucracy and the lack of accountability between the legislators and the administrators makes this consent something of a fiction, however.

but perhaps doing it for less money than would be spent in paying successful tort claimants, and doing it through compensation instead of requiring resort to the tort system.

The suggestions sketched out below should have other positive effects, too. The volume of Katrina-related lawsuits has the potential to create tremendous strain on the local court system, which, of course, is not functioning at peak efficiency nowadays because of the hurricane. Second, and more significantly, a careful but generous compensation system that could be justified by appeal to principles of overall distributional fairness would send a powerful message that might to an extent change the dominant narrative of government's response to Katrina's victims to date. The very simplicity of that narrative is its power—Poor people, and particularly poor African-American people, count for little.

IV. COMPENSATING KATRINA'S VICTIMS

What would constitute fair compensation for Katrina's victims? To answer this question, we need a sense of what "compensation" includes. We might begin by inquiring into the meaning of term as used in tort law. But the answer is less than clear. As Professor Ellen S. Pryor has noted, compensation has been insufficiently and to an extent incorrectly theorized. The problem begins with the generally accepted goal of compensation, which is to place the plaintiff in the position she would have occupied had the injury not occurred. Although this may be possible in simple cases (again, *A* steals something of *B*'s or negligently destroys it), a moment's reflection shows the goal simply is not attainable in many if not most cases. For example, what if the thing *A* destroyed was irreplaceable and of great sentimental value to the plaintiff? In that case, whether or not we can assign a market value to the item, money damages will fail to restore the plaintiff to a pre-accident state. The problem is more acute in the case of serious personal injury. Often the injured party will never be the person she was before the harmful event and for many different reasons. A healthy young person may now be unable to walk or only able to do so haltingly or with assistance. Brain injuries may be wholly or partly irremediable. Even where full physical functioning can be restored, the pre-injury and post-injury person is not the same. The

very fact of the harmful occurrence will change the plaintiff, and those changes will evolve over the course of time.¹¹⁸

If restoring the pre-accident plaintiff is often impossible, what should be the goal of compensation? Professor Pryor has begun to develop a model of compensation that focuses more on rehabilitation. She notes that to the extent courts and litigants think about rehabilitation, it is often with a limited medical model in mind.¹¹⁹ Thus, a plaintiff might be considered rehabilitated when she has regained a level of function that is considered medically adequate, even though continued efforts might result in additional function. These judgments are based on an often-unstated combination of deference to the medical profession and a belief, not typically stated in normative terms, that further rehabilitative efforts should not be undertaken if they would only yield incremental benefits.¹²⁰ Other, more creative steps that might be taken to rehabilitate the plaintiff in the fullest sense of the word may not even be considered. For instance, if the plaintiff enjoyed but can no longer engage in a competitive sport involving strategy (such as tennis), perhaps bridge lessons would lead to participation in a fulfilling substitute activity.

Professor Heidi Li Feldman has also developed this richer idea of compensation, beginning with the same insight that a monetary judgment “does not literally make [the plaintiff] whole. A fake arm, an assistant, or any other surrogate for the victim’s lost limb is...a substitute, not a return to the actual status quo.”¹²¹ She then draws on Aristotle’s notion of flourishing as the justification for compensation. The concept is admittedly elusive, in part because of its inherent subjectivity and pluralistic nature. But the concept contains an important insight for the present project of imagining what the lives of New Orleans residents could look like, post-Katrina. They should be given the “opportunit[y] to lead lives of worth.”¹²²

Feldman focuses on money as a way to “foste[r] flourishing” because it is “extremely versatile.”¹²³ This statement is doubtless true,

¹¹⁸ “The post-injury self often differs in crucial ways from the pre-injury self – psychologically, cognitively, spiritually, emotionally, and rationally....What she values, what seems worthwhile, and in what order and with what weight, all may greatly change.” Pryor, *supra* note 13, at 670.

¹¹⁹ *Id.* at 666-669.

¹²⁰ *Id.* at 676-680.

¹²¹ Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Compensation*, 75 TEX. L. REV. 1567, 1580 (1997).

¹²² *Id.* at 1586.

¹²³ *Id.* at 1588.

but given the constraints of distributive justice, it is fair to husband the actual monetary payments issued, and to focus more closely on programs and payments with greater accountability. For example, job-training programs, urban revitalization initiatives, and direct home-building assistance (whether in the form of government-financed labor or other voucher programs) seem well-suited to allowing Katrina's survivors, many of whom are still displaced, to flourish in their post-hurricane lives. But it is important to underscore Professor Pryor's point that these lives will never be what they once were.

Government-funded compensation should be marked by at least two advantages over the tort system (which, not incidentally, a well-constructed program might largely supplant in these cases). First, the program's creation should be preceded by fact-finding, including extensive interviews with survivors. Doing so would lay bare their anger and frustration, their pain and desperation. Solutions that fail to take these natural emotional responses into account are bound to fall short. Second, the program should be of long duration, thus providing the survivors with a renewable and flexible source of assistance as their lives and circumstances change. Some "trial and error" should be built in.

As to specifics: For those who lived in New Orleans before Katrina, any compensation system faces daunting obstacles, and no perfect solution is possible. An obvious place to start is with rebuilding the homes that were destroyed. Although the usual cap on government-funded housing replacement payments is justified in most situations, here the payments should be sufficient to rebuild.¹²⁴ But what are the residents returning *to*? Stories abound of the difficulty in living in a city where basic public and private services are absent or inadequate. Thus, insofar as local government lacks resources, a national commitment to supporting the city as it struggles to regain its basic

¹²⁴ This is not to say that other sources of money available to the displaced should not be considered in appropriate cases. Insurance coverage through the National Flood Insurance Plan is available to those who had paid the premiums. One report estimated that 64.4% of Louisiana homes flooded in 2005 were covered by the NFIP. Jeffrey Meitrodt & Rebecca Mowbray, *After Katrina, Pundits Criticized New Orleans, Claiming Too Many Residents Had No Flood Insurance*, NEW ORLEANS TIMES-PICAYUNE, Mar. 19, 2006, at 1. The cap on payment is \$250,000. NATIONAL FLOOD INSURANCE PLAN: PROGRAM DESCRIPTION, at 25, available at <http://www.fema.gov/doc/plan/prevent/floodplain/nfipdescrip.doc> (last visited Sept. 26, 2006). Where such coverage, such as private insurance, is available, the continuing demands of distributive justice suggest that it be used as a primary source of recovery.

infrastructural support is vital. As for private businesses, a creative program of enterprise zones, job retraining, and (in the short run, at least) bringing goods and services into “depleted” areas would constitute positive movement.

Again, though, it will be important to listen to the stories the survivors are telling. Some of what may well be needed has to do with restoring confidence that the poorer residents of New Orleans count as citizens. Thus, making sure that people have the ability to vote (even when they remain displaced) may be especially vital. Indeed, the failure to provide any such access for the recent mayoral election served only to deepen the sense that federal government was simply not concerned about those whose harm they had in part caused.¹²⁵

New Orleans will not be reconstructed quickly and will never be quite the city it was. The status quo ante is even less imaginable here than in the case of a personal injury victim. Nonetheless, a well-designed compensation program can revitalize the city and restore hope to its inhabitants. While civil suits render judgment and then have done with the parties,¹²⁶ a broadly imagined and executed compensation scheme can flexibly account for changing circumstances. For example, it may turn out that many flood victims will need psychiatric care far into the future. A program that declines to impose a time limit on such care is not troubled by this development.

Nonetheless, no such program can fully fix what Katrina and the government’s ineptitude have wrought. The practical problems with compensation, as well as the theoretical difficulties it raises, compel more serious attention to planning and prevention. The reports that have come forward already indicate that much of the suffering seen in the hurricane’s aftermath was preventable. While much of the attention has appropriately focused on the failure to evacuate many of those in Katrina’s path, even a well-oiled evacuation and rescue effort would not have saved thousands of homes and businesses. A better-designed and maintained hurricane protection system would have been needed for that. Yet we have been slow to learn the lessons of Katrina; by all accounts, the levee system would again fail in the face of a storm

¹²⁵ For a summary of the problems (with a link to a more extensive document), see Civilrights.org, <http://newreconstruction.civilrights.org/details.cfm?id=46496> (last visited Sept. 26, 2006).

¹²⁶ As noted earlier, there has been some move towards structured payments. See *supra* note 13 and accompanying text. But the overall amount of money to be paid does not change even when post-judgment facts prove the judgment to have been much too high or low.

of similar magnitude. The residents of the Gulf Coast, and all of us, have a right to demand better, whatever the cost.

V. CONCLUSION

Chosen from among many, one survivor's tale may serve to put a human face on the need for collective recognition that the residents of New Orleans deserve more than our sympathy. Michael Knight was a 44-year-old tow-truck driver from the unforgettably named Flood Street in the Lower Ninth Ward. His heroism in the aftermath of Katrina was well-chronicled: He and two relatives searched his neighborhood by boat for those stranded and did this nearly a full day before the Coast Guard arrived.¹²⁷ After several days living between the boats and Knight's roof, the men had rescued an estimated four hundred people. Perhaps more could have been rescued, but, according to Knight, the Coast Guard refused his request for a drop-off plan that would have enabled him to bring larger numbers of people to safety.¹²⁸

Interviewed after evacuating to Atlanta, Knight acknowledged that his neighborhood was "gone," but said he wanted to return, even though his new home—finished one year earlier, after twenty-five years of saving—was underwater.¹²⁹

By June 2006, Knight was back on Flood Street—in an area which remained officially restricted and was filled with destroyed houses and debris—and had nearly finished rebuilding his house, with a sign outside welcoming visiting and returning residents. Knight had to rebuild almost entirely with his own labor and out of his own funds, salvaging and washing materials from the original structure. Like many Katrina victims, Knight is angry over the lack of official help both during and after the hurricane. And as one of a smaller group of people who remained in New Orleans to help others escape, the mental and emotional trauma of survivorship are compounded by memories of those he could not save.¹³⁰

¹²⁷ Cheryl Corley, *All Things Considered: Emotional Scars Still Haunt Katrina Survivors* (NPR radio broadcast, June 14, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5485268> (last visited Sept. 6, 2006); Frank Etheridge, *Last of the Ninth*, SALON.COM, Sept. 13, 2005, <http://dir.salon.com/story/news/feature/2005/09/13/ninth/index.html> (last visited Sept. 6, 2006).

¹²⁸ Corley, *supra* note 127.

¹²⁹ As he stated: "I don't want to be here...I don't want to make new friends. I don't want to look for a new job. I want to be home." Etheridge, *supra* note 127.

¹³⁰ Corley, *supra* note 127.

Any effort to compensate the hurricane's victims should have in mind Michael Knight, and many thousands like him. Tort recovery is likely unavailable, and neither the best practical nor theoretical fit in any case. A well-devised compensation plan can better approach the requirements of distributive justice, sending the powerful message that we stand—if belatedly—with those whose lives were forever changed by Katrina.

