

Issues in Legal Scholarship

CATASTROPHIC RISKS: PREVENTION, COMPENSATION, AND
RECOVERY

2007

Article 1

Roles of Government in Compensating Disaster Victims

Stephen D. Sugarman*

*University of California, Berkeley, sugarman@law.berkeley.edu

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Abstract

First explored are the nature of disasters – societal and individual, natural and manmade – and the place of both tort law and private insurance in providing compensation for disaster victims. Following brief discussions of disaster prevention and the sorts of private and public harms that are caused by disasters, five possible roles of government with respect to individual victim compensation are examined: 1) Facilitating the Receipt of Private Compensation for the Consequences of a Disaster; 2) Assuring Insurance Availability for Disaster Victims When the Market Fails to Do So; 3) Providing Victim Compensation Either When Government Should Have Prevented the Disaster or When It Is the Sort of Disaster We Aspire to Have Government Prevent; 4) Providing Victim Compensation as an Alternative to Tort Recovery; and 5) Providing Victim Assistance to Overwhelmed Communities For Reasons of Altruism and National Solidarity. Finally, brief attention is given to the type and level of victim compensation that government might assure.

KEYWORDS: disasters, disaster compensation, catastrophe, disaster insurance

*Stephen D. Sugarman, Roger J. Tryanor Professor of Law, UC Berkeley (Boalt Hall)

Disasters are going to occur, even if we don't know which ones they will be, when or where they will happen, or how devastating they will be. Beyond roles it might play in disaster prevention (or harm reduction), what is the responsibility of government with respect to victim compensation – compensation for personal injury and death, property losses, and financial losses? After setting out some preliminary considerations as to the nature of disasters and the place of both private insurance and tort law in providing disaster compensation, I suggest there are at least five potential roles for government:

- Facilitating the Receipt of Private Compensation for the Consequences of a Disaster
- Assuring Insurance Availability for Disaster Victims When the Market Fails to Do So
- Providing Victim Compensation Either When Government Should Have Prevented the Disaster or When It Is the Sort of Disaster We Aspire to Have Government Prevent
- Providing Victim Compensation as an Alternative to Tort Recovery
- Providing Victim Assistance to Overwhelmed Communities For Reasons of Altruism and National Solidarity

Finally, I briefly explain that the decision to aid disaster victims is only the first step, and that an equally difficult next step is deciding in what form that aid should take.

I. Preliminary Considerations Concerning the Nature of Disasters

A. What Makes Something a Disaster? Individuals v. Society

At the individual level, even if no one else is directly impacted, a loss may be disastrous (or catastrophic, words I use interchangeably here). For example, if an otherwise healthy young person with no dependents falls down the stairs and becomes a quadriplegic, that person will be widely understood to have suffered a catastrophic loss. The victim will almost surely incur enormous harm – a dramatic change in personal lifestyle, huge medical and related expenses, and, very likely, a sharp reduction in earnings potential. Yet, regardless of how catastrophic to the individual, this is not the sort of event that is considered to be a societal disaster. The same might be said about a couple losing their precious home to a fire started in their kitchen or a gas stove explosion that leads to the deaths, say, of one of two parents and one of their two children. Even if crushingly disastrous for the victims (and the survivors), these events are not what we mean by societal disasters.

At the society level, a disaster is generally understood as an event that causes large losses to a substantial number of people. Such an event might also

cause smaller losses to very many people, but even very widespread minor losses by themselves are not likely to be viewed cumulatively as amounting to disaster. Moreover, while events like hurricanes often cause disasters, many do not, thereby making clear that it is the consequences of an event that make it a disaster (or not).

Under the federal disaster relief program, which is largely run by the Federal Emergency Management Agency (FEMA), a “major disaster” is said to have occurred when the President, in response to a request from a state governor, declares it so (the President also has the authority on his own to declare an “emergency.”)¹ Generally speaking, the President restricts these declarations to events with widespread and very grave consequences that are seen to overwhelm the capacities of state and local governments.² Under the governing law, a “major disaster” is supposed to be the result either of a “natural catastrophe” or of a fire, explosion, or flood, regardless of the cause.³

Events need not be declared disasters by the President to be considered societal disasters, however. For example, a mining accident in a small mining town, in which twenty miners are trapped and then die, may well be termed a disaster in that community. This implies that, even when confined to specific geographic locations, societal disasters can range from the smaller scale (the mining example) to the enormous (e.g., the consequences of hurricane Katrina).

The “event” that counts in determining whether there has been a societal disaster is sometimes ambiguous. Things like dynamite explosions, airplane crashes, and earthquakes are vivid occurrences, and when they do enough harm the boundaries of the resulting disaster are likely to be reasonably clear, even if the identities of those individuals who were seriously hurt or killed as a direct result of such events may not be entirely certain (to say nothing of those who were indirectly harmed).

But in other situations, the beginning and ending of an event may be quite fuzzy, and, in turn, just who is a victim of the disaster may be especially uncertain. Consider, for example, a terrible heat wave. We might be confident that more than 500 people in a certain city died from the disastrous heat, but determining on which days the heat wave began and ended, what geographic area to count as impacted by the heat, and just who died as a result of the heat may be quite difficult. Catastrophic famines and droughts have similarly uncertain temporal and geographic boundaries, and so the absence of a vivid triggering

¹ <http://www.fema.gov/>.

² U.S. General Accounting Office Major Management Challenges and Program Risks: Federal Emergency Management Agency (GAO-03-113 2003).

³ Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended by Public Law 93-288, June, 2006; <http://www.fema.gov/about/stafact.shtm>.

occasion may make it hard to appreciate just what are the disastrous consequences of such an “event.” Other sorts of calamities lacking an a vivid triggering event can also unfold over time and space, like the enormously destructive consequences of the widespread use of asbestos decades before its latent dangers were appreciated.

Nor it is clear what are the minimum number of people who must be harmed, or the minimum amount of property that must be damaged, in order for something to qualify as a societal disaster. Besides, the way events are framed may determine whether what might otherwise be understood to be several separate incidents are to be lumped together and thereby understood to be sufficiently harmful to be characterized as a societal disaster. Suppose, first, a crazed student kills a dozen or more suburban classmates within seconds by firing off hundreds of rounds from a semi-automatic weapon. The consequence of that rampage will surely be termed a disaster for the community in which the school is located. Now suppose a serial killer murders a dozen people over a week’s time in one community. That community is also likely to be said to have suffered a disaster. On the other hand, a long-past, out-of-town victim of the serial killer may well not be seen to be included in the disaster. Indeed, if the serial killer acts in a number of cities, the consequences of those acts may not be grouped together as a single societal disaster, and none of the individual communities may be understood to have suffered a societal disaster. The media probably plays a role in framing the way that the public views these sorts of events, and the media has an incentive to gather together separate occurrences in order to label something larger a disaster so as to get the public’s attention.

Part of the problem of trying to reach an understanding of what we mean by a societal disaster is that the word “disaster” itself is now routinely tossed around in ways that wildly exaggerate the momentous nature of what is being described – such as, “my room is a disaster area” or “last night’s date was a disaster” or “the basketball team’s record so far this year is a disaster.”

At the other extreme one can imagine catastrophic events on a scale that could destroy our civilization as we know it.⁴ These include full scale war using weapons of mass destruction, endless global winters possibly caused by the earth being struck by an object from space, pervasive pandemics that wipe out a large share of the population, and so on. Such events could be so overwhelming to the American people and our national government as to make anything discussed here largely irrelevant, and for that reason I put aside potential occurrences of this enormity.

In the end, it is perhaps helpful to focus here on the idea of “major disasters” (as does FEMA) implying relatively large aggregate losses that a) are

⁴ R. Posner, *Catastrophe: Risk and Response* (2004).

comprised, at least in part, of harms that are catastrophic to many individuals and b) are often sufficiently grave to overtax the capacity of even moderate size or larger communities to deal with the consequences.

B. Types of Disasters: Natural v. Manmade

Some major disasters are well understood to be naturally caused – like the consequences of some tornadoes and volcanic eruptions. And natural disasters are what typically come first to mind when one thinks about major disasters in general. Yet, a moment's reflection makes clear that many major disasters are the result of human acts – like the terrorist attacks on 9/11/01, wars, and riots, as well as the chemical leak in Bhopal and the nuclear reactor meltdown in Chernobyl.

This distinction is often blurred, however. Hurricane Katrina is a good example. The hurricane itself was obviously a force of nature (I put aside claims that hurricanes are becoming more frequent and more violent because of manmade global warming). But many are convinced that humans were importantly responsible for the catastrophic consequence of Katrina because of a) the way the levees were (or were not) designed and maintained, and b) the way evacuation of New Orleans was (or was not) carried out.

Airplane crashes can also be ambiguous on this dimension. On the one hand, the making of the plane, its piloting, and the organization of the trip and its route are the result of human activity. On the other hand, planes often crash because of bad weather. Does the latter make it a natural disaster? Does it depend on whether the pilot or the air traffic controllers should have prevented the crash? Fires, shipwrecks, avalanches and the like are yet other examples of events that can bring catastrophic consequences that may be uncertainly labeled as natural or manmade. In the end, it is not clear what is gained by trying to categorize disasters as natural (“acts of God”) or not, although those who catalog disasters tend to do so anyway.⁵

C. Types of Losses: Property Destruction or Damage, Death or Serious Personal Injury, Financial Losses, and Other Woes

A large earthquake can easily result in widespread serious injury and death, a huge amount of property damage, and enormous financial losses of other sorts as well. From the perspective of the individual victim of the earthquake, however, the direct consequences are of the same sort as are incurred by victims of

⁵ <http://www.disastercenter.com/>; <http://historical.disaster.net/>;
<http://www.disasternews.net/>; <http://www.redcross.org/services/disaster/>.

individual disasters that are not societal disasters. Put differently, although the Oakland hills firestorm of 1991 was a societal disaster, the deaths that followed yielded losses of the same sort that routinely occur from, say, auto accident fatalities, and the property damage that followed the destruction of 3000 homes was of the same type that flows from ordinary fires (say, from lighted cigarettes or lightning) that burn down single buildings.

In general, the same point may be made about serious personal injuries. These harms bring with them expenses (like medical and rehabilitation expenses), lost income (or at least a diminished ability to earn), and what tort law calls non-economic losses. These latter include the physical pain and consequent suffering that goes along with a physical trauma, the emotional harm that can come from an injury to one's self or a loved one, the disappointment or embarrassment arising from one's changed appearance or altered ability to engage in pleasurable activities and favorite pastimes as a result of an injury, the harm to one's dignity or to one's health from being injured, and so on. Once more, these types of harms are no different if one is badly injured in an earthquake or in an auto accident.

Nevertheless, in some cases the consequences of a similar injury will be greater if it is incurred as part of a societal disaster. For example, in the aftermath of an earthquake or hurricane the local hospital staff may be unable to provide the immediate care it normally provides, thereby leaving victims with more serious permanent harms. Or, the informal family and social support network on which a victim might otherwise rely may itself be severely disrupted and unable to function, thereby leading to larger losses. Or, a victim may be more emotionally scarred from being part of a community-wide trauma rather than an individual one. (On the other hand, a community's heroic response to a disaster might have a positive long term emotional impact of the disaster's victims that would not occur where the injury was an isolated one.)

One tends to think of disasters as involving physical force and physical harm, and indeed those who rank disasters tend to do so in terms of the number of lives lost or the value or physical property destroyed. Yet, a disaster can occur without either of these. For example, to shareholders of Enron, especially those many employees whose retirement savings were largely or exclusively concentrated in the corporation's stock, the company's sudden financial meltdown was very much a disaster.

What seems most special about social disasters, then, is that they are experienced by a wider community (however defined), and indeed, in the case of many major disasters, the lifeblood of the community itself is potentially at risk. Moreover, because of the very widespread nature of some disasters, the recovery effort may be much more burdensome. For example, when one person's home burns down, finding someone else or some group in the community to provide temporary housing while the person relocates (or finding stable interim housing

while the person rebuilds), may not be terribly difficult. But if vast numbers are made homeless, both the need for help is much greater and those able to provide help many fewer – as the recent hurricane Katrina experience vividly showed.

Furthermore, certain catastrophic losses may be coherently understood only as societal losses. These include, for example, the extinction of plant or animal species (or other grave environmental harm perhaps not even involving direct harm to private property) or the breakdown of a functioning state or local government.

D. Insured/Insurable Losses (or Not)

The financial consequences of many of the losses that result from catastrophic events may be ameliorated by the advance purchase of private insurance that covers the peril in question. Life insurance, health insurance, disability insurance, and accidental death and dismemberment insurance are all examples of privately sold policies that provide compensation for individuals suffering casualty losses to the person. Property insurance (covering fire and all sorts of other perils) is a private mechanism that provides compensation to those who suffer covered losses to physical property (both real property and personal property); and homeowner's insurance, for example, will often pay, not only for the rebuilding or repair of one's home, but also for temporary living costs.. Business interruption insurance can serve as at least a partial substitute for temporarily lost income or pay for temporarily higher expenses. And while these sorts of insurance policies are primarily used to cover the risk of individual loss in non-disaster settings, they can indeed come into play in the event of a disaster.

Yet, one problem with private insurance solutions is that there is sometimes no private insurance available for certain types of catastrophic risks to which people are subject.⁶ Indeed, it is precisely the dramatically large event that leads to widespread disastrous consequences that is frequently specifically excluded from certain standard private insurance policies. For example, the destruction of one's home or other buildings is generally not covered by ordinary property insurance (or homeowners') policies if the harm is caused by things like war, nuclear radiation, floods, and, at least in some places, earthquakes.⁷

Sometimes those catastrophic risks may be specially insured against through privately purchased policies that are narrowly tailored to specific

⁶ Paying the Price: The Status and Role of Insurance Against Natural Disasters in the United States (Kunreuther and Roth eds. 1998); Jaffee and Russell, Catastrophic Insurance, Capital Markets, and Uninsurable Risks, 64 J. Risk and Insurance 205 (1997).

⁷ http://www.ehow.com/how_110961_obtain-disaster-insurance.html.

potentially catastrophic events (although sometimes the availability of these private policies requires governmental intervention, as discussed later). But often, no private insurance market exists for these risks.

While this insurance unavailability might be viewed as a market failure, there are usually understandable reasons why insurers won't underwrite certain risks.⁸ First of all, they find themselves unable to sensibly price the insurance, both because the precipitating event too infrequently occurs and when it does the amount harm it will cause is not really predictable. Moreover, it is especially worrying to insurers that the catastrophe might occur markedly earlier than expected, so that not enough premiums would yet have been accumulated, thereby putting an insurer at risk of insolvency. Even if the timing and scale of the risk were reasonably predictable, however, insuring against infrequent disasters would require a long accumulation and investment of premium income in a way that is not altogether attractive to insurers (and re-insurers who might be enticed to spread the risk beyond the insurer who initially sold coverage to its customers). Among other things, U.S. tax law rules discourage insurance lines that involve premium collection without payouts, even if funds are set aside for eventual losses. Besides, when the gigantic-loss event finally occurs, insurers could be swamped by the claims-handling process, having to rely on out-of-area and/or inexperienced staff who are likely to be more costly and less efficient. As a result, catastrophic risk coverage might simply be an unattractive product for mainstream insurers to offer.

Two common reasons why underwriters typically don't cover certain risks are also relevant in the disaster setting. One is moral hazard, by which I mean that the insured may do something (or fail to do something) that precipitates the insurable event or the level of its consequences. The other is adverse selection, by which I mean the insurer is not easily able to screen out, or charge more to, those customers with higher than average risks. For example, suppose that a lot of people don't take care of their property in a way to minimize the risk of landslide damage and that insurers cannot monitor this failure to take sufficient precautions. Then, not only are landslide damage claims likely to be larger than predicted, but also insurers may find it infeasible to charge different premiums to those who are more and less at risk, thereby forcing them to set premiums at a rate that discourages purchase by responsible owners. In such a setting, especially given the possibility of enormous landslide claims made by lots of customers in one location, who are all harmed by a single major storm, insurers may prefer simply to exclude this risk.

⁸ Kunreuther, *Has the Time Come for Comprehensive Natural Disaster Insurance?* in *On Risk and Disaster* (Daniels, Kettl, and Kunreuther, eds.) 175 (2006).

Not all insurance against catastrophic harm is subject to this sort of exclusion, however. For example, “major medical” insurance is designed to cover personally catastrophic risks that would cause the insured to need a great deal of expensive medical care. And this sort of health insurance generally will cover medical costs incurred in connection with any sort of societal disaster. One reason for the availability of this coverage is that, even a major disaster is not likely to cause a large share of any insurer’s customer base to file claims.

So, too, large amounts of life insurance are generally available for purchase and proceeds of the policy are normally payable regardless of whether the person died from a societal catastrophe or not. To be sure, in some policies some causes of death are excluded from coverage. These may include suicide for a moderate period of time after the policy is obtained, as well as death from sky diving, bungee jumping, and other specifically listed perils – i.e., what are viewed as extraordinarily dangerous activities that the insured party voluntarily undertakes. But deaths from earthquakes, floods, or terrorism, for example, are generally covered by standard life insurance policies. Again, even a major earthquake is likely to kill only a small share of any one life insurer’s clients, and the amount of the insurance payout has been specified (and specifically priced) in advance..

Insurance unavailability is one thing. Yet, even when insurance is available, potential victims may not purchase advance protection against possible losses. This may occur for several reasons. Some people feel they simply cannot afford to buy the insurance (or at least they find it so expensive that they forego it in order have money left to pay for basic essentials of daily living).

Other people, who in important respects clearly could afford to buy private insurance coverage to provide compensation in case of a disaster, do not do so. This might arise from inattention to one’s affairs, or a failure to appreciate that one is at risk. Or, if coverage is sold separately for a specific risk, potential victims may psychologically discount nearly to zero that particular danger to them, thereby concluding that insurance is not needed and/or unduly expensive. Moreover, some people may find it psychologically discomforting even to consider the potentially devastating consequences of even very small risks and so, along with repressing their fears, they pay no attention to the possibility of purchasing insurance.

Still others may be very clear-headed about the risk they face, find the quoted premium to be appropriate, and nonetheless choose not to buy as a result of a deliberate decision to take a chance. Indeed, as discussed later, some might elect not to pay for coverage because they believe that, if a societal disaster does occur, government will step in and help out, thereby making it foolish for them to lay out cash in advance.

Regardless of the reasons for insufficient private insurance coverage, the

upshot is that a community can find itself dealing with the aftermath of a societal disaster in which large numbers of victims confront devastating uninsured losses. In such settings, the community may be faced with the reality that, if nothing is done to make up for the lack of private insurance, the entire community may suffer wider fallout effects, which would not occur were a single member or a single family of the community devastated or killed by other than a societal disaster.

E. Having a Viable Legal (Tort) Remedy Against the Cause of the Disaster (or Not)

By using the legal system, some victims of certain societal disasters may obtain financial recovery for their losses against those private parties who are responsible for their injuries. But many do not have this remedy.

Perhaps most importantly, losses from wholly natural disasters are not compensable in this way because you cannot sue “Mother Nature” or “God” for “acts of God.” (I put aside instances in which the claim is that people should have prevented the harm caused by nature.⁹)

Even when victims (or their surviving heirs) technically have a legal remedy, the prospects of successfully recovering compensation from a solvent party vary enormously.

Sometimes, the remedy is worthless because legally liable actors will have little or no money. Other times, the legal remedy is worthless because liable actors cannot be identified, or, even if known, cannot be found. For example, the 9/11 terrorists themselves, besides being dead, are not good targets of legal claims liability, even if they are clearly formally liable for the incredible havoc they caused, because their estates don’t have the money to pay the compensation award that would be imposed. Maybe 9/11 victims could win a lawsuit against the presumably wealthy Osama bin Laden, but, at least for now, they cannot get him before the court. More generally, all too often the people who secretly set disastrous fires, set off disastrous explosions, or spread around disastrous poisons remain unknown (recall, for example, the Tylenol scare of some years ago when an unknown person managed to lace bottles of Tylenol with poison).

In still other instances, human actors were in some sense a cause of the disaster, but they were not at fault in doing so. And if the law in those settings requires that fault must be proved as a condition of recovery, then the victims of the disaster have no legal right to compensation from their injurers. To be sure, proof of fault is not always required – say, in the case of a dynamite explosion

⁹ Schooner and Siuda-Pfeffer, Post-Katrina Reconstruction Liability: Exposing the Interior Risk-bearer, 43 Harv. J. Legis. 287-327 (2006).

that unavoidably goes awry and results in a disaster.¹⁰ But for most accidental harms, proof of fault is a condition of legal liability.

Suppose, for example, a drug company carefully tests a drug that appears to be altogether safe and very beneficial to patients. Yet, suppose that, when the drug is used by the population at large, it suddenly becomes clear that the drug is lethal to some people, has already killed hundreds, and should be withdrawn. Assuming that the drug company pulls the drug from the market at the first moment when it could plausibly have known of its dangerousness, then this grim pharmaceutical disaster is probably not its fault. And since the law generally requires victims to prove drug company fault before they can recover in court, on these facts the disaster victims would have no legal remedy.¹¹

Finally, in yet other settings, event at-fault, identified, and seemingly solvent actors will escape legal liability. Two very different examples illustrate the point. First, as a disaster unfolds, it is routine that professional rescuers (firefighters, police and the like) will be called to the scene, and it is, alas, predictable that over time some will be injured or killed in the course of doing their jobs. Yet, in nearly all states, even if the danger (say, a fire) has been carelessly caused by an identified and solvent actor, these professional rescuers (or their survivors) will have no legal claim against the wrongdoer because of what is usually termed the “firefighter’s” rule.¹² One basis for this rule is that these professionals are already provided reasonably generous compensation for their injuries (and deaths) through advance work-based arrangements. A different justification is that, as professionals who knowingly confront a danger they are paid to confront, they are only entitled to a warning of the peril and have no right to claim that the wrongdoer should have prevented the danger.

Second, the very fact that an event has lead to a societal disaster may also prevent victims from recovering in tort. For example, after the huge electricity blackout in New York City in 1977, New York’s highest court precluded the claims of victims who were themselves not direct contractual customers of the utility involved (Con Edison), even though it accepted the jury finding that the company was grossly at fault in causing the blackout.¹³ At base, the court feared that requiring compensation of all victims could bankrupt the company, disrupt its operations, and quite possibly result in the denial of the public of its basic need for electricity. This is an instance in which, had there merely been a single victim who was not a Con Edison customer (for example, a tenant whose electricity is paid for by the landlord), then (under the same facts) that victim clearly would

¹⁰ Restatement of Torts 3rd section 20.

¹¹ Restatement of Torts 3rd Products Liability section 2.

¹² *Levandoski v. Cone*, 841 A.2d 208 (2004).

¹³ *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (1985).

have been able to recover compensation from the utility. Rather perversely, then, the fact that so many were harmed was what allowed the defendant to escape legal responsibility. (A different justification for this result might be that, when catastrophic results occur, if the defendant has to pay for all of the foreseeable consequences of its misconduct, this would be excessive “punishment.” Yet, tort law normally does not require any relationship between the degree of fault and the amount of liability.)

F. Promoting Precautions to Prevent or Minimize Disasters in the Future

Although my general focus here is on victim compensation, a few words may be appropriate on the issue of prevention. If it is not too burdensome to do so, then it will be desirable for people to take action before a disaster occurs that can either reduce the frequency of disasters happening, and/or reduce the severity of the harm that follows when disasters do occur. Government might do several things to promote these outcomes.

1. Stimulating would-be victims to take precautions against disasters

Government might take steps to stimulate potential disaster victims to engage in loss prevention (or reduction) measures. For example, certain sorts of structural enhancements to buildings can sharply limit the harm done by earthquakes of certain magnitudes. And government could provide information to building owners about these measures, provide financial incentives to owners to utilize these measures, require owners to take such precautions now, and/or penalize owners who failed to take such measures and suffer harm in a subsequent quake. Similar actions can be taken by government to encourage precautions for other potentially catastrophic risks like floods or tornadoes.

2. Discouraging manmade disasters

Beyond a focus on would-be victims, government could attend to the causes of disasters and take steps in advance to prevent their happening (or at least reduce their prevalence and/or severity). I have in mind here government actions that stimulate private parties who would later be found responsible for a disaster to take advance precautions. Ordering railways, chemical companies, explosives makers and the like to adopt specific safety measures is one strategy. Threatening such companies with the possibility that their victims (or public prosecutors) could sue them if precautions are not taken and harm occurs is another. Sending in government inspectors to look for conditions that might lead to disasters and

then demand risk-reducing actions is yet another strategy. Still another example is requiring private parties to obtain some sort of advance approval from public officials before engaging in activities that could have disastrous consequences – for example, demanding FDA approval prior to the sale of prescription drugs. In some instances, the potential danger from activities is thought to be so great that government might elect to ban it altogether and use a variety of means to enforce such a rule. Certain environmental controls are of this sort.

3. Government itself taking precautionary measures

Sometimes, government itself can directly take measures that are intended to prevent disasters. The Army Corps of Engineers may build dikes or re-direct waterways and the like in an effort to reduce the flood risk to a specific area. Or government may run (and regularly improve) the air traffic control system in hopes of preventing air crash disasters. And so on.

G. Saving People, Fixing Public Property, and Restoring Core Public Functions (Apart from Victim Compensation)

When a disaster occurs, like an earthquake or a hurricane, there can be considerable destruction and disruption of public property and public functions. Clearly, dealing with these consequences is a duty of government. The roads, parks, and beaches may have to be cleared and restored. Public buildings like schools, libraries and civil offices may need to be fixed or rebuilt. The criminal and civil justice systems, regulatory bodies, administrative units and the like may need to get up and running again. If public employees die or are injured in the disaster they have to be replaced. And so on.

Moreover, in the course of a disaster unfolding, public authorities often must send out rescuers in hopes of minimizing harm. For example, fires have to be put out, those cut off by floods need to be retrieved if possible, those already injured need to be taken to places where medical care can be provided, and so on. Moreover, if there is adequate warning, pre-rescue efforts may need to be taken even before the disaster has struck – like facilitating evacuations.

Depending on the extent of the disaster, local government may not be able to bear this effort by itself, and other governments must be called in to help. Local and state governments typically have reciprocal aid pacts in which they pledge to help each other out in cases of such emergencies, and, of course, where the disaster's consequences are wide enough and large enough, the federal government must also step in, say, by providing money and/or federal emergency personnel.

But this sort of governmental effort in dealing with disasters is not my

central focus here. Rather, my concern is with the possible roles that government might play with respect to the compensation of individual victims of societal disasters.

II. Roles of Government in Compensating Societal Disaster Victims

Assuming that, despite prevention efforts, major disasters are going to occur anyway, what are roles of government with respect to victim compensation in the aftermath?¹⁴ Note well, that effectively helping victims after a disaster often requires government action beforehand, by putting victim compensation arrangements in place. Note too that, merely because a true societal disaster has occurred, that does not necessarily mean that some special disaster-based scheme must come into play.

A. Facilitating the Receipt of Private Compensation for the Consequences of a Disaster

One basic role of government is to facilitate the availability of private sources of compensation in the event of a disaster. This partly involves the protection of victims' ordinary legal rights. I have two related, but different, jobs in mind here.

1. Enforcing insurance contracts and ensuring that insurers are solvent and pay what they owe

First, by opening up its courts, government can help assure that those who bought insurance before a disaster occurred and later find that their valid claim is rebuffed, are able to sue their insurer and win a judgment against the defendant. In cases of egregious refusals to pay valid claims, government can (and many states do) allow victims to assert and, on proper proof, win substantial additional financial compensation (for pain and suffering, as punitive damages, and so on) as a way to prod insurers to live up to their contractual obligations in the first

¹⁴ Trebilcock and Daniels, Rationales and Instruments for Government Intervention in Natural Disasters, in *On Risk and Disaster* (Daniels, Kettl and Kunreuther eds.) 89 (2006); Rabin (with Bratis), Financial Compensation for Victims of Catastrophes: United States, in *Compensation for Victims of Catastrophes: A Comparative Legal Approach* (Faure and Hartlief eds.) 303 (2006); Moss, Courting Disaster: The Transformation of Disaster Policy since 1803, in *The Financing of Catastrophic risk* (Froot ed.) 307 (1999); D. Farber and J. Chen, *Disasters and the Law: Katrina and Beyond* (2006).

place.¹⁵

Beyond that, government may also take steps (as state governments generally do) to assure that insurers will actually have the money to pay valid claims in the event of a disaster.¹⁶ This requires regulators to be certain that insurers are both charging actuarially adequate rates (and not cutting premiums too much in order to obtain more business) and managing the premiums collected in a responsible and secure manner. In addition, to deal with the problem of insurer insolvency, states typically have created guaranty funds through which, in effect, solvent insurers step up and provide at least limited benefits for claimants whose insurers have financially collapsed.

These jobs of helping policy holders collect from their insurers apply, of course, to claims arising out of events that are, and are not, societal disasters. And while assuring insurer solvency may be especially important when it comes to events that occasion multiple, large claims, this is a good example of how more general public action, aimed at a broader problem, comes into play to help societal disaster victims.

It is also worth noting in this context that, although governments often interfere with respect to various terms that are to be included or excluded from insurance contracts in general, they have typically permitted casualty insurers to exclude property damage coverage that is the result of various specified disasters as noted above. Understandably, government must be careful not to require private insurance coverage of the sort that will cause insurers to withdraw from the business entirely.

2. Creating enforceable tort rights against those who cause manmade disasters

I have already briefly discussed the fact that some disaster victims will have valuable tort claims against those who caused their losses, and I simply want to note here that it is another basic role of government both to define the relevant tort rights and then to make the judicial process available to those who make claims that cannot be resolved outside of court.

As mentioned above, however, it is important to appreciate that, in defining the boundaries of tort rights, common law courts have not infrequently curtailed the rights of disaster victims out of a fear that otherwise the financial devastation of the defendant might lead to an even greater harm to the community.

¹⁵ Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (1973).

¹⁶ K. Abraham, Insurance Law and Regulation (4th ed.) 108-113 (2005).

3. Facilitating charitable/voluntary organizations and efforts to step in and assist victims of disasters

Finally, I want to emphasize under this heading that, in the aftermath of a disaster, government is hardly the only actor that might step in to help victims. Private actors with no formal legal duty to help might well also “come to the rescue.” These can be individuals or local groups of people who spontaneously rise to the occasion, and they can be organizations set up in advance to respond. Indeed, quasi-public groups like the Red Cross (which typically works along side FEMA) have disaster response as their central mission.¹⁷

Government can take steps in advance and after a disaster occurs to promote this outpouring of private “charity” (both its quality and quantity). This can be done by encouraging donations to and voluntary service commitments to disaster relief organizations (e.g., by providing tax benefits for donors). It can be done through advance coordination agreements meant to help assure that there is as little duplication of effort as possible once a disaster occurs, that groups are able to take advantage of their expertise, and so on. Government might also simply try to promote a general cultural norm that it is a moral obligation to help one’s neighbors, community members, or even fellow countrymen in the event of a disaster (for example, by honoring those who have done so, by promoting this value in schools, and so on).

There is inevitably some tension between the role of private actors and that of government in the provision of disaster relief. Basically, government has to be concerned about discouraging private relief (or indeed, personal advance provision for financial compensation) by promising to take care of everything if a disaster hits (or even simply by being seen to do so once disasters strike, regardless of whether anything specific was promised in advance). Doing so risks causing potential victims and their would-be helpers to ignore the problem and just step aside and leave it to government when a catastrophe happens. Hence, in order to stimulate those private actors, government somehow has to define its role as supplementing and not supplanting that of others. I will discuss this coordination problem further below.

¹⁷ <http://www.redcross.org/index.html>.

B. Assuring Insurance Availability for Disaster Victims When the Market Fails to Do So

1. Stepping in when the private insurance market fails to cover property losses from certain disasters

As noted already, sometimes the private insurance market by itself will not provide insurance coverage for the consequences of certain disasters. In that case, government might act, either by becoming an insurer itself and offering (or even mandating purchase of) the missing coverage or by working with insurers to get (or force) them to provide the coverage.¹⁸

The latter could involve getting each insurer of similar risks (e.g. property insurers) to take on its “fair share” of the target risk (like earthquakes). Or it could involve creating of a fund paid for by insurers (presumably from extra premiums collected from its customers) that covers the target risk (like earthquakes). Alternatively, government may become the actual insurer of the risk (like earthquakes) although even there government might yet enlist private insurers in the roles of selling the product, collecting the premiums, and perhaps even processing the claims were the covered risk to occur.

The regime supervised by California’s current California Earthquake Authority is one example of how government can get involved with creating a market for insurance coverage for a risk that is not covered by nearly all basic property insurance policies sold in California.¹⁹ A somewhat different role is played by the state of Florida under the Florida Hurricane Catastrophe Fund that was created in 1993 in the wake of Hurricane Andrew.²⁰ The National Flood Insurance Program is an example of how the federal government stepped in to create coverage for a risk that private insurers were generally unwilling to underwrite on their own.²¹ Recent governmental interventions designed to assure the availability insurance against the consequences of terrorism (most importantly, a temporary agreement by the federal government to pay for a share of covered losses) is yet another.²² These schemes are all aimed at physical property damage. Although not now in place, it is imaginable that, with the help

¹⁸ U.S. General Accounting Office, *Terrorism Insurance: Alternative Programs for Protecting Insurance Consumers* (GAO-02-199T, 2001).

¹⁹ <http://www.earthquakeauthority.com/>.

²⁰ <http://www.florid.com/FHCF.htm>.

²¹ http://www.fema.gov/plan/prevent/floodplain/How_the_NFIP_works.shtml

²² <http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/>; Levmore and Logue, *Insuring Against Terrorism – And Crime*, 102 Mich. L. Rev. 268 (2003).

of government, the insurance industry could provide property insurance against the full range of natural disasters.²³

An important issue confronting any such arrangement – either a comprehensive scheme or one aimed at a specific disaster risk -- is the premium structure. Is the government arranged scheme, on average, charging the equivalent of “market” rates, or are taxpayers subsidizing those who buy the insurance? A justification for subsidy might be the otherwise low income status of the victims. A second-best sort of justification might be that, if, after the disaster, political realities would require government to come in with taxpayer money and help out anyway, it might be socially desirable to get at least some contribution in advance from those who are specifically at risk.

Additional critical pricing issues are (1) whether individual or classes of buyers will be charged differently because they run different risks, and (2) to what extent will underwriting investigations be carried out and underwriting conditions be attached so as to promote efficient precautions by those who are at risk. Failure to differentiate among insurers in the way a private market would results in subsidies. To be sure, sometimes these seeming subsidies are justified because price classification is simply too costly to engage in. Other times, failure to discriminate in pricing may reflect a positive choice to favor certain parties who are risk, such as low (or high) income people. In any event, the absence of actuarially sensible risk-related premiums can discourage both insurance companies and certain property owners from participating, and it can cause some people to incur risks they would not run were their insurance costs actuarially fair.

Beyond assuring the availability of certain types of property damage insurance, other federal insurance programs protect against potentially disastrous financial losses. Moreover, unlike, say, the California earthquake program or the National Flood Insurance Program, these financial loss insurance regimes are largely universal (effectively mandatory). They include the programs that insure bank deposits,²⁴ private pensions,²⁵ and securities held by stock brokers²⁶ against the financial collapse of various institutions.

²³ Kunreuther, Has the Time Come for Comprehensive Natural Disaster Insurance? in *On Risk and Disaster* (Daniels, Kettl, and Kunreuther, eds.) 175 (2006); for a recent conference on this broad topic, see *Insuring Catastrophic Losses: The Status of TRIA and Proposed Natural Disaster Backstops* (University of Connecticut Law School), www.wrf.com/risk2.

²⁴ <http://www.fdic.gov/deposit/index.html>.

²⁵ <http://www.pbpc.gov/>.

²⁶ <http://www.sipc.org/>.

2. The underlying role of basic social insurance (and basic needs-based aid)

Governments also create social insurance programs that come into play in the event of a disaster, even if these mechanisms are by no means restricted to disaster settings. In this respect they are like efforts to assure insurer solvency, as noted already.

Social insurance is aimed at personal loss, not property loss. For example, in the United States our social security system effectively requires workers to partially insure against loss of income from retirement or death, the Medicare Part A component of social security in effect requires workers to insure against the need for costly hospitalization services when they become elderly (or disabled), and the unemployment compensation system in effect requires workers to partially insure against the loss of wages arising from involuntary unemployment. Their mandatory nature makes them like bank deposit insurance, but unlike flood insurance.

Mandatory social insurance is perhaps best justified on the combined grounds that some workers would otherwise feel themselves unable to afford this sort of insurance and that many would, in any case, simply choose not to purchase coverage that later turns out to be needed. This can be viewed as a kind of collective paternalism that forces people to do what is best for their longer run interests, regardless of their short term preferences. Alternatively, it can be viewed as an effort to force people to contribute in advance their own fair share (or at least something) to a scheme that will help them in times of personal need, rather than having them rely upon taxpayers in general when the time comes.

The key point here is that, when people suffer personally from a societal disaster, general social insurance is already in place, and so certain disaster victims (and their families) can call on this scheme to help compensate for their income losses, medical expenses, and so on. If nothing else, this means that any special disaster victim compensation arrangement needs to consider how to deal with the availability of basic social insurance. And it may well mean that the wider and more generous the underlying social security safety net, the less need there will be for special governmental intervention in case of a disaster.

Furthermore, while not exactly social insurance, it is also vital to appreciate that all sorts of other government “relief” programs that are available to victims of what might be seen as personal disasters are normally intended to be there to help as well when it is a societal disaster that has occurred. This includes income support provided by welfare programs like TANF, housing support programs like public housing units and so-called section 8 housing vouchers, food assistance provided by food stamps and so on. Again, special disaster relief schemes need to take that fact into account.

As an aside, some people will already be receiving benefits from needs-based relief programs and/or social insurance schemes like unemployment compensation when a societal disaster strikes their community. Hence, an important, and sometimes quite difficult, role for government is simply to assure the continued provision of assistance to those who were already obtaining that support before the event (a problem much exacerbated in the aftermath of hurricane Katrina, for example, because so many claimants were relocated to other states)²⁷.

C. Providing Victim Compensation Either When Government Should Have Prevented the Disaster or When It Is the Sort of Disaster We Aspire to Have Government Prevent

First, suppose government actors should have prevented a catastrophe from occurring, but failed properly to carry out precautionary obligations, or carried them out in an inadequate or careless manner that facilitates the disaster.

In such settings, the public may believe that, as a result, government has an obligation to compensate the victims. People can have rather different visions of what they mean by “government” in such settings.

One approach is to think of government as some independent body with money, like a corporation or other private enterprise, whose treasury is appropriately tapped when the misfeasance or nonfeasance of its employees or officers brings about a disaster that should have been avoided. Perhaps the more realistic view is that if we collectively (through our elected leaders and our employees) failed to get the job properly done, then perhaps we collectively have an obligation to provide compensation to those who are harmed as a result.

However this is conceived, one way to effectuate this role of government is to allow victims to file tort claims against the government. Yet, in fact, the Federal Tort Claims Act (FTCA)²⁸ is quite unreceptive to many of the claims that would likely be made with respect to failures by federal officials to prevent disasters. The result is that when the finger of responsibility is pointed at federal government actors, even carelessness, incompetence or both may not suffice to impose financial responsibility via tort law on the deepest of pockets we have – even in cases where, had the wrongdoing actors been private parties, tort recovery would have been allowed (and the actors’ employer would be vicariously liable).

This immunity is especially sweeping at the federal level because the

²⁷ Winston, Golden, Finegold, Rueben, Turner, and Zuckerman, *Federalism after Hurricane Katrina: How Can Social Programs Respond to a Major Disaster?* Urban Institute (2006).

²⁸ <http://www.lectlaw.com/def/f071.htm>.

FTCA protects government from tort liability for the consequences of discretionary acts (a concept that has been broadly defined). This includes discretionary acts that juries would later have found to be altogether unreasonable. Other federal statutes contain special tort immunity provisions, for example, in legislation governing the flood control and flood insurance program. State tort claims acts often contain weaker governmental tort immunity provisions, although the law in some states is largely parallel to federal law.

This discretionary immunity provision of governmental tort claims acts primarily rests on considerations of separation of powers. The idea here is that the judicial system should not be second guessing the policy (and related) choices made by the executive/administrative branch. The point seems to be that, if the public objects that a wrong decision was made, it is not to register this judgment through juries, but rather through other political processes, such as by pressuring legislators or executive actors to decide differently, by voting those who are misbehaving out of office and so on. Of course, these alternative remedies are of little solace to disaster victims who are now suffering because of incompetent government.

On the other hand, it is important as well to emphasize that immunity under tort claims acts does not necessarily mean that government will, or should, turn its back on its victims. It is simply that their remedy, if any, is not to come through tort law. That, in turn, suggests that a role of government might be to create a specific disaster-compensation scheme (other than tort law) to provide compensation in such instances.

In any event, it is not only for specific instances of public “fault” for which government may be called upon to provide disaster compensation. As a society, we broadly see it as government’s job, for example, to provide public security – to protect us against crime, of both the routine sort and the special sort that amount to social catastrophes, like large-scale terrorist attacks. This goal for government is a matter of aspiration, and thoughtful people concede that is simply not feasible for government to prevent all such crimes.

Nonetheless, when such events do occur that are either personal disasters for victims or broader societal disasters, then, as members of society at large, we may conclude that, in effect, we should all chip in and provide compensation to victims.

State “victims of violent crimes” laws²⁹ are perhaps best viewed as an example of government acting in this way. These schemes (which are neither all that effective nor very generous) are usually meant to provide financial help to those who are made destitute or otherwise devastated by some violent crime to their person. Government aid provided to victims of urban riots might also be

²⁹ <http://www.nacvcb.org/progdir.html>.

viewed in this way.

In hindsight, some might argue that the September 11th Compensation Plan should be seen as a program by which government is taking responsibility for its failures to prevent the terrorist acts of 2001.³⁰ But, even if one believes that the federal government could not have stopped these terrorist acts (which was the general view at the time the compensation plan was enacted), the 9/11 plan might be justified by the aspirational idea that, since it is government's job to stop terrorism in general, it is government's duty to compensate terrorism victims even if their harms were not reasonably preventable in this instance.

So, too, the scale of the extra-ordinary assistance voted by Congress in the aftermath of hurricane Katrina may be justified either on the basis of specific prevention failings of federal officials (if one believes that) or on the basis of the more general social understanding that flood prevention is a federal responsibility.

D. Providing Victim Compensation as an Alternative to Tort Recovery

Sometimes the prospect that future or existing victims will sue in tort those responsible for a disaster (or potential disaster) is socially daunting. On the one hand, the fear of possible tort liability in the future, were a disastrous accident to occur, may prevent what otherwise is thought to be a socially desirable project from going forward at all. On the other hand, once a disaster has occurred, the potentially crushing burden of tort liability may threaten the very existence of some highly desirable social good or service.

In these settings, one possibility is for government, either *ex ante* or *ex post*, simply to bar tort claims (or at least some claims, or at least limit the amount of claims). This is, in effect, what the New York Court of Appeals did in the "blackout" case discussed earlier when, *ex post*, it cut off the electric company's tort responsibility to those who were not direct customers of Con Edison. This decision followed an earlier New York case (which generally reflects the law across the U.S.) which freed a water company from potentially devastating tort liability for carelessly failing to provide the water it had promised to make available at local hydrants for firefighters to use to contend with burning buildings.³¹

Denying a tort remedy need not necessarily mean that victims simply go uncompensated, however. For fire risks, for example, one explanation for the tort immunity of water companies is that these accidental losses may well be better dealt with via private fire insurance (both because it is both widely available and widely purchased and because that insurance, unlike water rates, is priced to

³⁰ <http://september11fund.org/>.

³¹ *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (1928).

reflect the fire risk attached to the insured building).

But other times, society might conclude that government should provide (or arrange for) a substitute compensation arrangement in lieu of tort law. I next consider three somewhat different settings in which this has occurred.

1. Compensation plans adopted in advance of a (potential) disaster that are designed to facilitate the pursuit of a social good

When the nuclear power industry was getting underway, commercial liability insurers were unwilling to provide broad coverage against the risk of harm from a serious reactor meltdown, presumably on the basis that (1) the likelihood of this happening, although very small, was quite unpredictable, and (2) the amount of harm, while potentially astronomical, was also unpredictable. Faced with altogether inadequate insurance coverage, the nation's electrical utility companies announced that they were unwilling to develop nuclear energy because they were unwilling to risk the company's entire wealth on the even slight chance of serious accident.

Some opponents of nuclear power argued that this was a good reason for never allowing this sort of development in the first place, i.e., an unwillingness of the industry to take responsibility for the social costs it might impose. Yet, politicians concluded that the benefits of nuclear power outweighed the disaster risk, and that society would be harmed were nuclear power to be stalled because of the overhang of tort liability.

Hence, in 1957 Congress adopted the Price-Anderson Act³² which simultaneously restricted the tort rights of potential victims of a serious nuclear accident and mandated private arrangements to assure at least some compensation to victims were such an accident to happen. This scheme technically did not create a substitution for tort law, but it amounts to much the same thing. Specifically, the Act provided that the power company where the accident occurred would be strictly liable in tort for the consequences (this was probably the law of most states anyway, although there had not then been any cases directly on point). But it limited tort recovery in an inventive way.

First, power companies with nuclear reactors were required to purchase the level of liability insurance that the insurance industry was then willing to sell (and over time as the industry capacity has grown, Congress has amended the Act to insist on higher coverage). Second, since this coverage would be quite inadequate in the event of a grave nuclear accident, the Act further provided that, were there such an accident, then every company in the nation operating a nuclear

³² <http://www.gao.gov/new.items/d04654.pdf>; <http://www.nei.org/>.

plant would have to contribute into a fund a specific amount per plant that would be used to pay additional victim compensation in the local area where the disaster occurred. The total contribution that would be available to the fund has increased over time, both as the number of nuclear power plants grew and as the Congressionally-required contribution per plant has been expanded. Through this plan, the government, in effect, forces the entire industry to pool its resources and collectively insure against the risk all of the firms face.

Even this much expanded coverage, however, would presumably not suffice were the U.S. to suffer an accident of the Chernobyl sort. Fortunately, nothing like that has happened in America so far, and so we have no experience with what would happen next. The Act promises vaguely that Congress would then take appropriate action, but does not provide for exactly what that would be or whether it would be other than what the federal government already provides in the event of other disasters, discussed below.

A quite different strategy was employed in 1976 in furtherance of the federal government's effort to get a large share of Americans to take the so-called Swine-flu vaccine.³³ Because they could not get tort liability insurance protection, vaccine makers initially refused to supply the product at a time when federal health officials feared that, without a large nationwide vaccination campaign, a pandemic flu that was predicted for the up-coming flu season could kill a very large number of Americans. In short, the Ford Administration feared a disaster in the making.

To break the log-jam, the federal government relieved the vaccine makers of the tort liability they feared; instead, simply put, Congress agreed that the government itself could be sued as though it were the vaccine provider. Alas, things turned out very different from what was anticipated. The dreaded pandemic did not arrive. The vaccine was taken by a substantial number of people, but, as a bitter irony, it turned out to be highly dangerous in some cases, and many were seriously injured. In the end, the federal government wound up paying substantial victim compensation (through tort law).

2. Compensation schemes designed to relieve a tort law crisis with respect to a social good

A somewhat different strategy was embraced with respect to childhood vaccines. In the 1980s, pharmaceutical firms making those vaccines were beginning to be successfully sued by parents on behalf of children who, the parents claimed, were being severely injured by the side effects of vaccines (especially the vaccine aimed at preventing pertussis, or whooping cough as it is informally called).

³³ <http://www.law.duke.edu/journals/lcp/articles/lcp64dAutumn2001p49.htm>.

Were the claims about side effects correct, the nation had a public health disaster on its hands. While it was very important for children's health to curtail whooping cough, at the same time it would be very bad if many children were being gravely harmed in the process. National public health leaders concluded that, on balance, continued widespread vaccination was the socially more desirable route for the nation to take, especially as there was some doubt in their minds that the vaccines were actually having the claimed side effects. But, faced with potentially enormous tort liability (especially as compared with the amount they could realistically charge for their products), the vaccine makers threatened to cease vaccine production.

Notice, that what is different about this category from that described above, as illustrated by nuclear power and swine flu, is that here injuries have already occurred and tort suits have been filed and some have already been successful. Yet, as with those other examples, the fear of future tort liability was seen to threaten the provision of something vital to the nation.

In response, Congress adopted the Childhood Vaccine Act.³⁴ This law provides an alternative to the tort remedy. Claims can be filed with the U.S. Court of Claims on behalf of any child who displays certain symptoms within a certain period after receiving the vaccination. The Court then determines a compensation amount that the family is offered. A key element of the compensation package to be offered is that, in no case, will the amount of non-economic loss compensation exceed \$250,000 (which is far less than some juries had been awarding for pain and suffering and possibly for punitive damages in certain individual cases).

Families are not required to accept the sum offered by the Court of Claims, but if they reject that sum and decide to sue the vaccine maker anyway, the plaintiffs are then subject to federal rules as to tort liability that make it much harder for them to win, at least in states that had earlier moved in the direction of imposing strict liability on the defendants merely for making a product that a jury might find was the cause of the child's injury.

This plan is not funded by taxpayers generally. Rather, a fee attached to each vaccination, thereby, in a sense, making families as a group insure against the risk that their child might be an unlucky victim (this puts aside issues of whether individual families actually pay this fee or have it waived or paid for by their health insurance).

Later, a scientific consensus developed (although not everyone has accepted it even yet) that the pertussis vaccine was not actually the cause of the harms the claiming children's families were assigning to it – the position of the vaccine makers all along. The initially sharp fall off in the share of parents

³⁴ <http://www.hrsa.gov/vaccinecompensation/>.

getting their children vaccinated has abated. And the number of claims that the whooping cough vaccine is causing severe harm has dropped. Nonetheless the statutory compensation scheme, with its presumption about causation, has continued in effect. And despite paying out benefits to about two thousand claimants, the scheme has faced considerable criticism for its delays and for what are seen as efforts by claims administrators to find creative ways of denying eligibility.

Florida and Virginia have also enacted plans with respect to medical malpractice that are somewhat similarly constructed, although they contain key differences.³⁵ In those instances, the states were faced with what they feared would become something of a catastrophe in the provision of medical services, especially with respect to the delivery of babies. At the time, large numbers of doctors were said to be refusing to do this work and moving their practices out of state.

The seeming cause of this pending potential disaster in the provision of medical care was a few extremely high medical malpractice awards against a few doctors in so-called “bad baby” cases, where the harms suffered by a severely-damaged newborn were being blamed on malpractice in the delivery process. The doctors asserted that these were unavoidable birth defects or unavoidable consequences of difficult childbirths, and that they were being held strictly liable. Regardless, even for doctors who had never been sued the consequence was that either malpractice liability insurance was no longer available (as some insurers withdrew from the market) or the rates charged obstetricians were skyrocketing, making it financially infeasible for many doctors to do this sort of work in those two states (or so they claimed).

In order to assure the continued provision of obstetrical care, the legislative solution adopted in both Virginia and Florida was intended to take away the right of future “bad baby” claimants to sue in tort, and in its place provide a compensation scheme for these children. As with the federal Childhood Vaccine Act, these state compensation plans, while mandated by legislation, are not funded by taxpayers at large, but instead by various actors who provide medical services (who presumably pass the cost on the public at large through higher fees).

These plans, especially Virginia’s, have been criticized from a variety of perspectives and have not been copied elsewhere, although they continue in force. Moreover, creative lawyers have found ways to continue to bring tort claims in certain settings, especially under Florida’s plan. Yet, whatever the plans’ shortcomings or their contribution to solving the problem they were aimed at, the

³⁵ Bovbjerg and Sloan, No-Fault for Medical Injury: Theory and Evidence, 67 *University of Cincinnati Law Review*, 53 (1998).

crisis in the provision of obstetrical services appears to have passed in both states.

3. Preventing a possible social crisis that tort litigation might create

As noted at several points already, the terrorist acts of 9/11 lead very quickly to the September 11th Victim Compensation Plan.³⁶ One justification for the adoption of the plan, as already explained, is that, even if government could not reasonably have prevented these acts (a now much-contested matter), we look to government generally to protect us from terrorism and when it does not, we pitch in as a nation to provide relief to those (or their families) who had the bad luck of being victims.

Yet, because of past practice, it is not altogether easy to explain the 9/11 plan on this basis. For example, even in recent years no such plan was enacted after the terrorist attacks on the ship the USS Cole (although arguably that event, especially since it took place outside the U.S. was not clearly understood to be a national “disaster”), or after the Oklahoma City bombing (although that was carried out by what arguably amounted to a domestic terrorist, perhaps social solidarity to help out victims of terrorists is more clearly felt with respect to foreign terrorists), or after the first World Trade Center bombing (although the harm done actually then was arguably not enough to amount to a disaster).

So, while it is true that the 9/11 terrorist acts were gigantically more harmful than those other examples of terrorism, there was a further feature of this event that I believe played a key role in the adoption of the compensation plan. From the outset it seems that our political leaders wanted to be sure that the national focus would remain centrally on the terrorists as the wrongdoers. In part, this may have been a desire by the Bush Administration to keep attention away from possible security lapses of the federal government, although, as a litigation matter, any such carelessness of that sort was probably immunized from tort liability anyway.

More important for my purposes here was the matter of potential airline tort liability – say, for the failure to secure access to the cockpit, or for failure to better supervise the screening of passengers. Not only might lawsuits against the airlines potentially undermine the foreign affairs line that the terrorists were the only bad guys here, but also, given the enormity of the disaster, tort liability could financially destroy two of our largest domestic carriers (United and American) both of whom were already in deep financial difficulties at the time. After all,

³⁶ <http://www.usdoj.gov/archive/victimcompensation/>; Rabin, The Quest for Fairness in Compensating Victims of September 11, 49 Cleveland State Law Review 573 (2001).

earlier on Pan Am had been successfully sued for very large sums in connection with a terrorist destruction of one of its jets over Lockerbie Scotland in 1988.³⁷

Hence, somewhat analogous to the Con Edison “blackout” disaster described above, as part of the September 11th Compensation Plan, airline tort liability was restricted by Congress to the maximum of their then in-place insurance policies (amounting to \$1.5 billion with respect to each of the four planes that were lost).³⁸ This put the financial burden of potential tort liability on the insurers, and not the carriers.

But along with limiting airline liability, Congress adopted a compensation scheme that was designed to woo claims with respect to deceased (and injured) victims out of the tort system altogether and into a special benefit plan instead. As with the Childhood Vaccine Act, tort rights were not eliminated, by the 9/11 plan, although some procedural restraints were imposed beyond of the liability cap.

Unlike the Childhood Vaccine Act, claimants under the 9/11 plan were not made a firm offer that they could either adopt or reject and then sue in tort if they wish. Instead, the law provided that merely filing a claim with the plan precluded a tort claim, at least once an award was made by the plan. But not too much should be made of this difference since the 9/11 claims administrator made the claims-award process highly transparent. This meant that nearly all claimants could be quite certain as to approximately how much they would receive were they to make a claim on the plan.

With respect to those who were killed in the 9/11 disaster, the plan was extremely successful in enticing nearly all of those eligible (well more than 95%) to seek recovery from the plan rather than to sue. Perhaps this was because of what many viewed as the generosity of the plan, despite charges that the amounts provided for non-economic loss were too small in the eyes of some and despite complaints about the way the plan dealt with other victim sources of compensation. Perhaps another reason for the success of the plan was that claimants realized that if they sued the airlines they might well not win; for example, it is much easier in hindsight to complain about better searching passengers and better blocking cockpit access. Most of the perhaps 90 or so lawsuits on behalf of deceased victims that remained in play at the time the compensation plan ended continue to be unresolved five years after the disaster, reflecting the generally slow pace of tort cases filed in the aftermath of disasters (although press reports suggest that perhaps 30 of those cases have been settled, the terms of which settlements remain secret).

Note how this category of government action differs from the nuclear

³⁷ In re Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804 (1994).

³⁸ <http://leahy.senate.gov/press/200109/010921a.html>.

power problem because there no harm had yet occurred; and it differs from the childhood vaccine problem because there tort suits had already been brought and won. Moreover, in both of those other categories, the government action was to curtail tort claims arising from future harms, whereas the 9/11 plan was aimed at curtailing claims that technically had already arisen but had not yet been pursued. All three categories, however, share the central feature that future litigation was feared and government acted with the goal of containing that future litigation while at the same time assuring substantial victim compensation (even if not at the level provided to successful tort claimants)..

E. Providing Victim Assistance to Overwhelmed Communities for Reasons of Altruism and National Solidarity

I want to turn now to yet a different justification for compensating disaster victims. It draws on notions of altruism combined with an understanding of the role of the larger community in helping out smaller groups in times of need.

As already suggested, if an event is not a societal disaster, then victims who find themselves in need can often look to their friends and neighbors, or perhaps local charities or even the wider (but still local) community, to help out. Indeed, some “disasters” are probably handled in just this way, for example, a mining disaster in which a dozen or so workers are killed.

But when it is a large scale societal disaster, the local community itself may be too undone, too devastated, to carry the burden of relief. In that case, a wider community – even the nation as a whole – may need to step in and help if the community is not to be permanently impaired. Put differently, on such occasions, it may well be that no other institution besides a larger governmental unit (often the federal government) is capable of organizing and delivering the needed help.

One could try to justify the national government providing compensation to victims of, say, erupting volcanoes on the ground that the wider community (here the nation) feels it appropriate for its tax dollars to be used to provide relief because the rest of us feel lucky that we were not victims this time (as we might well have been). That is, perhaps we see this form of aid as a sort of collective insurance.

Yet this way of thinking about the funding and provision of aid to, say, large scale natural disaster victims, is problematic. After all, only a relatively small share of Americans is truly at risk of, say, hurricane damage, and certainly some people are much more at risk than others. So, too, only a relatively small share of Americans is subject to a significant risk of earthquake damage, and so on.

One might argue that when you take into account all of the different

societal disaster risks, we are all subject to one or more of them and so we are all happy to chip in to provide a scheme that helps out those of us who are unlucky enough to be victims. Yet, in the end, surely the truth is that people in some localities are much more at risk of societal disasters than are others, and if the compensation plan is paid for by the nation, then thinking this as a kind of collectively desired insurance has some awkwardness to it.

This suggests that insurance may not really be the proper metaphor. I believe it is more a matter of a combination of a widely felt sense of altruism and a sense of national solidarity. Although Americans do contribute aid to disaster victims in other nations (individually, through private charities, and through government aid programs), even greater help is provided to victims of “our own” disasters.

Providing help on those occasions is a way for us to show that we Americans care about each other. We might not routinely make efforts to help out individually devastated people, but when it is a societal disaster, we want to show something of our own humanity – not only perhaps with an individual voluntary gesture, but also by having our government come in with help on our behalf.³⁹ Moreover, as already noted, when the devastation is broad and deep enough, communities themselves are endangered, or at least temporarily overwhelmed, and so helping out in such circumstances might be an especially effective use of public funds.

Hurricane disaster relief may be best understood in this way. Although the unavailability of private property insurance for flood damage may also be thought to justify such aid as a way of government providing substitute insurance, don’t forget that the federal government has already stepped in to this breach by creating the federal flood insurance scheme. Hence, federal aid provided to individual hurricane victims is typically well beyond what the government has seen as its insurance-creator role, and indeed, substantial hurricane assistance goes to those who would not need it, or, more likely, would need less, had they not failed to purchase flood insurance in the first place.

Thinking about disaster victim compensation as a matter of altruism on behalf of the wider community may also help explain why the 9/11 compensation plan was so quickly adopted without any noticeable public objection that this was not a proper use of taxpayer dollars. That is, New York City victims, the passengers on the various planes, as well as Pentagon victims, were understood to have taken a hit for the nation, and we as a nation had an especially strong psychological need to show solidarity with them – even though citizens living in most of the country must have realized, at least afterwards, that Manhattan was a far more likely terrorist target than their community was.

³⁹ G. Calabresi and P. Bobbitt, *Tragic Choices* (1978).

And the strength of that feeling of solidarity may help explain the extent of the compensation provided. Normally, FEMA and its programs are the central ongoing way in which the federal government deals with what might be termed our national disasters. And FEMA played an important role in response to the 9/11 disaster as well. But it is particularly worth emphasizing here that the 9/11 compensation plan was far more generous to the families of those who were killed on 9/11 than FEMA was, for example, to the victims of the Northridge, California earthquake, especially as FEMA does not provide anything simply on account of a death from a disaster.

Three aspects of disaster relief can make federal aid based on this altruistic instinct somewhat dicey, however. One, noted already, is how to feel about those victims who might have insured but did not and now are suffering devastating losses. That is, how much should these victims be held accountable for their past acts and how much should we be forgiving of what might seem like a prior lapse? In considering the matter, there is also the question of how much should we fear that providing public assistance after disasters occur will send a message that will undermine self-help efforts in the future?

A second concern stems from the reality that some communities are better prepared to deal with local disasters than are others. Sometimes this is a matter of better advance planning and better leadership as the disaster unfolds. When some places need more help because of failings along these lines, the same conflicting instincts come into play as just noted above.

A third concern is that, under the pressure to provide help to large numbers of people amid chaotic circumstances, those managing disaster aid are very much at risk of either burdening desperate people with oppressively bureaucratic requirements or paying out sums to fraudulent claimants. So, too, aid-providers risk either paying too much for rescue, clean-up, and recovery services that in some cases are not needed at all, or else failing promptly to get help where it is very much needed. In short, the good will underlying the public's instinct that a community should be helped to deal with a disaster can easily be undermined by program administration that, alas, is often easily exposed as too tight or too loose.⁴⁰

Notwithstanding these risks, central government help (largely through FEMA) of one sort or another continues to be provided in disaster after disaster. One additional explanation for this may be that, by its past practice, the federal government has created expectations that run throughout the nation that this is one

⁴⁰ For a good example of how a federal aid program sold to Congress as a response to disaster can be converted into something that looks more like "pork barrel" politics, see Gaul, Morgan and Cohen, No Drought Required for Federal Drought Aid, Washington Post, July 18, 2006 A01.

of its important roles, and therefore, to fail to help would threaten a general loss of confidence in government at a critical moment. Put somewhat differently, in the tumultuous times that often follow a societal disaster the public today regularly counts on government to step in to restore order and to get normal social and economic life up and running once more.

In the larger picture, it is also important to appreciate that some communities that suffer from a catastrophic event will (before the event) simply be poorer, and hence structurally less able to help out those of its members who face enormous plights in the aftermath of the disaster. This means that the same physical calamity may call for very different amounts (or types) of help depending on where it occurs. This reality suggests that national disaster assistance may turn out, at least in some cases, to be a re-distributive measure that is disproportionately concentrated on the “have-nots.” In one sense we can be comfortable with this result, since helping those with greatest need may be morally laudable.

What may be troubling, however, is that both our willingness to act on this instinct, as well as the level of assistance we seem prepared to provide, appear to be greater in the face of vivid disasters than with respect to, say, the disastrous consequences of every-day grinding poverty. Perhaps this is explicable on the ground that many Americans think that, unlike so many victims of major disasters, all too many routine poverty victims are themselves in some respects to blame for their condition or that routine poverty-assisting schemes (rather than dramatic gestures) are the right way to attack this social problem (which may also explain why many people who think of themselves as generous, and occasionally even impulsive, donors to organized charity do not give to street beggars).

Yet, it may well also be that, given all the need for financial help that exists in our society, we are just unable (or unwilling) to extend ourselves in especially generous ways all the time. We’d like to show ourselves to be generous at least some of the time, however. And from that perspective, helping out when there is a societal disaster is perhaps symbolically most potent, as well as most likely to gain the greatest attention and public recognition, thereby making us feel best about ourselves for providing the aid. This may also explain why those advocates seeking private and public contributions to support their favorite charitable endeavor often claim that the objects of their concern are facing an “emergency” (or some other word or phrase that suggests a temporary but extreme need, like those arising from natural catastrophes).

III. The Nature of the Compensation Provided

Although this is not the occasion to discuss them at length, I want to close by noting a few key issues that arise once we decide that some government

assistance to individual disaster victims will be provided. They go to the questions of what sort of aid is to be given and how much.

Disaster victims can be given grants or loans. The federal government provides both, but with respect to efforts to rebuild private property damaged or destroyed in societal disasters, it primarily provides loans via the Small Business Administration (“SBA”), albeit at less than market interest rates, which is an implicit grant. Most other victim compensation is not repayable.

Individual disaster victims can be given cash, or vouchers aimed good for certain purchases, or in-kind aid (like shelter, food, and the like). FEMA provides all of these types of help. The 9/11 compensation plan, by contrast, only provided cash.

The focus of the disaster aid can be on temporary needs or long run needs. In the immediate aftermath of a hurricane, for example, people may need basic temporary shelter; then they may need transitional housing while they are finding a new place to settle or their former homes are cleaned up, fixed, and/or rebuilt; and they may need help with those processes. Between FEMA and the SBA,⁴¹ the federal government offers all of these.

Help can be partial or complete (at least to the extent that money and other sorts of aid can do that). Hence, a key issue in disaster aid is the share of the victim’s loss to be replaced. This introduces considerations of deductibles (how much of the initial loss is simply to be born by the victim?), “co-insurance” (what proportion of the covered loss is to be born by the victim?), and caps (is there to be a maximum placed on assistance?). The California Earthquake Authority, for example, imposes a relatively high deductible on the policies it sells and puts a cap on the maximum coverage it will offer.

So too, not all losses need be treated the same way. Damage to physical property could be treated differently from personal injury or death on the one hand or loss of intangible property on the other. Even with respect to personal injury and death, non-economic loss could be treated differently from lost income, medical and other expenses and the like. The existing practice is a patchwork quilt. Some of the schemes described earlier provide nothing for personal injury or death; some provide for income replacement, medical care and other expenses, but not for pain and suffering; yet others provide compensation for pain and suffering as well, although in at least some of them the amount is capped.

Finally, as already mentioned, a particularly difficult issue with respect to disaster relief concerns the treatment of multiple possible sources of compensation. Not infrequently, victims find that there is more than one place they can turn for financial help in the face of a catastrophe. The question that all aid providers must answer is how they should deal with those other sources.

⁴¹ http://www.sba.gov/disaster_recov/index.html.

There are at least five possible solutions. One is for each source to ignore other sources and thereby risk overcompensation as victims recover for the same loss from more than one compensation provider. A second is to structure the aid providers so that they act in some agreed order, with the first provider paying without attention to the others, and each provider after that taking into account the compensation already provided by those who went before it. A third approach is to cumulate all the aid that all providers might make available to any one victim and then somehow draw a proportionate share of the needed compensation from each. Fourth, victims might be forced to opt to receive aid from one provider only, thereby foregoing compensation that others might have given. Finally, the issue may be sought to be avoided by re-defining the nature of each provider's compensation so that each is aimed at a different sort of need. For example, one provider would attend to temporary needs and the others to longer term needs, and among the latter one would deal with personal losses and the other property losses and so on.

What is clear is that U.S. and state government approaches to disaster compensation have adopted a variety of solutions to this issue as well. In the 9/11 plan, for example, claimants were forced to opt between tort law and plan benefits, and if they selected the latter, they knew that their compensation amount would be reduced by any life insurance proceeds they had, but not by immediate aid they had received from charity groups like the Red Cross. Swine flu vaccine victims, by contrast, were subject to very different rules.

Perhaps this seeming inconsistency along these various benefit parameters reflects genuinely different social understanding of the various programs. But perhaps not. Maybe the diversity in responses is better understood as accidental. Maybe greater awareness of past practice would result in more uniformity.

For now, this takes us to a final, perhaps self-evident, point. When adopted by Congress or state legislatures, the details of any plan providing compensation to victims of societal disasters are fashioned in the crucible of politics, and not infrequently the politics of crisis. In such settings, it might be too much to insist that government always follow certain consistent principles in determining when and how to provide assistance. Yet, at least the key political figures, their advisors, and the interest groups pushing for assistance may benefit from a more thorough understanding of the very different roles that government has played, and might play, in these circumstances. In this essay I have sought to provide such a taxonomy.