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# Improving the Odds of Government Accountability in the Disaster-Prone Era: Using the 9/11 Fund Factors to Remedy the Problem of Toxic Katrina Trailers

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**IMPROVING THE ODDS OF GOVERNMENT  
ACCOUNTABILITY IN THE DISASTER-PRONE ERA:  
USING THE 9/11 FUND FACTORS TO REMEDY THE  
PROBLEM OF TOXIC KATRINA TRAILERS**

OLYMPIA DUHART\*

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When the flood waters recede, the poor folk along the river  
start from scratch.

— Richard Wright<sup>1</sup>

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1. RICHARD WRIGHT, *The Man Who Saw the Flood*, in EIGHT MEN 102, 110 (Thunder Mouth's Press 1987).

## I. INTRODUCTION

It is called hurricane roulette.<sup>2</sup> And for many, participation in the game is a badge of honor signaling a willingness to “ride out the storm” in a designated hurricane zone, rather than seek refuge by moving to safer ground.<sup>3</sup> That is risky, indeed. But even such grave risks are minimal compared with the high stakes facing hurricane survivors that are counting on government assistance to help them rebuild after the storm.

Three years after the flood waters of Hurricane Katrina have receded, the rebuilding efforts for many of those displaced by the storm continue to paralyze the region and prevent meaningful relief. Not only has public housing been “cleaned up” in New Orleans, it has been virtually eliminated.<sup>4</sup> The rental housing market is marked by staggering rent increases,<sup>5</sup> rampant discrimination,<sup>6</sup> and biased restrictions.<sup>7</sup> Even the temporary shelters available for displaced people—trailers issued by the Federal Emergency Man-

2. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA 114 (2006) [hereinafter A FAILURE OF INITIATIVE], *available at* <http://www.gpoaccess.gov/Katrinareport/mainreport.pdf>. According to government officials, ten to twenty-five percent of people who live in a hurricane evacuation zone will not evacuate; they stay and take the chance that the hurricane will either hit somewhere else or that they will be lucky and relatively unaffected by the storm. *Id.* at 114. This statistic does not apply to the poor, sick, or elderly who are unable to evacuate because of immobility or to those who are not properly informed as to the risks presented by the storm.

3. During Hurricane Katrina, some of the informed, healthy, and capable people who made the personal decision that they did not want to leave “were gamblers, long ago courting risk like a lover.” DOUGLAS BRINKLEY, *THE GREAT DELUGE* 62 (2006). Brinkley points out that Good Samaritans, adrenaline junkies, squatters, and faith-followers convinced by parochial pride stay put. *Id.* As a life-long Floridian, I confess to having elected to “ride out” several hurricanes myself. After Katrina, of course, I am more reluctant than ever to adopt this approach for serious storms.

4. *See generally* James C. Smith, *Disaster Planning and Public Housing: Lessons Learned from Katrina* (2009) (unpublished manuscript, on file with author) (providing background information on the condition of public housing in New Orleans).

5. Susan Saulny & Gary Rivlin, *Renewal Money Bypasses Renters in New Orleans*, N.Y. TIMES, Sept. 17, 2006, at 14; BUREAU OF GOVERNMENTAL RESEARCH, *THE ROAD HOME RENTAL HOUSING PROGRAM: CONSEQUENCES FOR NEW ORLEANS 2* (2006) [hereinafter *THE ROAD HOME*], *available at* [http://www.bgr.org/pdf/reports/Consequences\\_for\\_N.O.\\_091506\\_.pdf](http://www.bgr.org/pdf/reports/Consequences_for_N.O._091506_.pdf) (“Average rents have risen by 25% to 30% across the metropolitan area, creating problems for moderate as well as low income families.”).

6. One study revealed that “[b]lack residents encountered discrimination nearly six times out of ten when apartment hunting in the New Orleans area post-Katrina.” Gwen Filosa, *Bias is Found in Rental Market*, THE TIMES-PICAYUNE, Apr. 25, 2007, at 1, *available at* <http://www.nola.com/news/t-p/frontpage/index.ssf?/base/news-8/1177482229124760.xml&coll=1&thispage=1>.

7. *See* Billy Sothorn, *A Question of Blood*, *The Nation*, Mar. 27, 2007, <http://www.thenation.com/doc/20070409/sothorn>; *see generally* Olympia Duhart & Eloisa C. Rodriguez-Dod, *Legislation and Criminalization Impacting Renters Displaced by Katrina*, in *LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA 141* (Robin Paul Malloy ed., 2009) (discussing consanguinity ordinance in St. Bernard Parish enacted following Katrina).

agement Agency (FEMA)—have been saddled with their own set of dangers.<sup>8</sup> The systemic administrative and legislative failures following the storm literally changed the face of New Orleans.<sup>9</sup> More importantly, the city remains in ruins, standing as proof of the government's breach of America's social contract.<sup>10</sup>

This Article uses the difficulties and dangers surrounding the FEMA trailers to examine whether disasters such as Katrina should compel us to re-imagine the proper role of government intervention in response to harms. The Article examines the responsibilities of the government to the survivors of a hurricane and how those responsibilities should be reconfigured in the disaster-prone.<sup>11</sup> Though Hurricane Katrina is a distant memory for some, the constant threat of hurricanes in the southeast region (such as Hurricane Gustav in August 2008) confirms that these issues re-

8. See Spencer S. Hsu, *FEMA Knew of Toxic Gas in Trailers; Hurricane Victims Reported Illnesses*, WASH. POST, July 20, 2007, at A01.

9. The city is now whiter and wealthier, quite removed from the community that once defined "The Big Easy." Rick Lyman, *Reports Reveal Hurricanes' Impact on Human Landscape*, N.Y. TIMES, June 7, 2006, at A16. The Census Bureau's first study of Gulf Coast areas hit by Hurricanes Katrina and Rita, released in June, 2006, showed that New Orleans emerged sixty-four percent smaller. *Id.* The report found that "[t]hose who remained in the city were significantly more likely to be white, slightly older, and a bit more well off . . . ." *Id.* The bureau reports were the first to measure the demographic, social, and financial impact of the Gulf Coast hurricanes. *Id.*; see, e.g., WILLIAM H. FREY, AUDREY SINGER & DAVID PARK, THE BROOKINGS INSTITUTION, *RESETTLING NEW ORLEANS: THE FIRST FULL PICTURE FROM THE CENSUS (2007)*, available at [http://www.brookings.edu/~media/Files/rc/reports/2007/07katrinafreysinger/20070912\\_katrinafreysinger.pdf](http://www.brookings.edu/~media/Files/rc/reports/2007/07katrinafreysinger/20070912_katrinafreysinger.pdf).

10. See Michael Ignatieff, *The Broken Contract*, N.Y. TIMES, Sept. 25, 2005, at 15; see also MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER, HURRICANE KATRINA AND THE COLOR OF DISASTERS 13* (2006) (discussing Ignatieff's argument); David Dante Troutt, Remarks at the Black History Month Observances at the Community Church of New York City (Feb. 10, 2008), available at <http://daviddantetroutt.com/speech1d.html> ("Political partisanship in the form of a Republican president responsible for the rescue of black residents of a Democratic city joined with structural racism and economic marginalization to reveal the erosion of the American social contract.").

11. The Intergovernmental Panel on Climate Change (IPCC) scientists, charged by the World Meteorological Organization and the United Nations Environment Programme with developing an authoritative statement on climate change, found in its 2007 report that several ecological systems were being affected by climate change springing from human activities. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, SUMMARY FOR POLICYMAKERS 12-14* (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf). Further, many experts have agreed that climatological changes have made the threat of natural disasters more likely in today's world. See generally High-Level Conference on Food Security: The Challenges of Climate Change & Bioenergy, Rome, Italy, June 3-5, 2008, *Climate Change Bioenergy and Food Security: Civil Society and Private Sector Perspectives*, 1-2, Doc. HLC/08/INF/6 (addressing concerns that the warming of the climate has increased hydro-meteorological hazards); see also Joel Mintz, *Climate Change and Presidential Leadership*, 39 ENVTL. LAW REP. 10045, 10045-47 (2009) (asserting global climate disruption and the objective case for concern). But see Peter Ferrara, *Baby, Baby It's a Cold World: Explaining Global Warming to Congress*, National Review Online, June 2, 2008, <http://article.nationalreview.com/?q=ZGQ3N2NINmJjOGFINDNiNTEzOGY5MjVhY2ZiNGYwNjk=%20%20> (arguing that the global warming "hysteria" is a political construct that is more related to class struggle than climate or science).

main a day-to-day struggle for many.<sup>12</sup> In fact, the proliferation of natural disasters in the current era makes the safety measures and remedies available for government-issued temporary housing even more relevant.<sup>13</sup> But has the housing assistance available for hurricane survivors improved much?<sup>14</sup> Presently, it is nearly impossible for government inaction in this arena to trigger any protected recognized rights. The few Katrina survivors who received aid are entirely dependent on the government's conferral of discretionary benefits.<sup>15</sup> They are subject to the whims and monumental failures of bureaucracy.<sup>16</sup> Part II of this Article briefly summarizes the housing challenges that persist in New Orleans because of Hurricane Katrina and contextualizes the needs for safe shelter. Part III traces failures of government accountability through an examination of the administrative failures surrounding the so-called "toxic trailers." This part details the dangers surrounding the toxicity levels in the trailers issued to Katrina survivors by FEMA and identifies the problems presented by the distribution of the trailers. Part IV reviews the inefficacy of the remedial response to the disaster relief and tracks litigation challenges. Part V pro-

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12. On September 1, 2008, Hurricane Gustav struck the New Orleans region as a Category 2 storm. Editorial, *Hurricane Warnings*, N.Y. TIMES, Sept. 2, 2008, at A22.

13. See Duhart & Rodriguez-Dod, *supra* note 7; see also NAOMI KLEIN, *THE SHOCK DOCTRINE* 410 (2007) (noting that climate scientists have directly linked increase hurricane frequency and frequency to rises in ocean temperature).

14. In sharp contrast to evacuation failures with Hurricane Katrina, it was evident from the start that the evacuation measures in place for residents in need during Hurricane Gustav were a huge improvement from those failures connected to Hurricane Katrina in 2005. See Jeff Hecht, *New Orleans Passes Easy Hurricane Test*, NewScientist, Sept. 2, 2008, <http://environment.newscientist.com/channel/earth/hurricane-season/dn14649-why-gustav-was-no-katrina.html>. Before Gustav, contra-flow measures were in place and evacuation plans for almost two million people were being faithfully carried out. Paulo Prada, Alex Roth & Jeff D. Opdyke, *Weakened Hurricane Hits Louisiana, Grazes Oil Patch*, WALL ST. J., Sept. 2, 2008, at A1. In sharp contrast, both local and federal failures complicated and delayed effective evacuations during Hurricane Katrina. See Olympia Duhart, *Blowing the Lid Off: Expanding the Due Process Clause to Defend the Defenseless Against Hurricane Katrina*, 13 TEX. WESLEYAN L. REV. 411, 427-30, 433-37 (2007).

15. The September 11th ("9/11") Victim Compensation Fund has no corollary in the Gulf Coast. See DANIEL FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* 317-19 (2006). Professor Farber argues in support of a fund to support Katrina victims in light of the federal government's role in the flooding and the disadvantaged status of most victims. *Id.*; see also Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329, 329 (2006) (advocating the creation of a Katrina Fund modeled after the September 11th Victim Compensation Fund to give financial relief to Katrina-affected residential homeowners to help close the gap between damages and insurable residential property losses). Professor Crusto asserts that the creation of the Katrina Fund would not only provide an opportunity for federal and state government to "redeem themselves" but would also stave off "Katrina's second coming[—a flood of] bankruptcies, foreclosures and homelessness." *Id.* at 372-73.

16. See David Dante Troutt, *Many Thousands Gone, Again*, in *AFTER THE STORM* 3, 20 (David Dante Troutt ed., 2006). ("Without their own city and state to protect them, they have become pinballs in a FEMA game of rotating hotel evictions."). Professor Troutt notes that survivors were given multiple conflicting reports about the end of housing vouchers. *Id.*

poses a remedy to address the gap in relief offered for trailer residents; specifically, applying the factors that led to the creation of the 9/11 Victim Compensation Fund.<sup>17</sup> This Article proposes the establishment of a Toxic Trailer Fund to assist Katrina survivors who weathered first a storm, then a slew of government failures. Finally, this Article raises and refutes potential counterarguments to the establishment of a fund to assist this discrete class of storm survivors.

## II. THE STORM AND ITS AFTERMATH—PERSISTENT HOUSING CHALLENGES

In the early summer of 2005, before “Katrina” meant anything to the National Hurricane Center,<sup>18</sup> New Orleans grappled with more than its fair share of problems. The city was besieged with crime, poverty, and an inadequate public education system.<sup>19</sup> Despite these shortcomings, New Orleans continued to maintain an appeal and culture uniquely its own. One writer observed that, despite its troubles, New Orleans “had a lot more civic life than most of the United States.”<sup>20</sup> It was a unique American city with a rich tradition and a bevy of life-long residents with strong roots in the community.<sup>21</sup>

Then the storm came. By all accounts a seminal event in American history, Hurricane Katrina took more than 1,550 lives<sup>22</sup> and displaced up to 250,000 people.<sup>23</sup> The storm struck areas through-

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17. The full name for the 9/11 Victim Compensation Fund is the Air Transportation Safety and System Stabilization Act. Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, § 1, 115 Stat. 230, 230 (2001) (codified as amended at 49 U.S.C. §§ 40101-40129 (2006)).

18. “Unlike New Orleans’s hurricane evacuation strategy, tracking hurricanes *was* the responsibility of the federal government.” BRINKLEY, *supra* note 3, at 62 (emphasis in original).

19. See DYSON, *supra* note 10, 1-12. Before the storm, New Orleans had a poverty rate of twenty-three percent, a figure seventy-six percent higher than the national average. *Id.* at 5-6. New Orleans has a forty percent illiteracy rate. *Id.* at 8.

20. Rebecca Solnit, *The Lower Ninth Battles Back*, THE NATION, Sept. 10, 2007, at 13. Solnit cites the sense of community fostered by social clubs, churches, crawfish boils, and extended families. *Id.*

21. Writer Mike Tidwell offers his analysis of the strong appeal of the region: “In my estimation, the Cajun Bayou region of Louisiana, at least before Katrina, was the most distinctive and culturally rich region in America.” Eric Kancler, Bayou Farewell, Mother Jones, Oct. 3, 2005, <http://www.motherjones.com/environment/2005/10/bayou-farewell>.

22. Prada, Roth & Opdyke, *supra* note 14; see also Editorial, *Deaths of Out-of-State Evacuees Raise Katrina Toll*, WASH. POST, May 20, 2006, at A2. The death toll includes deaths that are related to the storm or its aftermath. See Editorial, *Evacuee Deaths Increase Katrina’s Louisiana Toll*, ORLANDO SENT., May 20, 2006, at A14.

23. ALEX GRAUMANN ET AL., NAT’L OCEANIC & ATMOSPHERIC ADMIN., HURRICANE KATRINA: A CLIMATOLOGICAL PERSPECTIVE 1 (2005), available at <http://www.ncdc.noaa.gov/oa/reports/tech-report-200501z.pdf>. The storm ultimately impacted 1.5 million people. FEMA’s *Manufactured Housing Program: Haste Makes Waste: Hearing Before the Comm. on Homeland Security & Governmental Affairs*, 109th Cong. 59 (2006) (statement of Richard L.

out Mississippi, Alabama, and Louisiana,<sup>24</sup> with Louisiana suffering the hardest blows.<sup>25</sup> Following Katrina, poor people and people of color have been priced out of the area's redevelopment.<sup>26</sup> This dramatic shift in demographics signals both the demise of a distinct black American subculture<sup>27</sup> and an absolute crisis in an already troubled affordable housing market.<sup>28</sup> "The scope of physical destruction of homes caused by Katrina has not been experienced in the United States since the Civil War. Nearly a million homes were damaged; a third of them were destroyed or damaged severely."<sup>29</sup>

According to the National Low Income Housing Coalition, the residents of more than seventy percent of the most severely damaged homes were low income families.<sup>30</sup> Hurricanes Katrina and Rita, and the related levee breaks of 2005, destroyed—or nearly destroyed—82,000 rental units in Southeast Louisiana.<sup>31</sup> About sixty-three percent of these units were located in New Orleans.<sup>32</sup> Moreover, the post-Katrina affordable housing crisis is emblematic of the urban inequality that pervades America.<sup>33</sup> Human rights lawyer William Quigley notes that New Orleans is but one sign of changes throughout the country:

What is happening in New Orleans is just a more concentrated, more graphic version of what is going on all over our country. Every city in our country has some serious similarities to New Orleans. Every city has some abandoned neighborhoods. Every city in our country has abandoned

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Skinner, Inspector General, U.S. Department of Homeland Security) [hereinafter *FEMA's Manufactured Housing Program*].

24. A FAILURE OF INITIATIVE, *supra* note 2, at 103.

25. See *FEMA's Manufactured Housing Program*, *supra* note 23, at 59. More than one thousand people perished in Louisiana alone. *Id.*

26. Lyman, *supra* note 9; see also FREY, SINGER & PARK, *supra* note 9, at 1.

27. Editorial, New Orleans Fights for Its Character, Reuters, Jan. 14, 2007, <http://www.msnbc.msn.com/id/16624152/>.

28. See National Low Income Housing Coalition, Testimony of President of NLIHC to Ad Hoc Subcommittee, Apr. 24, 2007, [http://www.nlihc.org/detail/article.cfm?article\\_id=4132](http://www.nlihc.org/detail/article.cfm?article_id=4132) [hereinafter Crowley testimony]; see also Marcia Johnson, *Addressing Housing Needs in the Post Katrina Gulf Coast*, 31 T. MARSHALL L. REV. 327, 328 (2005-06) ("[T]he regions hardest hit by Katrina were already suffering significant housing shortages coupled with limited capital to sustain a good quality of life.").

29. Crowley testimony, *supra* note 28.

30. *Id.*; see also Associated Press, *Katrina's Victims Poorer than U.S. Average*, Fox News, Sept. 5, 2005, <http://www.foxnews.com/story/0,2933,168500,00.html>. For example, prior to Katrina, housing expenditures for almost half of the renters in New Orleans exceeded thirty percent of the household income—"the federal benchmark for determining if a renter's housing expenditures are burdensome." THE ROAD HOME, *supra* note 5, at 2.

31. THE ROAD HOME, *supra* note 5, at 1.

32. *Id.*

33. See generally David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000).

some public education, public housing, public healthcare, and criminal justice. Those who do not support public education, healthcare, and housing will continue to turn all of our country into the Lower Ninth Ward unless we stop them.<sup>34</sup>

Since Katrina is representative of government failures, its value as a model should not be overlooked as we seek to set higher standards for government response.

### III. GOVERNMENT FAILURES AND TOXIC TRAILERS

The scope of government neglect in post-Katrina New Orleans, particularly the abysmal federal response, may be measured by the systemic administrative shortcomings of FEMA.<sup>35</sup> FEMA was established through a 1979 Executive Order, which created what was a cabinet-level agency that reported directly to the President.<sup>36</sup> Even in its nascent period, FEMA showed signs of fragmentation and limitation. One person involved in the reorganization of the agency said it was like making a cake “by mixing the milk still in the bottle, with the flour still in the sack, with the eggs still in their carton.”<sup>37</sup>

Administrative fragmentation and a lack of priority for natural hazard—including floods, hurricanes, and earthquakes—troubled FEMA throughout the 1980s and 1990s.<sup>38</sup> Furthermore, the advent of terror shifted FEMA priorities away from natural disasters.<sup>39</sup> Once President Bush signed the Homeland Security Act in 2002, the federal reorganization placed FEMA squarely under the um-

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34. KLEIN, *supra* note 13, at 421; *see also* William P. Quigley, *What Katrina Revealed*, 2 HARV. L. & POL'Y REV. 361 (2008) (using narratives of Katrina survivors to advance seven key lessons for social justice).

35. FEMA has since become synonymous for the epic recovery failures of Hurricane Katrina. The agency has been subjected to scathing Congressional reports, public censures and media lashings. *See* Editorial, *Stonewalling the Katrina Victims*, N.Y. TIMES, Nov. 14, 2005, at A20 (“The recovery effort has been subject to blistering criticism from conservative, nonpartisan and liberal groups alike.”).

36. FEMA History, <http://www.fema.gov/about/history> (last visited June 13, 2009).

37. MITCHELL L. MOSS & CHARLES SHELHAMER, THE CTR. FOR CATASTROPHE PREPAREDNESS AND RESPONSE, THE STAFFORD ACT: PRIORITIES FOR REFORM 11 (2007), *available at* [http://www.nyu.edu/ccpr/pubs/Report\\_StaffordActReform\\_MitchellMoss\\_10.03.07.pdf](http://www.nyu.edu/ccpr/pubs/Report_StaffordActReform_MitchellMoss_10.03.07.pdf). The cake metaphor refers to the efforts under President Jimmy Carter to streamline the federal agencies with whom local and state officials had to work during disaster response periods. *Id.* “President Carter’s authority to create FEMA was limited, forcing him to transfer staff and procedures from existing agencies—and not creating a new, more centralized response system.” *Id.*; *see also* KLEIN, *supra* note 13, at 408-09 (referring to FEMA’s contemporary efforts as a “laboratory for the Bush administration’s vision of government run by corporations”).

38. DYSON, *supra* note 10, at 44-45.

39. *See* Iris Young, *Katrina: Too Much Blame, Not Enough Responsibility*, DISSENT, Winter 2006, at 44.



brella of Homeland Security.<sup>40</sup> After being “politicized and packed with patronage appointments” the agency was entirely unprepared to deal with the trouble ahead.<sup>41</sup>

Perhaps the most tangible and enduring example of FEMA’s shortcomings is the distribution of relief homes by FEMA—the trailer homes issued to hurricane survivors. Emergency housing needs fall to FEMA, which has assisted in rebuilding efforts through camp sites filled with mobile homes. Rather than being places of refuge, the camps have emerged as sites filled with strain and squalor. “[F]or tens of thousands of families, the Katrina crisis never ended . . . .”<sup>42</sup>

As writer Michelle Chen has noted, “[m]any New Orleanians see trailers as the fastest means of reestablishing themselves in their communities.”<sup>43</sup> More than three years after the storm, thousands of survivors are still living in “temporary” trailers. In February 2007, approximately 275,000 people were living in the travel trailers and mobile homes that FEMA purchased after Katrina.<sup>44</sup> FEMA reported these shelters cost more than \$2.6 billion.<sup>45</sup> At the peak, almost 119,000 trailers were used to house hurricane survivors.<sup>46</sup> At the start of the 2008 hurricane season, Katrina survivors still occupied more than 15,000 trailers in the Gulf Coast region.<sup>47</sup>

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40. DYSON, *supra* note 10, at 49; *see also* Chris Strohm, Collins, Lieberman Suggest FEMA Remain as Part of DHS, *CongressDaily*, Mar. 8, 2006 (reviewing calls post-Katrina to remove FEMA from the Homeland Security Department and make it an independent agency).

41. DYSON, *supra* note 10, at 51. At one point, FEMA had ten times the number of appointees as other agencies. MOSS & SHELLHAMER, *supra* note 37, at 11; *see also* John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA’s Failure to Provide Housing for Victims of Natural Disasters*, 68 LA. L. REV. 443 (2008) (criticizing FEMA’s inability to respond to its charge to meet emergency housing needs).

42. Chris Kromm, Coordinator, Gulf Coast Reconstruction Watch, Remarks at the Congressional Briefing “Addressing Remaining Low Income Housing Needs for Hurricane Evacuees and for the Gulf Coast,” *available at* <http://www.southernstudies.org/2007/09/institutes-capitol-hill-testimony-on-27.html>.

43. Michelle Chen, *New Orleans’ Displaced Struggle for Housing, Jobs, Neighborhoods*, NowPublic, Oct. 23, 2005, [http://www.nowpublic.com/new\\_orleans\\_displaced\\_struggle\\_for\\_housing\\_jobs\\_neighborhoods](http://www.nowpublic.com/new_orleans_displaced_struggle_for_housing_jobs_neighborhoods).

44. Amanda Spake, *Dying for a Home: Toxic Trailers Are Making Katrina Refugees Ill*, THE NATION, Feb. 26, 2007, at 3, *available at* <http://www.alternet.org/story/48004/>.

45. *Id.* FEMA awarded Gulf Stream Coach, Inc. contracts worth more than \$500 million for the production of 50,000 trailers within weeks of Hurricane Katrina. The CDC found that Gulf Stream, Forest River, Keystone and Pilgrim (all manufacturers of travel trailers) had manufactured significant percentages of trailers with formaldehyde levels above one-hundred parts per billion, “the level at which . . . acute adverse health effects can be experienced.” COMM. ON OVERSIGHT & GOV’T REFORM, U.S. HOUSE OF REPRESENTATIVES, REPORT ON TRAILER MANUFACTURERS AND ELEVATED FORMALDEHYDE LEVELS 1-2 (2008), *available at* <http://oversight.house.gov/documents/20080709103125.pdf>.

46. Leslie Eaton, *Agency Is Under Pressure to Develop Disaster Housing*, N.Y. TIMES, Apr. 13, 2008, at 18, *available at* [http://www.nytimes.com/2008/04/13/us/13trailers.html?\\_r=1&oref=](http://www.nytimes.com/2008/04/13/us/13trailers.html?_r=1&oref=).

47. Rhoda Amon, *A Look Inside FEMA Housing*, NEWSDAY, July 10, 2008, at A28 (“Estimates range[d] from 15,000 to 37,000.”); *see also* Maria Recio, *House Blasts FEMA, HUD, Laumakers Furious About Storm Victims’ Housing*, SUN HERALD, June 5, 2008, at

These camper-like units, which cost about \$15,000 each, “are fabricated from composite wood, particle board and other materials that emit formaldehyde.”<sup>48</sup> The amounts emitted are dangerous. Notably, more than 0.1 parts per million of formaldehyde in air can cause eye, lung and nose irritation,<sup>49</sup> and the National Toxicology Program has determined that formaldehyde may be “reasonably anticipated to be a carcinogen.”<sup>50</sup>

The Sierra Club conducted air quality tests on forty-four FEMA trailers between April and July, 2006 finding “formaldehyde concentrations as high as 0.34 parts per million.”<sup>51</sup> According to one study of the chemical’s workplace effects, that formaldehyde level is almost equal to what a professional embalmer would be exposed to on the job.<sup>52</sup> Among the Katrina evacuees who have called the trailers home for the past three years, there are increased reports

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A2, (estimating that as many as 22,000 Katrina victims were still living in trailers at the time).

48. Spake, *supra* note 44. Emitted from pressed wood and particle board products, formaldehyde has a long half life, remaining in indoor air in significant concentrations long after a structure is considered “new.” See COMING ALONGSIDE, FEMA TRAILER LIVING AND GOOD HEALTH: RECIPES FOR SUCCESS IN THE POST-KATRINA WORLD 2 (2007). “Formaldehyde is used in hundreds of products, but particularly in the resins used to bond laminated wood products and to bind wood chips in particleboard.” *FEMA’s Toxic Trailers: Hearing Before the H. Comm. on Oversight & Government Reform*, 110th Cong. 112-13 (2007) [hereinafter *FEMA’s Toxic Trailers Hearing*] (remarks of Scott Needle, M.D., on behalf of American Academy of Pediatrics). The American Academy of Pediatrics, concerned about the special vulnerability of children to formaldehyde exposure, urged FEMA to study the children’s exposure levels and steps needed to improve the health of exposed children. *Id.* at 4-5. The Academy also urged FEMA to set standards for formaldehyde levels in trailers purchased by the agency that exceed the current scientific standards to take into account the special exposure of children. *Id.*

49. See Healthy Child, Healthy World, Chemical Encyclopedia, <http://healthychild.org/issues/chemical-pop/formaldehyde> (last visited June 13, 2009). (“Formaldehyde is a strong smelling, volatile organic compound (VOC) and common indoor air pollutant. . . . [It] is normally present in air at low levels, usually less than 0.03 parts per million.”). A survey of eighty-four funeral directors and apprentices with occupational exposure to formaldehyde had the following results: embalmers reported with more frequency than control subjects symptoms of irritation of the eyes, upper respiratory tract, and skin. U.S. DEP’T OF HEALTH & HUMAN SERVS., AN UPDATE & REVISION OF AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY’S FEBRUARY 2007 HEALTH CONSULTATION: FORMALDEHYDE SAMPLING OF FEMA TEMPORARY-HOUSING TRAILERS 12 (2007) [hereinafter FORMALDEHYDE SAMPLING], *available at* [http://www.atsdr.cdc.gov/substances/formaldehyde/pdfs/revised\\_formaldehyde\\_report\\_1007.pdf](http://www.atsdr.cdc.gov/substances/formaldehyde/pdfs/revised_formaldehyde_report_1007.pdf). Chronic bronchitis, shortness of breath and nasal irritation were also reported at a higher level. *Id.*

50. FORMALDEHYDE SAMPLING, *supra* note 49, at 13. “While the U.S. Environmental Protection Agency has ranked formaldehyde a ‘probable’ human carcinogen, the World Health Organization recently upgraded its classification to ‘known’ concluding that formaldehyde is ‘carcinogenic to humans.’” Healthy Child, Healthy World, *supra* note 49.

51. Mike Brunner, Are FEMA Trailers ‘Toxic Tin Cans’? Private Testing Finds High Levels of Formaldehyde; Residents Report Illnesses, MSNBC, July 25, 2006, <http://www.msnbc.com/id/14011193>; see also SIERRA CLUB, TOXIC TRAILERS: TESTS REVEAL HIGH FORMALDEHYDE LEVELS IN FEMA TRAILERS (2008), [http://www.sierraclub.org/gulfcoast/downloads/formaldehyde\\_test.pdf](http://www.sierraclub.org/gulfcoast/downloads/formaldehyde_test.pdf).

52. Brunner, *supra* note 51. OSHA limits the formaldehyde to which workers can be exposed over an eight hour day to 0.75 parts per million. 29 C.F.R. § 1910.1048 (c)(1) (2005).

of wheezing, coughing, headaches, lethargy, sinus infections, and asthma attacks.<sup>53</sup>

According to the U.S. Department of Health and Human Services Agency for Toxic Substances and Disease Registry, an air quality analysis of ninety-six unoccupied trailers, similar to those distributed by FEMA to house people displaced by Hurricane Katrina, revealed that formaldehyde levels in those trailers averaged 1.04 parts per million.<sup>54</sup> Those levels ranged between 0.01 parts per million and 3.66 parts per million.<sup>55</sup> The report also indicated a positive correlation between room temperature and formaldehyde levels.<sup>56</sup> This is especially problematic for the warm, humid Gulf Coast.<sup>57</sup>

Currently, no federal standards are in place to limit formaldehyde in building materials used in travel trailers and recreational vehicles.<sup>58</sup> However, the Department of Housing and Urban Development (HUD) has set standards to limit the formaldehyde in manufactured housing and mobile homes.<sup>59</sup> The limit for plywood formaldehyde emission is 0.2 parts per million.<sup>60</sup> The HUD limit for particleboard materials is 0.3 parts per million.<sup>61</sup> Surprisingly, these standards still do not apply to travel trailers used as so-called “temporary” homes for emergency relief.<sup>62</sup> FEMA has since set its own standard limiting formaldehyde emission to sixteen parts per billion, but Congress has not yet taken a stance on what the appropriate standards for materials in travel trailers should be.<sup>63</sup> Rather than imposing minimum production standards on tra-

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53. See Spake, *supra* note 44.

54. FORMALDEHYDE SAMPLING, *supra* note 49, at 13-15. A health consultation represents a response to a “specific request for information about health risks related to a specific site, a chemical release, or the presence of hazardous materials.” *Id.* at 2. In July 2006, FEMA asked the Agency for Toxic Substances and Disease Registry (ATSDR) to evaluate air sampling data collected in the trailers by the EPA. *Id.* at 4. Though the findings are damning, the ATSDR relayed from the onset that the results should not be “generalized to all FEMA trailers” or “used to predict the health consequences of living in those trailers.” *Id.* at 5.

55. *Id.* at 15. The second part of the report examined whether ventilation in the trailers—either with open windows or air conditioning—was effective in lowering the levels of formaldehyde; the Agency found that both interventions lowered formaldehyde levels. *Id.* at 15-16.

56. *Id.* at 16.

57. City Rating.com, Average Temperature, <http://www.cityrating.com/cityweather.asp?city=New+Orleans> (last visited June 13, 2009) (reporting the average temperature for New Orleans as 61.8 degrees Fahrenheit and noting humidity reaches over ninety percent in the summer months).

58. Spake, *supra* note 44.

59. 24 C.F.R. § 3280.

60. 24 C.F.R. § 3280.308(a)(1) (2005).

61. *Id.* § 3280.308(a)(2).

62. Spake, *supra* note 44.

63. Mike Brunner, Congress Names Names in FEMA Trailer Probe: House Democrats Say Manufacturers Knew of High Formaldehyde Levels, MSNBC, July 9, 2008,

vel trailer manufacturers who stood to make billions of dollars on the sale of these homes, FEMA provided virtually no oversight to the process.<sup>64</sup> The agency relied upon the goodwill and fortune of the trailer home manufacturers, who were expected to self-regulate or respond to safety mandates that no one in the federal government had bothered to mention.<sup>65</sup> Worse, FEMA continued to defend its use of the trailers despite findings by the Sierra Club and the Occupational Safety and Health Administration in November 2005.<sup>66</sup>

In July 2007, the Committee on Oversight and Government Reform for the U.S. House of Representatives held an oversight hearing on FEMA's failure to respond adequately to reports of dangerous formaldehyde in the trailers.<sup>67</sup> Paul Stewart, a Hurricane Katrina survivor, gave the following testimony as part of his prepared statement at the hearings:

The first night we stayed in the camper my wife woke several times with difficulty breathing and a runny nose. She got up once and turned on the lights to discover that her runny nose was in fact, a bloody nose. This scared the hell out of us; we didn't know what was causing her bloody nose, or breathing issues and I was beginning to show symptoms of my own, which included, burring[sic] eyes, scratchy throat, coughing, and runny nose.

The symptoms continued for weeks and then months and finally we thought about just leaving, but at that point we were stuck because we were still wrestling with insurance issues, the Army Corps of Engineers, FEMA, our lot was still strewn with debris, money was in short supply, and I was trying to hold on to my job. We just couldn't afford to move.<sup>68</sup>

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<http://www.msnbc.msn.com/id/25607578/from/ET>.

64. *FEMA's Toxic Trailers Hearing*, *supra* note 48, at 206 (remarks of R. David Paulison, Administrator, Federal Emergency Management Agency) ("Given decades of successful history of using mobile homes and smaller travel trailers to provide temporary housing, we had no reason to anticipate problems with the habitability of travel trailer units.")

65. Gulf Stream Coach, which collected more than \$500 million and received the bulk of FEMA trailer contracts after Katrina, maintains it should not be responsible for formaldehyde levels in the trailers because no standards existed when the trailers were made and distributed. Brunner, *supra* note 63.

66. Paul Stewart, Remarks Before the Government Reform and Oversight Committee, U.S. House of Representatives (July 19, 2007), available at [http://www.toxic-trailer.com/govinvdocs/20070719\\_6.pdf](http://www.toxic-trailer.com/govinvdocs/20070719_6.pdf).

67. *FEMA's Toxic Trailers Hearing*, *supra* note 48, at 123-29 (including testimony from, among others, three displaced Gulf Coast hurricane victims and an industrial hygienist who testified that the limited testing performed by the Sierra Club revealed unacceptably high levels of formaldehyde).

68. *Id.* at 134-35 (prepared remarks of Paul Stewart).

The testimony offered at the hearing was shocking, but consistent with the theme of governmental neglect pervasive in the Katrina narrative. The testimony revealed that monitored levels of formaldehyde were seventy-five times higher than the recommended limit set by the National Institute of Occupational Safety and Health.<sup>69</sup> In the face of this information, FEMA released a public statement discounting any risk associated with formaldehyde exposure.<sup>70</sup> In its early stages, the agency tested only one occupied trailer to determine its formaldehyde levels.<sup>71</sup> Furthermore, FEMA's Office of General Counsel denied repeated requests made by some FEMA staff members to conduct testing.<sup>72</sup> A House Science subcommittee accused FEMA in January 2008 of manipulating scientific research on the formaldehyde issue to minimize the potential danger faced by the tens of thousands of survivors.<sup>73</sup> Rather than respond quickly to a probable cancer risk, however, FEMA officials planned to conceal information with hopes of avoiding any possible liability.

If the toxins in the FEMA-issued trailers create profound physiological risks for hurricane survivors, the social and psychological ills that plague those same people are even more pronounced. The FEMA-ville communities—the enclaves of trailers set apart to provide housing to Katrina survivors—fuel the alienation that serves as the bedrock for a host of other problems.

“[H]omelessness has doubled in New Orleans, and . . . suicide attempts among residents of Mississippi FEMA camps have [increased] seventy-nine times over pre-disaster levels.”<sup>74</sup> Women are especially vulnerable to sexual assault and domestic violence at FEMA camp sites.<sup>75</sup> Additionally, children face special social and psychological hurdles and are more vulnerable to physical health risks presented by chronic exposure to formaldehyde.<sup>76</sup> Marked

69. *Id.* at 155 (statement by Chairman and Rep. Henry A. Waxman).

70. *Id.*

71. *Id.* at 2.

72. *Id.* at 108, 239 (revealing FEMA's Office of General Counsel shunned testing because it would compel FEMA to take curative measures, noting that testing should be avoided because “should [the results] indicate some problem, the clock is running on our duty to respond to them”); see also Elizabeth Schulte, Still Left Behind: Katrina's Forgotten Refugees, Counterpunch, Sept. 5, 2007, <http://www.counterpunch.org/schulte09052007.html>. (describing the conduct of FEMA officials who “did their best to sweep their complaints under the rug”).

73. *Lawmakers Fault FEMA on Trailers*, WASH. POST, Jan. 29, 2008, at A3.

74. Kromm, *supra* note 42.

75. Peggy Simpson, Women's Media Center Katrina Campaign: New Study Explores the Aftermath for Women, July 10, 2007, <http://www.ms.foundation.org/wmspage.cfm?parm1=475> (mentioning a report by the Institute for Women's Policy Research indicating that women were more “vulnerable to sexual assault and domestic violence” following the storm).

76. Agency for Toxic Substances & Disease Registry, Dep't of Health & Human Servs., Medical Management Guidelines for Formaldehyde, <http://www.atsdr.cdc.gov/MHMI/mmg111.html#bookmark02> (last visited June 13, 2009) (noting one of the reasons for child-

increases in psychological displacement and serious mental health issues are also prevalent among FEMA trailer residents.<sup>77</sup> Furthermore, the physical displacement of Hurricane Katrina survivors no doubt fuels their sense of psychological displacement. Already set apart by race and poverty, many survivors have their “otherness” confirmed through government-sponsored exile.<sup>78</sup> The pervasive lack of open space and green space—for residents to talk and play—has contributed to the psycho-social ills that besiege Katrina survivors.<sup>79</sup>

As bad as life in the FEMA trailers has been, things may get worse as FEMA implements plans to force thousands of families in New Orleans, and across Louisiana, to leave their trailers.<sup>80</sup> Since November 2007, FEMA has been working toward closing all of the trailer camps it runs for Hurricane Katrina survivors.<sup>81</sup> However, the push for relocation did not affect people living in FEMA-issued trailers in private trailers parks and those living in trailers in front of their hurricane-damaged homes.<sup>82</sup> Although FEMA failed to meet the original May 2008 deadline for trailer closure, the federal government recently confirmed that many of the FEMA trailers were contaminated by formaldehyde and renewed its efforts to

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ren’s heightened risk of repeated formaldehyde exposure is the longer latency period of the chemical in children).

77. Interview by Dr. Lynn Lawry with Madeline Brand, National Public Radio (NPR), on NPR (Aug. 23, 2006), *available at* [http://nl.newsbank.com/nl-search/we/Archives?p\\_action=doc&p\\_doc](http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_doc). The broadcast notes a study that found people living in FEMA trailers had depression rates of seven times the national average and suicide rates of fifteen times the state’s norms. *Id.*

78. See Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325, 351 (2007) (discussing exile and assimilation as the primary means of addressing “otherness” in the context of Katrina survivors).

79. There is also something to be said for the series of events that led to the reliance on the FEMA trailers in the first place. The quagmire that envelops the Katrina survivors who live in FEMA trailers demonstrates too well the domino effect of compounded harms. Displacement can be traced to a host of social ills including public housing policies, environmental threats, and poverty.

80. Leslie Eaton, *FEMA Sets Date for Closing Katrina Trailer Camps*, N.Y. TIMES, Nov. 29, 2007, at A1, *available at* <http://www.nytimes.com/2007/11/29/us/29trailer.htm>.

81. *Id.* Most of the people living in FEMA trailers at that time—many of which were elderly, disable, or living alone—were jammed on playgrounds, church property, and parking lots around Louisiana. *Id.* Notably, a large of these people were renters before the storm. *Id.* In May 2009, FEMA renewed its call to take away trailers from residents in need of temporary housing. See Shaila Dewan, *Ready or Not, Katrina Victims Are Losing Temporary Housing*, N.Y. TIMES, May 8, 2009, at A1.

82. *Id.* Housing advocates for Katrina survivors say that the FEMA solution to the trailer eviction—providing listings of available rentals and rental assistance—is unable to meet the housing needs in the market crisis. Associated Press, *FEMA to Close 13 Post-Katrina Trailer Parks*, USA Today, Nov. 29, 2007, [http://www.usatoday.com/news/nation/2007-11-29-fema-trailers\\_N.htm](http://www.usatoday.com/news/nation/2007-11-29-fema-trailers_N.htm) [hereinafter FEMA to Close]. In response, FEMA officials defended the move as a step in obtaining a permanent housing shortage for survivors. *Id.* “I’m not sure that anyone really thought of these trailers as being their permanent home; I hope not,” said Ronnie Simpson, a FEMA spokesman. *Id.*

move Gulf Coast hurricane victims out of the trailers.<sup>83</sup> However, even as Hurricane Gustav pressed toward New Orleans in August 2008, survivors in FEMA trailers scrambled to find shelter.<sup>84</sup>

Moreover, the hurricane survivors who have been plagued with physical illness because of the now-documented formaldehyde emissions are not entitled to health benefits to cover their medical costs. Emergency room treatments, new medical expenses, and chronic complications from the exposure are not covered by the government.<sup>85</sup> For already survivors cash-strapped, additional medical fees can be catastrophic.<sup>86</sup>

As one activist noted, “This is not what the citizens of the Gulf Coast and our country envisioned when, in September, 2005, President Bush pledged from Jackson Square in New Orleans that our country would ‘do what it takes, and stay as long as it takes’ to rebuild the Gulf Coast.”<sup>87</sup>

The regulatory gaps noted above demonstrate the inability of the federal government to respond effectively to emergency housing needs. Furthermore, efforts by FEMA to block a prompt and effective investigation of the reports evince its willful abandonment of responsibilities. Even the “Centers for Disease Control and Prevention—generally considered a repository of nonpartisan scientific expertise—was ‘complicit in giving FEMA precisely what they wanted’ to suppress the adverse health effects.”<sup>88</sup> What are the chances for meaningful relief for disaster victims when the

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83. Leslie Eaton, *FEMA Vows New Effort on Trailers Posing Risk*, N.Y. TIMES, Feb. 15, 2008, at A12.

84. As Hurricane Gustav approached, New Orleans Mayor Ray Nagin expressed concern that the FEMA trailers would be swept up and tossed around in the storm. Mike Carney, Nagin Concerned FEMA Trailers ‘Will Become Projectiles,’ USA Today, Aug. 31, 2008, <http://blogs.usatoday.com/ondeadline/2008/08/nagin-concerned.html>. The push to relocate people from toxic trailers is, unfortunately, at odds with the harsh reality that affordable, alternative housing is not being offered to displaced people. See Eaton, *supra* note 83 (citing advocates for families who were worried that the sufficient appropriate housing was not established for displaced trailer residents).

85. Even after finally confirming in February 2008 that many trailers were contaminated with high levels of formaldehyde, FEMA did not offer any financial assistance to trailer residents to cover related medical expenses. Eaton, *supra* note 82.

86. See William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 960 (2007) (noting that a survey of Katrina survivors in a Houston shelter determined that seventy-two percent of them were not insured).

87. Kromm, *supra* note 42; see also George W. Bush, President of the United States, Address to the Nation at Jackson Square in New Orleans, Louisiana (Sept. 15, 2005), available at [http://www.usa-patriotism.com/speeches/gwb\\_katrina915.htm](http://www.usa-patriotism.com/speeches/gwb_katrina915.htm). In his speech to the nation, the President also invoked the images of Jamestown winters, Chicago after the great fire, and the San Francisco earthquake to demonstrate the will of the people to bounce back from nature’s wrath. *Id.* (“Americans have never left our destiny to the whims of nature—and we will not start now.”). Ironically, the unnatural disasters associated with the storm have proven more difficult to overcome.

88. *Lawmakers Fault FEMA on Trailers*, *supra* note 73.

agencies are politicized?<sup>89</sup> Clearly, a more predictable, objective solution is needed to address some of the difficulties that continue to haunt Katrina survivors.

#### IV. LITIGATION FAILURES: THE INEFFECTICACIES OF THE REMEDIAL RESPONSE

Since Hurricane Katrina, one constant that has emerged is the inability of remedial efforts to respond effectively to the challenges presented. As more recent litigation efforts make clear, the judiciary is not equipped to remedy the problem of response. To date, attempts to address the disaster relief problem through the courts have proven time consuming, exhausting, and ultimately unsuccessful. Litigation regarding public housing in New Orleans demonstrates the inability of the courts to respond to the government harms.<sup>90</sup> Finally, the recent failure of litigation connected to the levees failures proves how intractable government immunity can be.<sup>91</sup> The litigation problems connected to the toxicity levels in trailers seems to be just as riddled with difficulties in obtaining meaningful results.

Plaintiffs affected by formaldehyde levels in FEMA trailers filed a class-action lawsuit in Louisiana naming the federal government and trailer manufacturers as defendants.<sup>92</sup> The suit also

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89. The other obvious issue—but beyond the scope of this article—is how the recovery efforts went so wrong in the first place. Some commentators place the blame on the failure of the government to anticipate and meet the needs for adequate emergency housing. See Eaton, *supra* note 46 (noting that almost three years after Hurricane Katrina, FEMA still had not responded to Congress's call to develop shelter for victims of natural disasters). Many, however, point to plain old capitalism as the driving force behind the move. "In New Orleans . . . no opportunity for profit was left untapped." KLEIN, *supra* note 13, at 411. Another theory asserts that the biopolitics of disposability may play a role in the government's neglect that borders on abuse. See Henry Giroux, *Reading Hurricane Katrina: Race, Class, and the Biopolitics of Disposability*, C. LITERATURE, Summer 2006, at 171, 172-196 (arguing that because Hurricane Katrina disproportionately impacted the poor and people of color, the systemic hostilities to such groups played themselves out in the willful neglect and mistreatment of the survivors); see also David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1159-66 (2008) (identifying localism as the source of the persistent racial and economic fragmentation that cripples New Orleans).

90. The issue of public housing in New Orleans has been particularly volatile, triggering lawsuits, intense charges, and disappointment. Adam Nossiter, *In New Orleans, Some Hope of Taking Back the Projects*, N.Y. TIMES, Dec. 26, 2006, at A22. The fight over the future of public housing has drawn some heavy-hitters into the ring as shelter for twenty thousand people was at stake, luring bureaucrats, politicians, developers, lawyers, and accidental activists eager to return home. *Id.*; see also William P. Quigley, *Obstacle to Opportunity: Housing that Working and Poor People Can Afford in New Orleans Since Katrina*, 42 WAKE FOREST L. REV. 393, 399-408 (2007) (addressing the issue of affordable housing post-Katrina).

91. Cain Burdeau & Michael Kunzelman, *Louisiana: Katrina Flooding Lawsuit Dismissed*, TULSA WORLD, Jan. 31, 2008, at A6 (discussing a recently dismissed lawsuit over the levee breaches following Katrina in which a federal court cited the Flood Control Act of 1928, which shields the government from lawsuits when flood control projects such as levees break).

92. Complaint, *Hillard v. United States*, 2007 WL 647292 (E.D. La. Feb. 28, 2007)



names several travel trailer vendors<sup>93</sup> and alleges violation of the Stafford Act,<sup>94</sup> negligence, strict liability in tort, and breaches of implied and express warranties.<sup>95</sup> The plaintiffs are seeking to enjoin the defendants from providing FEMA housing, which purportedly violates federal regulations.<sup>96</sup> They also seek payments for alternative housing pending completion of mandatory testing for suitability; remediation of any defects in housing to bring the formaldehyde emissions to acceptable levels; actual, consequential, and punitive damages; medical testing and monitoring; and attorney's fees.<sup>97</sup> Based on the barriers confronting plaintiffs in past storm-related litigation, the plaintiffs' chances for success in this case appear remote. FEMA has already requested immunity from the lawsuits, moving to be dismissed from the cases.<sup>98</sup> Moreover, even if the court ultimately awards damages, litigation will take years to wind its way through the system. An immediate, dependable alternative is needed now.

#### V. IMPROVING THE ODDS: ESTABLISHING A TOXIC TRAILER FUND

To date, courts have not been able to meet the needs of Katrina survivors. Furthermore, legislation has also been entirely unable to meet the challenges presented by Katrina.<sup>99</sup> However, the critical review of the September 11th Victim Compensation Fund ("9/11 Fund") serves as a compelling guide for crafting a solution for the trailer survivors. Specifically, the factors that led to the creation of a 9/11 Fund militate in favor of a compensation fund to

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(No. 06-2576), 2006 WL 1746461.

93. *Id.* ¶ 5 (stating that the federal government was "flummoxed" when hundreds of thousands of its taxpayers were left with uninhabitable homes following Hurricanes Katrina and Rita).

94. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, also known as the Disaster Relief Act of 1974, provides federal assistance to victims of disasters. 42 U.S.C. §§ 5121-5207 (2006). The Act makes FEMA the agency responsible for directing the coordination of disaster relief assistance. *See* 14 A.L.R. Fed. 2d 173 (2006).

95. Complaint, *supra* note 92.

96. *Id.* ¶ 64.

97. *Id.*

98. Associated Press, *FEMA Seeks Immunity from Suits over Trailer Fumes*, USA Today, July 22, 2008, [http://www.usatoday.com/news/washington/2008-07-22-fema-immunity\\_n.htm?loc=interstitialskip](http://www.usatoday.com/news/washington/2008-07-22-fema-immunity_n.htm?loc=interstitialskip) (describing FEMA's arguments that the government should only be liable if it supervised day-to-day activities of its contractors and that a review of legislative history demonstrated that Congress intended to bar claims arising from disaster relief).

99. *See, e.g.*, Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005, H.R. 41977, 109th Congress (2005). In fact, some legislation has erected roadblocks, rather than reparative measures to address housing needs following Katrina. *See* Eloisa C. Rodriguez-Dod & Olympia Duhart, *Evaluating Katrina: A Snapshot of Renters' Rights Following Disasters*, 31 NOVA L. REV. 467, 469-74 (discussing the consanguinity statute passed by St. Bernard Parish following the storm and limiting those eligible to move into rental housing in the community).

assist a special class of Katrina survivors—those facing long-term medical complications caused by government-issued toxic trailers.

The lessons learned from the horrific terror attacks of September 11th<sup>100</sup> should not only inform our response to terrorism but should also inform our view of government's role in intervention. Just eleven days after the terrorists' attacks on commercial airlines that led to deaths at the World Trade Center, the Pentagon, and a crash at Shanksville, Pennsylvania, President Bush signed legislation aimed at preserving the viability of the air transportation industry.<sup>101</sup> Since the creation of the 9/11 Fund, scholars and politicians have questioned whether the legislation signaled a revolution in tort-type compensation schemes or the advent of welfare-relief measures.<sup>102</sup> On all accounts, the relief provided by the fund was both compassionate and compelling. The fund provided money on a no-fault basis to people who would forego tort remedies against airlines and other would-be defendants—all payable from the U.S. Treasury.<sup>103</sup> Though there are obvious differences between the circumstances that led to the tragedies of 9/11 and those that led to Hurricane Katrina, the relief offered by the 9/11 Fund provides a workable framework for rethinking and reconfiguring the proper role of government intervention following catastrophes.

According to the Final Report of The Special Master for the September 11th Victim Compensation Fund of 2001, ninety-seven percent of the deceased victims' families, who might otherwise have pursued lawsuits, received compensation through the fund.<sup>104</sup> More than \$7.049 billion was distributed to survivors of the September 11th attacks.<sup>105</sup> The average award for families of victims exceeded \$2 million, and the average award for injured victims was nearly \$400,000.<sup>106</sup>

In defense of the creation of the fund, the Special Master overseeing the fund distribution advanced the countervailing public policies served by the fund. The following factors were implicitly considered in the distribution of the 9/11 Fund: (1) the national perspective to a unique tragedy; (2) the uniqueness of the circumstances; (3) the need to meet the physical and psychological need for

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100. On September 11, 2001, the United States was victim to terrorist attacks that killed almost three thousand people. Joseph P. Fried, *The Grim Accounting of Sept. 11 Continues*, N.Y. TIMES, Jan. 16, 2005, at 29.

101. KENNETH R. FEINBERG ET AL., DEP'T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 3 (2004), available at [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf).

102. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 148 (2005).

103. *Id.* at 137.

104. FEINBERG ET AL., *supra* note 101, at 80.

105. *Id.*

106. *Id.* at 1.

closure; and (4) the benefit of a prompt and predictable alternative to litigation.<sup>107</sup> These same factors should control as we determine that a FEMA fund is needed to help storm survivors sickened by government-issued toxic trailers.

### A. National Perspective to a Historic Tragedy

Framing the entire policy argument is the perspective of the nation to a historic tragedy. Citing the profound and universal response to the day's events, the Special Master's report depicted the September 11 tragedy as a "unique historical event, similar in kind to the American Civil war, Pearl Harbor and the assassination of President Kennedy."<sup>108</sup>

Hurricane Katrina, the levee breach, and the ensuing flood in New Orleans and surrounding regions also constitutes a grave and historic national tragedy. Media coverage of Katrina demonstrates the extent to which the storm and its aftermath dominated the national spotlight. Indeed, a Pew Research Center's News Interest Index rated Katrina as one of the most watched news events of the past quarter century.<sup>109</sup> The high media exposure most likely explains the recalibration of public opinions regarding federal disaster relief.<sup>110</sup> Not surprisingly, Americans surveyed following the storm reported "low confidence in government responsiveness."<sup>111</sup> Almost seven in ten of those surveyed said that the federal government did not consider preparedness a top priority.<sup>112</sup> Approximately eight in ten of those surveyed blamed federal government

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107. See FEINBERG ET AL., *supra* note 101. In his report, Special Master Kenneth R. Feinberg expressly rejected the establishment of a similar act modeled after the Sept. 11 Fund. *Id.* at 83 (arguing that absent an attack like September 11th, no program should be established to deal with another terrorist attack).

108. *Id.* at 80.

109. PAUL C. LIGHT, CTR. FOR CATASTROPHE PREPAREDNESS AND RESPONSE, THE KATRINA EFFECT ON AMERICAN PREPAREDNESS 1 (2008), *available at* [https://www.riskinstitute.org/peri/images/file/postkatrina\\_preparedness.pdf](https://www.riskinstitute.org/peri/images/file/postkatrina_preparedness.pdf). According to the Center, seventy percent of Americans were closely following Katrina, placing it closely behind the Challenger accident and the September 11th attacks. *Id.* Notwithstanding the significant media coverage dedicated to Hurricane Katrina and its aftermath, some community activists are working to counter the relatively low media attention given to the toxic trailers. Derrick Evans, a school teacher and Mississippi native who heads the Gulf Coast Peoples' Movement for Full and Fair Recovery, has been driving his thirty-two foot FEMA trailer—dubbed the KatrinaRitaVille Express—around the country to raise awareness about the toxic trailers and failed recovery efforts in the Gulf. Amon, *supra* note 47.

110. A survey of Americans pre- and post-Katrina makes the point. The Robert F. Wagner School of Public Service and the University's Center for Catastrophe Preparedness and Response (CCPR) surveyed 1,506 Americans four weeks before Katrina hit and 1,004 Americans five weeks after the storm. LIGHT, *supra* note 109, at 2.

111. *Id.* at 4. ("The federal government was rated as largely unprepared for three specific scenarios: terrorist bombings, hurricanes and floods, and a flu epidemic.")

112. *Id.* at 5.

failures on disorganization and mismanagement.<sup>113</sup> The national perception of government failures is not only warranted but cemented by the federal government's refusal to implement curative measures to protect the people it put in harm's way.

### B. Uniqueness of the Circumstances

A major terrorist attack on American soil stunned people around the globe.<sup>114</sup> One autumn morning, more than 3,000 people died as terrorists left an indelible mark on Americans everywhere.<sup>115</sup> The events of 9/11 were tragic, but not unprecedented. Terrorist attacks also occurred on American soil in the twentieth century.<sup>116</sup> However, the enormity of the loss of life suffered in a single incident and the unimaginable circumstances surrounding the attack convinced the 9/11 fund representatives that the circumstances of September 11, 2001 were different.<sup>117</sup>

Similarly, the uniqueness of the Hurricane Katrina storm and its aftermath created special circumstances for toxic trailer residents. While hurricanes are commonplace in New Orleans,<sup>118</sup> the gravity of the storm, combined with the ensuing flooding caused by the levee breach, was most unusual.<sup>119</sup> The key element in the drowning of New Orleans was not a natural disaster; rather it was the levee failures bred from bad engineering and misplaced priorities that sank the city.<sup>120</sup>

Moreover, as was true of the 9/11 Fund, a relatively small class of people would benefit from the proposed Toxic Trailer fund, as long as that beneficiary group is narrowly defined to include those individuals who were (1) affected by Hurricane Katrina,<sup>121</sup> (2)

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113. *Id.*

114. See DANIEL GARDNER, *THE SCIENCE OF FEAR* 246-47 (2008).

115. Fried, *supra* note 100.

116. The Oklahoma City Bombing took place in 1995. GARDNER, *supra* note 114, at 260.

117. "What happened in September 11, 2001 was—for most of us—as startling and incomprehensible as the appearance of a second moon in the sky." GARDNER, *supra* note 114, at 246.

118. Several storms routinely move through the Southeast region of the United States during the Atlantic "hurricane season," which is June 1 through November 30. Tropical Cyclone Climatology, National Weather Service, <http://www.nhc.noaa.gov/pastprofile.shtml> (last visited June 13, 2009).

119. In addition to the loss of human life, the level of physical destruction in Hurricane Katrina was unprecedented. It was easily the most costly natural disaster in U.S. history as direct damage is estimated to be around \$80 billion. GARDNER, *supra* note 114, at 260. Insured losses are cited at \$41.1 billion. Prada, *supra* note 14.

120. Michael Grunwald, *The Threatening Storm*, TIME, Aug. 13, 2007, at 28.

121. Survivors of Hurricane Rita, who also received FEMA trailers after surviving a hurricane, would be similarly situated and subject to the same relief. See FEMA Accused of Twisting Science in Report on Trailer Danger, CNN, Jan. 29, 2008, <http://www.cnn.com/2008/POLITICS/01/29/fema.trailers/index.html> (noting the 150,000 households who have lived in FEMA trailers at some point since Hurricane Katrina and Hurricane Rita). While

moved into temporary housing by FEMA, (3) exposed to formaldehyde in their trailers, and (4) suffered injury or death.<sup>122</sup> Since one of the 9/11 factors is limiting relief to a discrete class of people who are uniquely situated,<sup>123</sup> the Toxic Trailer Fund would satisfy that criterion. Fairness demands that innocent victims of natural disaster compounded by government mistreatment be offered financial support to help pay for the inevitable medical complications ahead.<sup>124</sup>

### *C. The Physical and Psychological Needs for Closure*

The need for closure and a chance to move toward renewal play a central role in the consideration of relief.<sup>125</sup> The physical and psychological wounds of both 9/11 and Katrina will be extremely difficult to mend. First, the scope of the terrorist attacks of 9/11 made the horror almost insurmountable.<sup>126</sup> Additionally, the televised attacks were so horrific “it was as if we had watched everything through the living-room window.”<sup>127</sup> In addition to the physical and psychological tests facing people near the explosions, the vivid (and sometimes live) images of the disaster on television had the ability to psychologically affect people far removed from the scene.<sup>128</sup>

The same traits apply to the Katrina victims. As observed by pundits, politicians, and public intellectuals, Katrina and its aftermath created a nearly endless source of tension and abandonment in the public eye.<sup>129</sup> For those personally impacted by Katri-

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Katrina survivors are the topic of this paper, the proposed Toxic Trailer Fund would be available to anyone who qualifies under the enumerated factors and has suffered medical complications due to tainted trailers distributed by the government. This would obviously apply to Hurricane Rita survivors struggling with the same toxic trailer troubles. See Editorial, *Our view on Disaster Relief: Toxic Trailers for Hurricane Victims? Heckuva job, FEMA, USA Today*, Aug. 2, 2007, <http://blogs.usatoday.com/oped/2007/08/post-2.html>.

122. As an analogue, the 9/11 Victim Compensation Fund is limited to individuals who were present at the crash site and suffered physical injury or death. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 402(5), 402(7), 115 Stat. 230, 237 (2001) (codified as amended at 49 U.S.C. §§ 40101-40129 (2006)).

123. FEINBERG ET AL., *supra* note 101, at 79 (defending the Fund’s exclusion of victims of other terrorist attacks in Oklahoma City and Kenya).

124. In his defense of the establishment of a Katrina Fund, Professor Mitch Crusto points out that “[i]t would be unconscionable and plainly inequitable to treat Katrina victims with less sympathy and financial support than the September 11 victims.” Crusto, *supra* note 15, at 362.

125. FEINBERG ET AL., *supra* note 101, at 1.

126. The attacks of September 11, which saw terrorist takeovers of American commercial airplanes almost simultaneously in three locations, were the country’s worst terrorist event.

127. GARDNER, *supra* note 114, at 247.

128. *Id.*

129. See generally, Troutt, *supra* note 16 (a provocative collection of essays about Hurricane Katrina written by black intellectuals); *WHEN THE LEVEES BROKE* (HBO Films 2006) (a documentary detailing the travails of Katrina survivors by preeminent black movie director Spike Lee).

na, the displacement was profound.<sup>130</sup> The storm physically displaced and dispersed survivors throughout the nation.<sup>131</sup> More than three years after the storm, Katrina survivors still suffer daily from its effects. With the long-term health side-effects caused by toxicity levels in their trailers, survivors will no doubt continue to deal with the physical difficulties left behind in the storm's wake.

For other people who were safe from the storm's physical reach, ubiquitous media coverage had another effect. Compelling television images of an American city under siege made the tragedy very real for people far removed geographically from the storm. The Congressional hearings held over the toxic trailers shocked even the most practiced cynics. Representative Henry Waxman, a California Democratic and Chairman of the House Oversight and Government Reform Committee, said the nearly five thousand pages of documents reviewed in connection with the toxic FEMA trailers exposed "an official policy of premeditated ignorance."<sup>132</sup>

It is no surprise, then, that the abandonment felt by many storm survivors following the hurricane is pervasive.<sup>133</sup> Even FEMA's efforts to accelerate trailers relocations have left survivors stranded and confused. Faced with a choice between a poisonous trailer and homelessness, many survivors do not know what to do.<sup>134</sup> Congress has exposed the distribution of the toxic trailers<sup>135</sup> and must now fashion an appropriate remedy to address the problem.<sup>136</sup> FEMA's delay in addressing the toxic trailers "spawned

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130. See Trout, *supra* note 16, at 3-27.

131. See FREY, SINGER & PARK, *supra* note 9, at 22.

132. Gilbert Cruz, Grilling FEMA Over Its Toxic Trailers, TIME, July 19, 2007, <http://www.time.com/time/nation/article/0,8599,1645312,00.html>. Representative Waxman said FEMA's attitude was "sickening." *Id.* FEMA waited almost a year and a half after the first complaint and on the eve of a congressional hearing to act. *Id.* A federal toxicologist also testified at a House Science and Technology subcommittee hearing in April that the CDC, the Agency for Toxic Substances and Disease Registry, and FEMA manipulated scientific research to minimize the health risks facing residents of the trailers. Associated Press, Did CDC Stifle Toxic FEMA Trailer Alerts?, CBS News, Apr. 1, 2008, <http://www.cbsnews.com/stories/2008/04/01/health/main3987944.shtml>.

133. Before the last relocation push over the toxic trailers, FEMA's earlier mishandling of the relocation of Katrina survivors was likened to something out of a Kafka novel. Editorial, *Kafka and Katrina*, N.Y. TIMES, Dec. 2, 2006, at A14 (citing a federal judge's assessment of FEMA's aid application process as being so convoluted and confusing that it was unconstitutional).

134. Shaila Dewan, *Holdouts Test Aid's Limitations as FEMA Shuts a Trailer Park*, N.Y. TIMES, June 7, 2008, at A1 (detailing the official closing day of the Renaissance Village trailer park, which once housed about six hundred families displaced by Katrina). The transitional housing—rent vouchers—is sometimes out of reach for survivors because of technical ineligibilities. *Id.*

135. The revelation came after congressional hearings and reports by whistle-blowers that FEMA had suppressed evidence of the toxic trailers. Rick Jervis & Andrea Stone, *FEMA to Step up Trailer Relocations*, USA TODAY, Feb. 15, 2008, at 3A, available at [http://www.usatoday.com/news/nation/2008-02-14-toxic-trailers\\_N.htm](http://www.usatoday.com/news/nation/2008-02-14-toxic-trailers_N.htm).

136. Like the paradigm adopted for the 9/11 Victim Fund, a special master should be appointed to craft appropriate distribution amounts for eligible recipients. See FARBER &

fresh outrage” over the government’s completely failed response to Katrina.<sup>137</sup> After so many years, the survivors—as well as the public—deserve closure.

*D. Prompt and Predictable Alternative to Litigation*

The last feature of the 9/11 Fund that supports the creation of an analogous Toxic Trailer Fund is the absolute necessity of creating a prompt and predictable alternative to litigation. Although 9/11 victims had the option of pursuing tort damages against the airline industry, more than ninety-seven percent of the families voluntarily sought relief through the 9/11 Fund.<sup>138</sup> Special Master Kenneth Feinberg cites the extraordinary, proactive steps taken by the fund to keep claimants informed regarding their options.<sup>139</sup> For many victims, the transparency and predictability of the 9/11 Fund outweighed the risks, uncertainty, and delays connected to litigation.

The same calculus is likely to appeal to Katrina survivors moving out of toxic trailers but still facing long-term medical fees. To date, efforts to achieve justice for Katrina survivors in the courts have not been successful. Court challenges have presented substantial hurdles for litigants. First, sovereign immunity generally protects government agencies from liability.<sup>140</sup> Second, a stalled and fragmented court system has made it practically impossible for litigants to succeed in the courts.<sup>141</sup> And finally, litigants are likely to face serious difficulty in showing the nexus between formaldehyde-laced trailers and subsequent medical problems. For many of the Katrina survivors, the expense and expertise required to pursue such a claim in court is simply beyond reach.<sup>142</sup> Fur-

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CHEN, *supra* note 15, at 317-19. The U.S. Attorney General appointed Kenneth R. Feinberg as the Special Master for the 9/11 Victim Compensation Fund on Nov. 26, 2001. FEINBERG ET AL., *supra* note 101, at 4. The Special Master promulgated any necessary procedural and substantive rules and determined eligibility from the fund. *Id.* at 3.

137. Catharine Skipp, Toxic Trailers: Hurricane Katrina’s Victims Cope with Yet Another Ordeal—Unhealthy Residences Provided by Uncle Sam, *Newsweek*, Feb. 16, 2008, <http://www.newsweek.com/id/112828/output/print>.

138. FEINBERG ET AL., *supra* note 101, at 1.

139. *Id.* For example, walk-in offices were opened in New York and Washington, D.C. just fourteen weeks after the tragedy, a toll-free information telephone line was established to answer questions, thirty-three separate mass mailings were made to potential claimants, a website was updated more than 830 times, and a non-adversarial hearing process was established. *Id.* at 5-15.

140. See Tarak Anada, *The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?* 35 PEPP. L. REV. 279, 305-10 (2008) (analyzing the difficulties Katrina claimants face in bringing negligence claims against the government).

141. See Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 HOW. L.J. 677, 681 (2008).

142. Professor Crusto notes that “Katrina [survivors] . . . are not in a financial position to wait for possible assistance following protracted litigation.” Crusto, *supra* note 15, at 362.

thermore, meeting the immediate physical needs of the recipients would likely mitigate the health risks that the formaldehyde exposure creates.

Like the 9/11 Fund recipients who were compensated for both economic and noneconomic harms,<sup>143</sup> the trailer fund recipients should be offered compensation for both economic and noneconomic losses. The 9/11 Fund statutory definition of noneconomic losses included, but was not limited to, losses for physical and emotional pain, suffering, inconvenience, and loss of enjoyment of life.<sup>144</sup> Such an expansive definition of non-pecuniary losses will allow potential claimants under the Toxic Trailer Fund to receive full compensation for the massive scope of their losses.

The creation of a Toxic Trailer Fund is the best alternative to help compensate survivors for the losses caused by their exposure to toxic trailers.<sup>145</sup> It would also serve communitarian needs by offering relief for noneconomic harms that impact recipients of toxic trailers.<sup>146</sup>

## VI. CRITICISMS AND RESPONSES

The opponents of a Toxic Trailer Fund are likely to raise several potential arguments. However, each of these concerns can be adequately addressed through a commitment to government accountability.<sup>147</sup>

The first counter-argument will most likely be premised on the notion that the government has no affirmative duty to provide for its citizens. Challengers will likely assert that since the federal Constitution creates no positive rights, there is no mandate for a government-sponsored recovery fund. Nevertheless, scholars and advocates have long challenged the presumption that American

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143. FEINBERG ET AL., *supra* note 101, at 4.

144. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 402(5), 115 Stat. 230, 237 (2001) (codified as amended at 49 U.S.C. §§ 40101-40129 (2006)). The statute prohibited the award of punitive damages. *Id.* § 405(b)(5).

145. One of the most common side effects of exposure to formaldehyde is worsened respiratory health. *See Spake, supra* note 44. The majority of 9/11 survivors who received payouts from the 9/11 Victim Compensation Fund were for asthma and other respiratory problems. FEINBERG ET AL., *supra* note 101, at 56. Almost fifty-two percent of the claims were these illnesses. *Id.* at 56.

146. Ackerman, *supra* note 102, at 142 (arguing that the September 11th Fund represents one way “the legal response to tragedy can reflect our compassion” by developing “a sense of shared history and construct community”).

147. The existence of criticisms, even legitimate challenges to a trailer fund, should not foreclose the possibility of all government relief. Even the September 11th Victim Compensation Fund was not above criticism. *See, e.g., Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL’Y REV. 1, 2 (2006) (criticizing the September 11th victim Compensation Fund of 2001).



citizens are not entitled to positive protection by its government.<sup>148</sup> Furthermore, an argument against affirmative duties also fails to recognize the special needs created by compounded harms.

One way to reconsider government responsibility in disaster relief is to strengthen legislation that imposes clear, affirmative duties on the federal government to respond. Absent a disturbance in the swell of constitutional jurisprudence that refuses to acknowledge any positive rights in the Fourteenth Amendment,<sup>149</sup> there must be a reconfiguration through legislative channels to honor the social contract.<sup>150</sup>

Toxic Trailer Fund opponents may also contend that the financial burden is too high on an already-strained government and that the floodgates will be open for a list of assistance funds to cover long-term medical fees associated with natural disasters. However, adherence to the 9/11 Fund factors in the analysis described above will restrict, rather than expand, the class of people to whom a relief fund would be available. A commitment to the factors that guided the 9/11 Fund will meet the needs of those uniquely situated while guarding against an open door for people with less egregious injuries.

Critics of the establishment of a Toxic Trailer Fund may also argue that people should be responsible for their own well-being. A quick survey following initial reports of the toxic trailers suggests that at least some people are tired of what they perceive as an endless litany of "government handouts." Yet good government contemplates a responsibility for others, especially those who are unable to protect themselves.<sup>151</sup> This value is a sentiment gaining momentum among both politicians<sup>152</sup> and the public,<sup>153</sup> especially

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148. See, e.g., Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 224 (2006) (challenging the Rehnquist's Court's limiting view of the 14th Amendment as ahistorical).

149. In *Deshaney v. Winnebago County Department of Social Services*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment creates no positive rights in the constitution. *Deshaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). Such a limitation relieves the government of any affirmative duties to prevent due process violations and concomitantly limits the relief available to citizens harmed by government inaction. See Duhart, *supra* note 14, at 422. Ideally, in a post-Katrina, post-*Deshaney* world, the Supreme Court would reconfigure the limit on affirmative duties and act accordingly.

150. See Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI. KENT L. REV. 1127, 1170 (2006).

151. "We are more compassionate than a government that . . . sits on its hands while a major American city drowns before our eyes." President Barack Obama, Acceptance Speech at the Democratic National Convention (Aug. 28, 2008), available at <http://www.nytimes.com/2008/08/28/us/politics/28text-obama.html?>

152. See generally Representative Keith Ellison, Address at the Midwestern People of Color Legal Scholarship Conference (May 30, 2008) (calling for a turn to the politics of generosity).

153. "Not only did our government fail to answer the call of its most vulnerable citizens during that fateful period; it still fails each and every day to rebuild, redeem and rescue those who are ignored because of their poverty, their race, their passage into old age." Walter Mosley, *Shouting Under Water*, THE NATION, Aug. 23, 2007, at 18; see also Editorial, *Tough Choices Ahead: Paying for Katrina Relief*, MIAMI HERALD, Sept. 25, 2005, at L4 (not-

in the wake of various government bailout programs during the current economic hardships.<sup>154</sup> Unlike other bailout programs sponsored by the government to rescue corporate collapse, the Toxic Trailer Fund recipients can show a direct correlation to government activity: the distribution of formaldehyde-laced trailers.

Finally, the most effective response to opponents of a special fund is rooted in the principles of American government. The creation of a medical fund to assist hurricane survivors who lived in toxic trailers will bolster the central democratic value of government accountability in two important ways. First, establishing such a fund incentivizes the implementation of more stringent safety regulations. Second, it demonstrates a commitment to redress for government harms. The contract of citizenship is constitutionally and statutorily defined, but “much of it is a tacit understanding that citizens have about what to expect from their government.”<sup>155</sup>

## VII. CONCLUSION

The events surrounding Hurricane Katrina require governmental response. The challenge is to reach consensus on framing the relief. This relief requires the creation of a Toxic Trailer Fund under the paradigm adopted to formulate a proper remedy for the victims of 9/11.

Toxic trailers create immediate physical and psychological risks. They also create long-term medical problems that are not now covered by the government. As Hurricane Katrina survivors from New Orleans and elsewhere struggle to make their return home after years of neglect and mistreatment, the government must strive to meet basic accountability standards.<sup>156</sup> It is particu-

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ing that a poll following the storm showed that recovery on the Gulf Coast was a top priority for the country).

154. Nelson D. Schwartz, *A History of Public Aid During Crisis*, N.Y. Times, Sept. 7, 2008, at A27. The recent efforts to provide financial assistance to big business are not new. *Id.* For several decades, Washington has bailed out several corporations, including military contractor Lockheed Aircraft Corporation, the Penn Central Railroad, Chrysler, and Bear Stearns. *Id.*

155. Ignatieff, *supra* note 10, at 15. James Perry, Executive Director of the Greater New Orleans Fair Housing Action Center, renewed the call for government aid at the Democratic National Convention in Denver, Colorado in August 2008. Press Release, Greater New Orleans Fair Hous. Action Ctr., Fair Housing Director to Address Democratic Convention at Denver Roundtable (Aug. 25, 2008) (on file with author) (“We’ve made great progress but are far from recovery. As Gulf Coast advocates and citizens we call on America to honor President Bush’s commitment to rebuild New Orleans and the American Gulf Coast in a manner that is ‘even better and stronger than before the storms.’”).

156. Editorial, *Katrina One Year After*, THE NATION, Sept. 18, 2006, available at <http://www.thenation.com/doc/20060918/editors><http://www.thenation.com/doc/20060918/editors/print?rel=nofollow> (“This is the United States, a country that has . . . abandoned the Gulf Coast to the social Darwinism of the corporate *banditi*. It isn’t because we’ve lost the ability

larly important to meet these needs in this disaster-prone era.<sup>157</sup> Considering the same factors that emerged from the 9/11 Fund—the national perspective, the uniqueness of the circumstances, the need for physical and psychological closure, and the prompt and predictable alternative to litigation—the federal government should establish a relief fund for toxic trailer residents.

The people who survived Katrina have already tested their luck against hurricane winds, torrential rains, and flood waters. Rather than assist them in their time of need, the government has complicated and exacerbated their harms.<sup>158</sup> People who have lost nearly everything—homes, personal belongings, and those invaluable intangibles such as community and familiarity—should not be denied government assistance. Unless the law imposes a duty to recalibrate its recognition of harm, survivors who have weathered a storm and toxic trailers will continue to face a high-stakes gamble in their search for relief. We must improve their odds.

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to care. It's because we've left behind something larger than New Orleans: our notion of collective social responsibility.”).

157. The rise in natural disasters also raises the bar for the law to meet new challenges in crafting effective responses. *See generally* FARBER & CHEN, *supra* note 15, at 317-19. In addition, the recent increase in infrastructure failures also challenge the government to develop better safety standards to prevent such harms and to develop creative response to remedy victims harmed by such tragedies. Kevin Diaz, I-35W Bridge Tragedy May Yield New Rules, *StarTribune.com*, Nov. 14, 2008, [http://www.startribune.com/politics/state/34454549.html?elr=KArksi8D3PE7\\_8yc+D#aiU](http://www.startribune.com/politics/state/34454549.html?elr=KArksi8D3PE7_8yc+D#aiU) (discussing the oversight and design failures of the I-35W bridge collapse in Minnesota in August 2007 that killed thirteen people and injured another 145).

158. *See* NOAM CHOMSKY, *The Bush Administration During Hurricane Season*, in INTERVENTIONS 147, 149 (2007) (“Lost in the flood is a concern for the needs of cities and for human services.”).