

# COMMENT

## TWICE UPROOTED: HOW GOVERNMENT POLICIES EXACERBATE INJURY TO LOW-INCOME AMERICANS FOLLOWING NATURAL DISASTERS

ELIZABETH PIERSON HERNANDEZ\*

I. Introduction.....	220
II. Legal Background.....	223
A. A Vague FEMA Policy Shortchanged Thousands of Hurricane Dolly Victims .....	223
B. Federal Agencies Have Historically Left Low-Income Disaster Victims Stranded.....	226
C. Federal Agencies Discriminate Despite Congressional Direction to the Contrary .....	227
III. Analysis.....	229
A. FEMA’s Policy is Too Vague to be Consistently Applied .....	229
i. Impermissibly Vague: Rules .....	229
ii. Impermissibly Vague: Statues .....	230
B. “Ordinary Meaning” Supersedes <i>Chevron</i> Deference .	231
C. The Government Has Historically Treated Low-Income Disaster Victims Differently from High-Income Disaster Victims .....	233
i. The Poor Often Must Prove Discrimination by Race .....	233

---

\* St. Mary’s University School of Law, J.D. Candidate, December 2011. Colorado State University, B.A., 1998. I reported on numerous natural disasters during my ten years as a professional journalist. I wish to thank the editorial board and staff of *The Scholar: St. Mary’s Law Review on Minority Issues*, with particular thanks to Emmanuel Garcia and Professor Amy Kastely for their thoughtful insight on early drafts. My deepest gratitude to my husband, Victor, for his unending kindness, and to our son, Joaquin, who was born the day after I began work on the Law Review.

ii.	The Federal Government Has a Long, Unfortunate History of Discriminating Against Low-Income Disaster Victims .....	236
iii.	Bureaucratic Roadblocks Contribute to Discrimination .....	240
iv.	Congress Has Explicitly Ordered Parity in Treatment of Disaster Victims .....	242
IV.	Recommendations .....	244
A.	Congress Must Join Governments of Other Nations in Recognizing Housing as a Human Right .....	244
B.	Congress Should Write Legislation More Specifically Prohibiting and More Harshly Punishing Economic Discrimination Following Natural Disasters .....	247
V.	Conclusion .....	248

## I. INTRODUCTION

It was the middle of a summer day in 2008, in the middle of the week, when Hurricane Dolly crept in from the Gulf of Mexico and slammed into the South Texas Coast.<sup>1</sup> Before she eventually passed, Dolly would peel the laminated roof from the top of Rosa Elia Villarreal's house and toss it down in the middle of her front yard.<sup>2</sup>

Ms. Villarreal lives in Edinburg, Texas, and supports a household of six on just \$15,200 a year.<sup>3</sup> She does not have homeowner's insurance.<sup>4</sup> Without a roof, rainwater leaked into her home, causing damage and prompting the spread of mold.<sup>5</sup> Her grandchildren were taken to the emergency room for mold-related allergies on several occasions.<sup>6</sup> Because Ms. Villarreal could not afford the estimated \$10,000 in repairs,<sup>7</sup> she applied for housing-repair assistance with the Federal Emergency

---

1. Demian McLean, *Dolly Makes Landfall in Texas; Downgraded to Storm*, BLOOMBERG, (July 23, 2008, 11:43 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3OUUBR.33EY> (reporting details of Hurricane Dolly, which made landfall near the Texas-Mexico border at 1 p.m. on Wednesday, July 23, 2008). The storm was classified as a Category Two hurricane when it hit land with wind speeds of about 100 miles per hour. *Id.* On the first day after it hit, more than 61,000 people were without power, thousands more were in shelters, and as much as twenty inches of rain was expected in some areas. *Id.* Dolly was the first hurricane to cross the Gulf of Mexico in 2008, and the first to make a direct hit on the Rio Grande Valley since Hurricane Bret in 1999. *Id.*

2. Complaint for Injunctive Relief at 24, *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, No. 08CV00487 (S.D. Tex. Nov. 20, 2008), 2008 WL 5242607.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Complaint for Injunctive Relief, *supra* note 2.

Management Agency (FEMA) under a statute that allows people in her position to qualify for aid.<sup>8</sup> FEMA is charged with distributing assistance in coordination with its mission to “support our citizens” following disasters.<sup>9</sup> The federal government designated Hurricane Dolly as Disaster No. 1780.<sup>10</sup>

In seeking assistance from FEMA, Ms. Villarreal encountered the same situation as numerous homeowners following hurricanes Dolly and Ike in 2008: they were denied assistance by FEMA with only the explanation of “insufficient damage,” and no one as able to tell “them what legal standard was applied or what facts were relied upon to deny them assistance.”<sup>11</sup> Internally, FEMA created a term to attempt to explain why it denied applications by many low-income families, labeling the applications as denied for “deferred maintenance,” but it has neither defined the term nor publicly explained how it applies the term to denials.<sup>12</sup> Some evidence suggests FEMA denied storm-related claims to homeowners whose homes were not maintained, thereby discriminating against low-income people who simply cannot afford expensive home repairs.<sup>13</sup>

Federal law prohibits discrimination against low-income people after a disaster.<sup>14</sup> Between 10,000 and 15,000 low-income homeowners—or half

---

8. *Id.* See 42 U.S.C. § 5174(2)(A) (2006) (detailing presidential declaration powers after a disaster). The statute allows the President to:

[P]rovide financial assistance for—(i) the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and (ii) eligible hazard mitigation measures that reduce the likelihood of future damage to such residences, utilities, or infrastructure.

*Id.*

9. *About FEMA*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/about/index.shtm> (last updated June 21, 2010) (explaining the purpose of FEMA and its statutory authority). FEMA states that its mission is “to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.” *Id.*

10. Complaint for Injunctive Relief, *supra* note 2, at 5.

11. *Id.* at 2.

12. *Id.* at 5 (alleging the vagueness of “deferred maintenance”). The complaint states that “publicly available legal standards do not mention ‘deferred maintenance’ or explain how FEMA ascertains this information or uses it in its housing repair assistance decisions.” *Id.*

13. *Id.* at 29. (explaining the economic discrimination argument). The complaint alleges that “FEMA violates 42 U.S.C. § 5151(a) by implementing an unpublished and unascertainable ‘deferred maintenance’ policy that effectively disqualifies low-income families from housing repair assistance, promoting rather than preventing economic discrimination.” *Id.*

14. See 42 U.S.C. § 5151(a) (2006) (providing that federal relief after a disaster “shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of . . . economic status”).

of all Hurricane Dolly applicants—were denied claims based on FEMA’s vague criteria of “insufficient damage” and “deferred maintenance.”<sup>15</sup> The homeowners alleged the vague “deferred maintenance” rule “institutionalizes economic discrimination.”<sup>16</sup> A low-income housing official said FEMA had not solved the problem despite pleas from many experts in the housing field: “This tragedy will be repeated again unless FEMA stops its ad hoc policy of denying home repairs to help poor families with disaster damage,” said John Henneberger, co-director of the Texas Low Income Housing Information Service.<sup>17</sup> Ms. Villarreal and others sued FEMA and prevailed in district court, but the Fifth Circuit refused to compel FEMA to publish specific standards.<sup>18</sup> The homeowners appealed to the Supreme Court, which denied the petition for writ of certiorari in November 2010.<sup>19</sup>

This Comment urges FEMA to publish clear definitions of “insufficient damage” and “deferred maintenance” so that homeowners might better understand the criteria used in assessing their claims, and so FEMA employees are not given either real or apparent authority to arbitrarily deny claims. More broadly, this Comment demonstrates that the vague FEMA policy is merely a symptom of a larger problem. A problem in which a variety of government agencies charged with helping disaster victims practice—at times unintentionally—inherently discriminatory practices against low-income people. The nation saw evidence of this up-close following Hurricane Katrina in 2005, as well as in the wake of numerous tornadoes, earthquakes, and hurricanes before and since.<sup>20</sup> This Com-

---

15. Complaint for Injunctive Relief, *supra* note 2, at 5.

16. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, No. B-08-487, 2009 WL 1346030, at \*1 (S.D. Tex. May 13, 2009) (citation omitted), *vacated*, 608 F.3d 217 (5th Cir. 2010), *cert denied*, 562 U.S. \_\_\_, 131 S. Ct. 525 (2010).

17. John Henneberger, *Current FEMA Disaster Recovery Policy Will Leave Low-Income Hurricane Survivors Unassisted*, TEXAS HOUSERS (July 1, 2010), <http://texashousers.net/2010/07/01/current-fema-disaster-recovery-policy-will-leave-low-income-hurricane-survivors-unassisted/>. Henneberger estimates that, as a result of FEMA’s deferred maintenance policy, 115,000 “elderly, disabled, and low-wage homeowners” were left to fend for themselves in damaged homes, without government aid after Hurricanes Ike and Dolly. *Id.* The Federal Disaster Mitigation Act of 2000 compelled the executive branch to create specific guidelines for determining aid eligibility, and Congress gave FEMA until 2002 to create the guidelines. *Id.* However, FEMA still had not complied as of July 2010. *Id.*

18. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 225 (5th Cir. 2010), *cert denied*, 562 U.S. \_\_\_, 131 S. Ct. 525 (2010).

19. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 562 U.S. \_\_\_, 131 S.Ct. 535 (2010) (denying petition for writ of certiorari from the Fifth Circuit).

20. *See Declared Disasters by Year or State*, FED. EMERGENCY MGMT. AGENCY, [http://www.fema.gov/news/disaster\\_totals\\_annual.fema](http://www.fema.gov/news/disaster_totals_annual.fema) (last modified July 3, 2011, 3:52PM) (listing federal disaster declarations since 1953). On average, FEMA has issued fifty-eight disaster declarations per year since 1998. *Id.*

ment further urges Congress to recognize housing as a human right and to pass laws that ensure low-income Americans will not be the target of discrimination following natural disasters.

Part II of this Comment addresses the vagueness problem in the FEMA policy by analyzing case law relating to other vague governmental policies and how courts have responded. Part III of this Comment demonstrates that federal agencies have historically acted in ways that disproportionately affect low-income victims of natural disasters and shows that such discrimination by federal agencies happens despite express direction from Congress to help, not hurt, low-income Americans stricken by disasters of all kinds. Finally, Part IV of this Comment proposes solutions for making FEMA's policies non-discriminatory and for diminishing government discrimination of all kinds against low-income victims of natural disasters.

## II. LEGAL BACKGROUND

### A. *A Vague FEMA Policy Shortchanged Thousands of Hurricane Dolly Victims*

When victims of a natural disaster apply for financial aid with FEMA, the agency provides them with an informational handout that explains the process of applying, the intended purpose of the aid, and the requirements for eligibility.<sup>21</sup> Additionally, it provides general information for those who lose their homes and are looking for help.<sup>22</sup> This is the same handout presumably available to the more than 10,000 Texans who applied for housing aid after Hurricane Dolly and were rejected under the

---

21. *Disaster Assistance Available from FEMA*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/assistance/process/assistance.shtm#0> (last modified Aug. 11, 2010, 2:03PM) (providing information on how to obtain housing, non-housing, and other services in the wake of a disaster). Some disaster victims are eligible for money to pay for medical bills, funeral costs, clothing, cleaning supplies, cars, and moving expenses, all of which must be directly related to the disaster. *Id.* As with the housing aid, the non-housing aid is available only for expenses that are either not covered or only partially covered by insurance. *Do I Qualify for Housing Needs Assistance?*, FED. EMERGENCY MGMT. AGENCY, [http://www.fema.gov/assistance/process/qualify\\_other\\_housing.shtm](http://www.fema.gov/assistance/process/qualify_other_housing.shtm) (last modified Aug. 11, 2010, 2:03PM).

22. *Disaster Assistance Available from FEMA*, *supra* note 21 (specifying what types of housing aid are available through FEMA). The agency helps disaster victims secure temporary housing, repair their home, replace their home, or construct an entirely new home. *Id.* In giving aid, the agency strives to make the home "safe, sanitary, and functional." *Id.* Victims who receive the assistance can use it to repair, among other things, foundation, sewage systems, heating and air conditioning, electrical systems, floors, ceilings, and cabinets. *What Specific Items are Covered by "Housing Needs" Assistance?*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/assistance/process/housingneeds.shtm> (last modified Aug. 11, 2010, 2:03PM).

“insufficient damage” or “deferred maintenance” premise.<sup>23</sup> It is problematic, however, that nowhere in the handout or in FEMA’s other literature does the agency define “insufficient damage” even though thousands of disaster victims received rejection letters listing the term as the only reason for the government’s decision to deny aid.<sup>24</sup> Internally, FEMA assesses applications using a “deferred maintenance” designation, which disfavors applicants who have not properly maintained their homes before a disaster.<sup>25</sup> The result is discrimination against low-income people following natural disasters.

On one hand, FEMA’s use of the “insufficient damage” rationale to deny aid is troubling because it is not clearly defined in FEMA literature or rules, thereby making arbitrary application possible. On the other

---

23. Complaint for Injunctive Relief, *supra* note 2, at 5 (outlining the extent to which applicants were denied aid following Hurricane Dolly). FEMA admitted that it denied aid to an unusually high number of people in the aftermath of Hurricane Dolly, 10,000 of which were denied for “deferred maintenance.” *Id.* A FEMA spokesman said the high rate of denials was attributable to “[a] lot of the homes . . . [having been] built from second-hand materials. So the damage was, in most cases, caused from the faulty building of the house, and not the storm.” *Id.*

24. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, No. B08487, 2009 WL 1346030, at \*7 (S.D. Tex. May 13, 2009) (granting a preliminary injunction to plaintiffs who sought to compel FEMA to publicly disclose its criteria for evaluating housing-repair applications), *vacated*, 608 F.3d 217 (5th Cir. 2010), *cert denied*, 562 U.S. \_\_\_, 131 S. Ct. 525 (2010). The denial letter from FEMA to homeowners acknowledges that the family is enduring hard times since the disaster, and it informs the homeowners of their right to appeal the decision to FEMA. Complaint for Injunctive Relief, *supra* note 2, at 6–7. The letter describes “insufficient damage” in this way: “Based on your FEMA inspection, we have determined that the disaster has not caused your house to be unsafe to live in. This determination was based solely on the damage to your home that are related to this disaster.” *Id.* at 7. FEMA refused to explain to plaintiffs’ counsel the precise standards it uses in evaluating applications. *Id.* at 5.

25. *La Union Del Pueblo Entero*, 2009 WL 1346030, at \*9.

FEMA’s deferred maintenance policy uses a standard derived from federal law, which requires that to be eligible for assistance the damage incurred must have been caused by the disaster and not the poor construction or poor maintenance of the home. *Id.* The court held that FEMA must make public “ascertainable eligibility standards and criteria,” but not directly condemning the FEMA “deferred maintenance” policy. *Id.* Plaintiffs in the case allege a variety of injuries stemming from what they allege were denials based on “deferred maintenance.” *Id.* Several plaintiffs allege that Hurricane Dolly damaged their roofs, allowing water to seep into the home and causing or exacerbating asthma or other respiratory problems. *Id.* The Fifth Circuit later held the district court abused its discretion in granting the injunctive order because plaintiffs could not show a substantial likelihood they could win on the merits and remanded the case. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 225 (5th Cir. 2010), *cert. denied*, 562 U.S. \_\_\_, 131 S.Ct. 525 (2010). In March 2011, the district court denied the Plaintiff’s Motion for Summary Judgment and ordered the parties to file a discovery plan. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, No. B08487, 2011 WL 1230099, at \*10 (S.D. Tex. Mar. 30, 2011).

hand, Congress has given FEMA some measure of discretion in the application of statutes by allowing FEMA to determine its own rules<sup>26</sup> and allowing FEMA to handle relief efforts “as may be necessary and proper.”<sup>27</sup> Therefore, any analysis of the vague nature of “insufficient damage” must include an analysis not only of the courts’ doctrines dealing with vague rules and statutes, but also of the statutory language from which FEMA draws its enforcement power.

The legal framework described above presents clashing principles. The two principles are: first, the administrative doctrine granting deference to agencies in interpreting and applying statutes to which their work relates; and second, the federal courts’ general aversion to unnecessarily vague policies. Furthermore, the “ordinary meaning” doctrine bolsters homeowners’ arguments and casts doubt on the legality of FEMA denials.<sup>28</sup> Under “ordinary meaning,” an agency must apply the ordinary meaning of a term unless it is specifically defined in the statute;<sup>29</sup> here, the term “insufficient damage” is not specifically defined. The ordinary meaning of language is left to interpretation. However, it could be argued that “insufficient damage” suggests strongly there was not enough damage to make a home unlivable or to drastically affect the quality of life of those in the home. This Comment will explore how the ordinary meaning of “insufficient damage” interplays with the doctrines of vagueness and agency discretion. The convergence of the two doctrines and the “ordinary meaning” rule shed light on whether FEMA is properly exercising its discretion in denying aid to low-income homeowners.

---

26. 42 U.S.C. § 5174(j) (2006) (requiring that the executive branch issue regulations, but not demanding specifically the nature of those requirements). Specifically, the statute says the president “shall prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance.” *Id.*

27. 42 U.S.C. § 5151(b) (2006) (allowing FEMA to handle discrimination regulations as it deems necessary); 42 U.S.C. § 5164 (2006) (allowing FEMA to make relief-assistance rules “as may be necessary and proper”). The President can exercise his discretion “directly, or through such Federal agency as the President may designate, any power or authority conferred to the President by this chapter.” *Id.*

28. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (requiring that courts apply an ordinary meaning to a term that statute fails to define). In *Dolan*, a customer sued the U.S. Postal Service under the Federal Tort Claims Act after she tripped over mail she alleged was negligently left on her porch. *Id.* at 483. The court laboriously interpreted the term “negligent transmission” according to its ordinary meaning since it was not defined in statute. *Id.* at 486.

29. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994) (“In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.”).

B. *Federal Agencies Have Historically Left Low-Income Disaster Victims Stranded*

Unfortunately, the vague FEMA policy is not the only circumstance in which the federal government has acted in ways harmful to low-income natural disaster victims. The government's policies are at times discriminatory and often inconsistently applied. This Comment will analyze the legal issues surrounding government discrimination in the context of Hurricane Katrina and other natural disasters and will consider discriminatory acts and alleged discriminatory acts by FEMA and other federal agencies.

Government discrimination received worldwide attention following Hurricane Katrina in 2005 when the government made a delayed and, at times, insufficient response to helping thousands of low-income individuals in New Orleans.<sup>30</sup> Many of the cases brought in federal courts following the delayed federal response involved allegations of racial discrimination.<sup>31</sup> However, it was impossible to ignore that most of the people who were victimized by racial discrimination also lived in poverty, or were members of other protected classes under federal law. Many advocacy groups continue working to alleviate the discrimination they encountered after Hurricane Katrina, and their work includes providing aid to low-income disaster victims.<sup>32</sup>

---

30. COMM. ON HOMELAND SECURITY & GOV'T AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322 at 3 (2006), available at <http://www.gpo.access.gov/serialset/creports/katrinanation.html> (finding the government's response to Hurricane Katrina was inadequate). Some members of Congress advocated the removal of FEMA from its place under the umbrella of the Department of Homeland Security, citing the poor response to Katrina as evidence that the existing bureaucratic structure was not working. *Id.* at 721. They explained that the director of FEMA should be able to have a direct line to the President in times of disaster without going through the bureaucracy of Homeland Security. *Id.* The Senate report found that "Hurricane Katrina provided countless examples of federal assets not being deployed quickly enough, such as the delayed arrival of active-duty military in a chaotic New Orleans, possibly due to the lack of authority and clarity in the tasking orders." *Id.* at 722 (footnote omitted).

31. Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev., 723 F. Supp. 2d 14, 18 (D.D.C. 2010) (denying motion by HUD to transfer the case to a court in New Orleans from the D.C. District Court). Plaintiffs alleged that HUD used a formula in distributing money from the Road Home Program that discriminated against African-Americans. *Id.* Specifically, they alleged that the awarding "ha[d] a discriminatory disparate impact on African[-]Americans living in historically segregated communities." *Id.* Awards were based on the value of a home before the hurricane hit, and since African-Americans were more likely to live in less expensive homes, they automatically received less money from the federal government for repairs. *Id.*

32. See, e.g., NOW Board Calls for Disaster Planning Without Discrimination, NAT'L ORG. FOR WOMEN (Sept. 27, 2005), <http://www.now.org/issues/economic/092705katrinairesolution.html> (calling for the federal government to remove discriminatory elements of its

Furthermore, federal agencies have been accused of discrimination against low-income homeowners in a variety of other circumstances that both include and go beyond the response to Hurricane Katrina. For example, after Hurricane Andrew, low-income homeowners in Florida claimed they were targets of the government when they tried to obtain shelter.<sup>33</sup> Furthermore, residents in another Katrina lawsuit prevailed when a court held that the government should have been clearer about what activities might qualify the litigants for housing assistance.<sup>34</sup>

C. *Federal Agencies Discriminate Despite Congressional Direction to the Contrary*

Congress has made efforts to ensure that low-income people do not suffer discrimination at the hands of federal agencies that are determining how to distribute post-disaster aid.<sup>35</sup> The Stafford Act, which authorizes agencies to distribute disaster aid, specifically prohibits economic discrimination.<sup>36</sup>

---

disaster-planning policies). The group calls attention to discrimination against sex, race, ethnic origin, marital status, parenthood, physical abilities, and mental abilities. *Id.* In calling attention to discrimination against the aforementioned groups, the National Organization for Women also addresses many issues particular to low-income discrimination. *Id.* In a declaration, the group states that “rescue boats were not allowed to enter low-income, flooded, mostly African-American areas because it was ‘too dangerous.’” *Id.* The document also points to the government’s decision to leave mostly low-income residents stranded for several days without supplies at the Superdome, convention center, and public hospital, resulting in deaths. *Id.*

33. *Lockett v. Fed. Emergency Mgmt. Agency*, 836 F. Supp. 847, 850 (S.D. Fla. 1993). Following the destruction in South Florida caused by Hurricane Andrew in 1992, thousands of Floridians were left without homes. *Id.* The low-income residents experienced more difficulty in receiving housing assistance from the government than their high-income neighbors. *Id.* They asserted that FEMA policies “systematically precluded many low-income residents displaced by the hurricane from receiving any form of temporary housing assistance.” *Id.* at 851.

34. *McWaters v. Fed. Emergency Mgmt. Agency*, 436 F. Supp.2d 802, 803 (E.D. La. 2006) (holding that FEMA should have stressed to residents that receiving a Small Business Administration loan was not a prerequisite for receiving housing assistance from the government). Admittedly, plaintiffs were not successful in convincing the court to recognize economic discrimination against low-income people. *Id.* In so finding, the court gave the government leeway due to the massive size of the rescue and recovery efforts. *Id.* at 824. To the government’s benefit, the court reasoned: “Even the most sensitive and prepared of government actors would have struggled with the magnitude of Katrina, and inevitably those with economic resources will recover more quickly than those without.” *Id.*

35. See 42 U.S.C. § 5151(a) (2006) (explaining rules for impartial disaster relief); see also Post-Katrina Emergency Management Reform Act of 2006, Pub. L. 109-295, 120 Stat. 1355, 1394 (codified in scattered sections of the U.S.C.) (making structural changes to FEMA).

36. § 5151(a). The Stafford Act requires that “the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial

Congress also discourages economic discrimination in other circumstances. For example, the federal government does not allow medical providers who receive a federal public-health scholarship to discriminate against low-income patients in their health practices.<sup>37</sup> Similarly, Congress has prohibited employers who offer legal benefit plans to their employees from discriminating in favor of the workers who make the most money.<sup>38</sup> These policies demonstrate the government's aversion to express discrimination against low-income individuals.

An analysis of income-based discrimination after natural disasters must be broader than natural disaster policy itself. Many people in poverty suffer discrimination after a natural disaster, not because the government implements malicious disaster-aid policies, but rather because of long-standing economic discrimination that existed before disaster struck. In times of disaster, the government makes great efforts to help the poor, as is apparent from an array of government policies designed to reach out to the needy in the wake of tragedy.<sup>39</sup> However, any pre-existing discrimination against the poor is magnified during times of disaster, exacerbating the effect of a hurricane, flood, or earthquake.<sup>40</sup> The idea is not unique to the United States; worldwide, discriminatory policies in times of calm translate to discriminatory policies in times of disaster.<sup>41</sup> The effect of disaster on low-income people is exacerbated simply because they have fewer resources with which to cushion themselves from tragedy compared to people with moderate or high salaries.

---

manner, without discrimination on the grounds of . . . economic status." *Id.* The statute also prohibits discrimination on the basis of "race, color, religion, nationality, sex, age, [and] disability . . ." *Id.*

37. 42 U.S.C. § 254n(b)(1)(B) (2006) (relating to the rules under which recipients of certain government funds must conduct their healthcare practices.) The statute requires compliance with the requirements in 42 U.S.C. § 254g (2006), which prohibits "discriminat[ion] in the provision of services" if a person either cannot pay, or if the person will be using government insurance provided under the Social Security Act—namely, Medicaid and Medicare. *Id.*

38. 26 U.S.C. § 120(c)(1) (2006) (prohibiting discrimination in favor of highly compensated workers).

39. § 5151(a) (explaining rules for impartial disaster relief designed to aid those in need).

40. *See* Third United Nations Conference on the Least Developed Countries, May 14–20, 2001, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, ¶ 18, U.N. Doc. A/CONF.191/BP/7 (May 13, 2001), available at [http://www.unctad.org/en/docs/aconf191bp\\_7.en.pdf](http://www.unctad.org/en/docs/aconf191bp_7.en.pdf) (explaining that the need for helping disadvantaged people continues to exist during times of disaster). Nations and international bodies have a responsibility to help poor people secure basic needs. *Id.* at ¶ 17. "[B]ecause core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster." *Id.* at ¶ 18.

41. *Id.*

### III. ANALYSIS

#### A. FEMA's Policy is Too Vague to be Consistently Applied

FEMA's "insufficient damage" policy is discriminatorily vague when analyzed according to courts' assessments of both agency rules and statutes. Although the FEMA policy is neither a statute nor a rule, it shares characteristics of statutes and rules in that it guides the manner in which the agency carries out its mission and is thus analogous to statutes and rules. Courts have frowned upon agency rules that are impermissibly vague.<sup>42</sup>

##### i. Impermissibly Vague: Rules

A rule is vague if it meets two standards: first, the rule requires a person of ordinary intelligence to engage in a guessing game as to its meaning; and second, the rule gives broad discretion to an enforcer as to whether it applies in a particular situation.<sup>43</sup>

In this circumstance, FEMA told homeowners only that "insufficient damage" is grounds for denial. Persons of ordinary intelligence could reasonably come to wildly differing conclusions as to the meaning of "insufficient damage." To illustrate, three likely interpretations of "insufficient" that a person of ordinary intelligence might reach include an assessment of: the livability of a home, visibility of damage, or monetary damage. A person using the "livability" standard might deem a home sufficiently damaged that appears in good repair to the naked eye but suffers from an invisible problem such as mold infestation, making the home non-compliant with modern health and safety standards and, therefore, unlivable. However, another person who assesses the damage based on the level of visibility could find the same mold-infested home to be

---

42. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 518 (1994) (Thomas, J., dissenting) (condemning the vagueness of the Health and Human Services Commission rule, which "appears to be nothing more than a precatory statement of purpose that imposes no substantive restrictions"); *Fed. Trade Comm'n v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977) (instructing the Trade Commission to develop a definitive interpretation of its procedural rule). An agency must provide clear interpretations of its rules so that those who rely upon the rules have appropriate notice as to the agency's intentions in enforcing them. *Fed. Trade Comm'n*, 567 F.2d at 103.

43. *Farid v. Ellen*, 593 F.3d 233, 240 (2d Cir. 2010) (holding that a prison rule prohibiting "any item" and all smuggling was unconstitutionally vague as applied to a prisoner who had contraband in his cell). The prisoner was found with two envelopes of papers and seven copies of a book entitled *The Politics of Parole*. *Id.* at 237–38. He was a member of a group called the "Long Termers Committee," which worked to change the criminal justice system from inside the prisons. *Id.* at 237. The court held that the statute did not give Farid proper notice that his book was contraband and did not constrain the guards in their manner of application of the rule. *Id.* at 241.

insufficiently damaged simply because the damage is invisible to the naked eye. A third person using the criterion of economic damage could concur with either the first or second person depending solely on the amount of monetary damage caused by the disaster. If the mold could be removed for a nominal fee, the inspector would agree with the person using the “visibility” standard that the damage is insufficient, whereas if the mold could be removed only through high-priced mediation the damage would be sufficient. Therefore, the FEMA policy fails the first prong of the “impermissibly vague” test because a person of ordinary intelligence would have to engage in speculation as to the meaning of “insufficient damage.”

The second prong of the “impermissibly vague” test requires that a rule give specific direction as to its enforcement requirements.<sup>44</sup> The “insufficient damage” category provides little or no apparent direction to FEMA workers as to how they should enforce or apply the policy, giving agency employees charged with enforcement of the rule wide latitude and the freedom to interpret the term in any number of ways.<sup>45</sup> Therefore, the “insufficient damage” policy fails the second prong of the vagueness test because it lacks specific direction for enforcers to follow.<sup>46</sup>

## ii. Impermissibly Vague: Statutes

Court decisions involving statutory vagueness are instructive in analyzing whether the “insufficient damage” policy is impermissibly vague. In analyzing whether a statute is vague, courts consider whether it provides fair notice to the public.<sup>47</sup> In short, the danger of a vague statute is that parties do not have a clear sense of the law and are thus not informed enough to know whether and how they are violating the law.<sup>48</sup> The

---

44. *Id.* (requiring direction in the way a rule or statute is applied). A court must “consider whether the law provides explicit standards for those who apply it.” *Id.* (quoting *Chatin v. Coombe*, 186 F.3d 82, 87 (2d Cir. 1999)).

45. *See Farid*, 593 F.3d at 240 (holding a rule to be unconstitutionally vague when it didn’t provide proper notice and failed to “adequately constrain” those charged with its enforcement).

46. *See id.* (laying out the second prong of the vagueness test).

47. *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (finding a Chicago city ordinance unconstitutionally vague because it required loiterers to disperse after receiving a warning to disperse from a police officer). The fair notice requirement is intended “to enable the ordinary citizen to conform his or her conduct to the law.” *Id.* The Court held that an order issued after a law was broken does not provide notice because it provides the public with information only after the alleged illegal activity has occurred. *Id.* at 59.

48. 16B AM. JUR. 2D *Constitutional Law* § 972 (2011) (explaining the void-for-vagueness principal embodied in the Due Process Clause of the Fourteenth Amendment, relevant here by analogy to the undefined—thus vague—term “insufficient damage” used by FEMA). Courts have consistently upheld the principle that a statute must be definite to be

homeowners affected by Hurricane Dolly—people of ordinary intelligence—were unable to know with specificity how the “insufficient damage” term was applied to them when they were denied assistance and sought recourse in the federal courts.<sup>49</sup>

In a previous instance the Kansas Supreme Court struck down a statute that outlawed “official misconduct” because it was “too indefinite to serve as a warning.”<sup>50</sup> The same could be said of the FEMA “insufficient damage” policy, which is so vague that it does nothing to warn homeowners of the damage necessary to qualify for disaster aid. Therefore, the “insufficient damage” policy is too vague under established statutory standards because it does not provide the public with fair notice.<sup>51</sup>

#### B. “Ordinary Meaning” Supersedes Chevron Deference

Agencies must apply the ordinary meaning of a term if that term is not defined in the statute.<sup>52</sup> Here, the ordinary meaning of the term “insufficient damage” suggests that the damage is minimal, or too insignificant to warrant repair.<sup>53</sup> Victims of Hurricane Dolly had homes that sustained

---

valid. *Id.* A statute is adequately definite if a person of ordinary intelligence who uses common sense could understand and comply. *Id.* By analogy, a person of ordinary intelligence using common sense should be able to understand in what cases FEMA would apply the “insufficient damage” administrative standard.

49. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, No. B08487, 2009 WL 1346030, at \*8 (S.D. Tex. May 13, 2009), *vacated*, 608 F.3d 217 (5th Cir. 2010), *cert denied*, 526 U.S. \_\_\_, 131 S. Ct. 525 (2010). The court held that, although FEMA had discretion to implement the Congressional mandate to provide emergency housing money, FEMA impermissibly duplicated the federal statute rather than making the standards more specific and definite. *Id.* at \*9. FEMA’s failure to specify a definite standard in question contradicted the Congressional mandate that the agency provide details as to how one might qualify for aid. *Id.* at \*10.

50. *Kansas v. Adams*, 866 P.2d 1017, 1023 (Kan. 1994) (holding the statute to be unconstitutionally vague). The court dismissed two charges of official misconduct against a police chief, reasoning that people of ordinary intelligence could not determine exactly what constituted misconduct. *Id.* The court held that “[d]ue to the great divergence of opinion held in our society as to what is acceptable or proper behavior, misconduct is in the eye of the beholder.” *Id.* at 1023.

51. *See City of Chicago*, 527 U.S. at 58 (explaining the importance of the fair notice standard in the context of city ordinances).

52. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994) (holding in favor of the FDIC agency when a former employee alleged he was terminated in violation of due process). The Court in the *Meyer* case turned to Black’s Law Dictionary to determine the ordinary meaning of the term “cognizable.” *Id.*

53. *Insufficient-Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/insufficient> (last visited July 8, 2011) (defining “insufficient” as “inadequate”). An alternative definition is: “Lacking adequate power, capacity, or competence.” *Id.*

massive amounts of damage from the storm.<sup>54</sup> The damage was hardly insignificant: roofs were damaged, plumbing destroyed, and seeping water caused mold and mildew to grow.<sup>55</sup> Under the ordinary meaning of “insufficient damage,” many denied homeowners should have qualified for government aid. Therefore, FEMA in this case should not have broad discretion because it is obligated to apply the most ordinary meaning of “insufficient damage.”

Although the ordinary meaning doctrine means FEMA incorrectly applied its policy, there are many circumstances in which an agency has broad discretion to apply the law as it sees fit. Several arguments address the view that FEMA acted within its rightful discretion in its application of the policy, but each can be refuted.

Admittedly, courts have given administrative agencies broad discretion when implementing laws. The Fifth Circuit granted FEMA deference in *La Union del Pueblo Entero v. FEMA*<sup>56</sup> citing the agency’s adherence to necessary standards in implementing the law.<sup>57</sup> Specifically, the Fifth Circuit said FEMA’s actions passed both prongs of the *Chevron*<sup>58</sup> deference test and therefore were permissible, making it impossible for courts to interfere with agency implementation of the law.<sup>59</sup> Furthermore, courts

---

54. Press Release, Fed. Emergency Mgmt. Agency, \$44 Million Approved to Assist Texans Recover from Hurricane Dolly (Oct. 3, 2008), <http://www.fema.gov/news/news.release.fema?id=46258>. More than 38,000 people applied for disaster aid, most of which involved some type of damage to a residence. *Id.* FEMA inspectors conducted 31,876 housing inspections and ultimately approved more than \$30 million in aid for residential aid under the Individuals and Households Program (IHP). *Id.* The IHP aid included: \$25 million for temporary housing, rental assistance and home repairs, and \$5 million for medical costs and other disaster-related needs that were not covered by individual victims’ insurance. *Id.*

55. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, No. B08487, 2009 WL 1346030, at \*9 (S.D. Tex. May 13, 2009) (granting homeowners’ request for an injunction to require FEMA to articulate specific standards used in assessing home-repair applications), *vacated*, 608 F.3d 217 (5th Cir. 2010), *cert denied*, 562 U.S. \_\_\_, 131 S.Ct. 525 (2010). One plaintiff, Maria Gallardo, said that after her roof leaked, her ceilings, walls, and carpet rotted, forcing her family members to move out to avoid becoming sick from mildew. *Id.* at \*9. In Francisca Perez’s home, plumbing damage caused mold and mildew to grow. *Id.* The Fifth Circuit reversed and remanded the case, and the plaintiffs petitioned the Supreme Court for writ of certiorari. *Id.* at \*10.

56. 608 F.3d 217, (5th Cir. 2010), *cert. denied*, 562 U.S. \_\_\_, 131 S.Ct. 525 (2010).

57. *Id.*

58. 467 U.S. 837 (1984).

59. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 223–24, *cert. denied*, 562 U.S. \_\_\_, 131 S.Ct. 525 (2010); *see also* *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 843–44 (1984) (giving deference to the Environmental Protection Agency in its interpretation of air-quality laws). The *Chevron* Court applied a two-step rule: first, when Congress speaks unambiguously, Congress’ intent must be implemented without respect to agency decision. *Chevron*, 467 U.S. at 843–44. Second,

have repeatedly found FEMA's actions to be judicially unreviewable when those actions are informed by statute and are not arbitrary or capricious.<sup>60</sup>

However, FEMA's actions after Hurricane Dolly are distinguishable from its action in other disasters because actions following other disasters were not based on impermissibly vague policies. Notably, courts that affirmed FEMA's broad discretion did not address the "insufficient damage" policy, but instead dealt with various other agency actions. The FEMA response to Hurricane Dolly was so far outside accepted standards that it could be considered discriminatory.<sup>61</sup> Therefore, FEMA acted outside its discretion in creating and enforcing its "insufficient damage" policy because the policy was sufficiently vague as to overstep the agency deference otherwise granted to agencies.

C. *The Government Has Historically Treated Low-Income Disaster Victims Differently from High-Income Disaster Victims*

i. The Poor Often Must Prove Discrimination by Race

Poverty itself is not a protected status under the Constitution; therefore, lawsuits alleging discrimination based on poverty are less likely to prevail than those based on other protected statuses.<sup>62</sup> Furthermore, economic discrimination is not expressly prohibited in important housing legislation, including the Fair Housing Act.<sup>63</sup> Because of these omissions in the Constitution and federal statutes, there is not a large body of case law documenting discrimination based solely on poverty. Instead, low-in-

---

when Congress leaves room for agency interpretation, courts must defer to the agency's interpretation as long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

60. *See e.g.*, *St. Tammany Parish v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 323 (5th Cir. 2009) (holding FEMA actions in tort unreviewable by the court because they are "grounded in social, economic, and political policy"); *Calif.-Nev. Methodist Homes, Inc. v. Fed. Emergency Mgmt. Agency*, 152 F.Supp. 2d 1202, 1208 (N.D. Cal. 2001) (holding that FEMA's decision to deny request for earthquake relief funds was unreviewable by court); *City of San Bruno v. Fed. Emergency Mgmt. Agency*, 181 F.Supp. 2d 1010, 1015 (N.D. Cal. 2001) (finding FEMA's decision to deny the city discretionary funds to be discretionary rather than arbitrary and capricious, and thus the decision was allowed under the Administrative Procedures Act).

61. *See La Union Del Pueblo Entero*, 2009 WL 1346030, at \*9–10 (detailing the injuries alleged by the plaintiffs and concluding that by outlining specific criteria, FEMA could have alleviated many of their injuries).

62. *Banks v. United States*, No. 05-6853, 2007 WL 1030326, at \*7 (E.D. La. March 28, 2007) (holding that poverty is not itself a protected class); *see also Harris v. McRae*, 448 U.S. 297, 323 (1980) (explaining that an amendment that directly impacts the indigent is not necessarily unconstitutional, because poverty is not a suspect class).

63. 42 U.S.C. § 3605 (2006) (prohibiting discrimination in real-estate and related transactions).

come disaster victims more commonly file lawsuits alleging discrimination based on a protected status, such as race.<sup>64</sup>

Because income is not a protected status, legal challenges by low-income people to the government's disaster response come in the form of racial discrimination allegations. For example, plaintiffs have alleged that the federal government violated the Equal Protection Clause of the U.S. Constitution when it responded with great delay to the predominantly African-American city of New Orleans following Hurricane Katrina.<sup>65</sup> In one lawsuit, a federal court agreed with African-American plaintiffs that the federal Road Home program designed to help rebuild after Hurricane Katrina was discriminatory against African-Americans.<sup>66</sup> The Road Home is a massive housing recovery project—in fact, the largest in U.S. history—funded by the U.S. Department of Housing and Urban Development designed to return people to homes or rental units after hurricanes Katrina and Rita in 2005.<sup>67</sup> In Louisiana, the program offered homeowners up to \$150,000 to obtain housing in one of three ways: staying in their home, buying another home in Louisiana, or selling their home without buying another in the state.<sup>68</sup> However, the program granted money to rebuild homes based on the pre-disaster value of the home.<sup>69</sup> The result was that African-Americans consistently received lower amounts of government aid than did White homeowners because the homes in African-American neighborhoods were consistently worth less than homes of comparable size, age, and construction located in White neighborhoods.<sup>70</sup>

---

64. *See, e.g.*, *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 723 F. Supp. 2d 14, 16 (D.D.C. 2010) (asserting that the formula used to allocate grants to homeowners following Hurricane Katrina had a "racially discriminatory effect").

65. Michael Kogut, *Making the Case: Did the Government's Response to Hurricane Katrina Violate the Equal Protection Clause?*, 11 SCHOLAR 127, 128 (2009) (concluding that victims of Hurricane Katrina could likely not succeed in an Equal Protection challenge to the government because the court-imposed "intent" requirement would be too difficult to prove).

66. *Greater New Orleans Fair Hous. Action Ctr.*, 723 F. Supp. 2d at 16–17 (granting a preliminary injunction on the grounds that plaintiffs were likely to prevail in their allegations that the HUD formula had a discriminatory impact on African-American homeowners).

67. *Office of Community Development-Disaster Relief*, LOUISIANA.GOV, <http://doa.louisiana.gov/cdbg/DRHousing.htm> (last updated Sept. 3, 2010).

68. *Id.*

69. David Hammer, *Road Home's Grant Calculations Discriminate Against Black Homeowners, Federal Judge Rules*, THE TIMES-PICAYUNE, Aug. 16, 2010, [http://www.nola.com/politics/index.ssf/2010/08/dc\\_federal\\_judge\\_finds\\_road\\_ho.html](http://www.nola.com/politics/index.ssf/2010/08/dc_federal_judge_finds_road_ho.html).

70. *Id.*

The City of New Orleans was a deeply divided city by both race and socioeconomic status before the hurricane, and that division became more apparent after the storm, according to a StoryCorps New Orleans interview with “Smitty” Smith, a native of the hard-hit Lower Ninth Ward and a former labor organizer.<sup>71</sup> Smith remembers a New Orleans where African-Americans were separate from Whites, and were poorer than Whites.<sup>72</sup> Although there was talk of integration of the South after the Civil Rights Movement, but true integration eluded the city with the exception of Mardi Gras and other festivals; integration was not a reality of everyday life in New Orleans.<sup>73</sup> “The culture of the South permeated New Orleans in spite of all of its chatter about this, that, and the other, the so-called . . . race-mingling is largely a myth. The place was strict in its order of things . . . . On an everyday social and economic basis, it was strict because you were in the Deep South.”<sup>74</sup> The racial and socio-economic divisions that existed before the storm were magnified after the disaster.

People like Lucrece Phillips witnessed the devastation of the poor, largely African-American Ninth Ward in New Orleans.<sup>75</sup> Phillips, forty-two, was rescued along with five of her family members and a friend from the attic of her Ninth Ward home the day waters flooded the city and left thousands homeless or dead.<sup>76</sup> Her house was ruined; her neighbors downstairs, a forty-one-year-old woman and her five-year-old son, were trapped before the current swept them to their deaths.<sup>77</sup> “I can still hear them banging on the ceiling for help,” she told a *Times-Picayune* reporter the day she was rescued.<sup>78</sup> “I heard them banging and banging, but the water kept rising.”<sup>79</sup> Phillips is one of many who live in African-American neighborhoods that not only suffer disproportionately after natural disasters, but also have significantly smaller pots of money than their White neighbors from which to rebuild.<sup>80</sup>

---

71. Interview by Nick Karel with Ward ‘Mac’ McLendon & J.F. ‘Smitty’ Smith in New Orleans, La. (Mar. 2010), in Bruce Nolan, *StoryCorps New Orleans: Lower 9th Ward Residents Reflect on the Power of People*, THE TIMES-PICAYUNE, Apr. 29, 2010, [http://www.nola.com/storycorps/index.ssf/2010/04/storycorps\\_new\\_orleans\\_lower\\_9.html](http://www.nola.com/storycorps/index.ssf/2010/04/storycorps_new_orleans_lower_9.html) (click the “play” button on the second audio recording embedded within the news article).

72. *Id.*

73. *Id.*

74. *Id.*

75. Trymaine D. Lee, *Nightmare in the 9th Ward All Too Real for One Woman*, THE TIMES-PICAYUNE, Sept. 1, 2005, <http://www.pulitzer.org/archives/6970>.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Kogut, *supra* note 65.

ii. The Federal Government Has a Long, Unfortunate History of Discriminating Against Low-Income Disaster Victims

Hannibal, Missouri, is the storied hometown of Mark Twain, a fact that the well-to-do residents and government officials of the town value because of the town's prominence as a tourist attraction.<sup>81</sup> Afraid the historical sites of Twain's childhood would one day be threatened by flooding of the adjacent Mississippi River, the town enlisted the U.S. Army Corps of Engineers in 1985 to build a 3,000-foot floodwall through town that would protect the historical areas but leave the poor residents exposed and vulnerable to a flood.<sup>82</sup> When the river flooded in 1993, the town's poor communities were devastated.<sup>83</sup> One resident lamented: "They put in a flood wall to save Mark Twain's house and all the stuff about that dead man, so I don't know why they don't help the living."<sup>84</sup> The Hannibal flood was one of many in which the federal government encouraged and funded disaster-related projects that served to protect the wealthy and middle class at the direct expense of the poor.<sup>85</sup>

At times, discriminatory disaster policy has been evident in local governments as well. In 1992, voters in the City of San Francisco passed an initiative creating a \$350 million loan fund for property owners to retrofit their buildings in order to make them more resistant to earthquake damage.<sup>86</sup> The city could have saved more lives if it passed a slightly higher bond amount, but chose not to do so.<sup>87</sup> The decision was economical, but may also have been discriminatory against the city's Chinese residents, who lived in the areas most likely to crumble in an earthquake, argues author Ted Steinberg in his book, *Acts of God: The Unnatural History of Natural Disaster in America*.<sup>88</sup> "Whose lives are we talking about here? Clearly, the lives of some are worth more than others."<sup>89</sup>

Furthermore, government and non-profit organizations focus on getting homeowners back into their homes after disasters, but renters—who often have less money—have historically been left to the devices of the

---

81. TED STEINBERG, *ACTS OF GOD: THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA* xvii (2000).

82. *Id.* at xvi–xvii. The twelve-foot wall cost \$8 million to build, and the U.S. Army Corps of Engineers paid for most of it. *Id.* at xvi.

83. *Id.* at xvii. The flood was the worst in the city's history and of such strength it is expected only once every 500 years. *Id.* at xvi. It brought the river's waters thirty-two feet high, spilling over the wall. *Id.*

84. *Id.* at xvii.

85. *Id.*

86. STEINBERG, *supra* note 81, at 45.

87. *Id.*

88. *Id.*

89. *Id.*

private sector and at times left homeless.<sup>90</sup> For example, a disproportionate number of the evacuees who left New Orleans after Hurricane Katrina were renters, and many of them struggled to survive in their new cities after the federal government ended rental assistance.<sup>91</sup> Although the government ended the program after a twenty-six-month stretch of rent-free housing for recipients, which was significantly longer than the Congressionally mandated eighteen months of assistance, the end of assistance marked the beginning of harder times for victims.<sup>92</sup> The members of one family found themselves eating more beans and less meat once the rental assistance program ended in order to have enough money to pay for utilities.<sup>93</sup> One scholar found that the government relegates renters' recovery to a lower priority than it does recovery of homeowners.<sup>94</sup> In an academic study, researchers at the University of California at Berkeley studied disaster aid to victims of the 1989 Loma Prieta earthquake in California.<sup>95</sup> They found that homeowners, largely middle-class, received sixty-two percent of the \$1 billion in home-repair funds even

---

90. Charles W. Gould, *The Right to Housing Recovery After Natural Disasters*, 22 HARV. HUM. RTS. J. 169, 185–86 (2009) (establishing that the law and disaster writings pay little heed to how renters recover). Gould argues that getting renters back into housing after a disaster is a complicated project. *Id.* at 185. “Renters have been called both the easiest and the hardest households to return to permanent housing”; they are easy because they could move to any number of properties, but they are hard when no rental properties are available. *Id.* He argues that, “[d]istressingly, governments and NGOs tend to see rental housing as within the private sector and thereby leave some of the lowest-income individuals and families at particular risk.” *Id.* at 186.

91. See Kristin Carlisle, *Katrina Evacuees in Texas Remain in Limbo*, SHELTERFORCE: J. AFFORDABLE HOUSING & COMMUNITY BUILDING, Fall 2006, available at <http://www.nhi.org/online/issues/147/texas-evacuees.html> (telling the story of a former resident of New Orleans who is struggling to make ends meet after FEMA ended her housing assistance). FEMA's operation was the largest rental program in United States history, housing at one point 143,000 people. Press Release, Fed. Emergency Mgmt. Agency, FEMA Temporary Housing Program Ending for Families of Hurricanes Katrina and Rita (Apr. 7, 2009), available at <http://www.fema.gov/news/newsrelease.fema?id=47936> (indicating that the various assistance under FEMA would end May 1, 2009).

92. Press Release, Federal Emergency Management Agency, *supra* note 91.

93. Carlisle, *supra* note 91. Some disaster victims pondered the serious consequences of FEMA's decision to halt rental aid to needy, displaced families. *Id.* “I really hate that FEMA had to make the decision not to help people with rental assistance, because there are some people out there that really do need it,” said Gaynell Bogan, a forty-five-year-old New Orleans resident who was living in Austin, Texas, following Hurricane Katrina. “I guess they feel like ‘we can't take care of you forever’ . . . but people are not living in good situations right now.” *Id.*

94. Gould, *supra* note 90. One reason rental units are less likely to receive government disaster aid is that they are subject to a more complicated ownership structure, often involving multiple parties, than are single-family units. *Id.*

95. Rich Connell, *Disaster Aid Uneven, Study Says: Recovery: UC Berkely Report on Bay Area Quake Finds That Most Relief Efforts Help Middle-Class Homeowners Rather*

though they accounted for only forty percent of the damaged units.<sup>96</sup> Therefore, the government's lack of attention to rental units, in both the length and amount of housing assistance, contributes to low-income renters' difficulty in finding stability after a disaster.

In America's heartland, a long history of tornadoes has left disaster victims intimately acquainted with economic discrimination by the federal government. Since 1953, tornadoes in the United States have prompted FEMA to declare 410 disasters.<sup>97</sup> Tornadoes can occur on any continent, but the United States sees more than any other nation—about 1,000 every year.<sup>98</sup> Most form in one of two places: Florida or a section of the Southern Plains known as Tornado Alley.<sup>99</sup> The region earns its nickname because it is where cold, polar air meets warmer air, making it the ideal climate for brewing tornados.<sup>100</sup> Greensburg, Kansas, is one of the communities in Tornado Alley.<sup>101</sup> Like other communities in the region, it lacks large industry, has lower-than-average incomes, and is generally less affluent than much of the coastal United States.<sup>102</sup> Therefore, because of the lower incomes in many places in Tornado Alley, residents are more vulnerable to financial destruction when a disaster hits; subsequent economic discrimination by the government makes that destruction even more devastating.

The median household income in the United States in 2009 was \$51,425, whereas the median household income in Kiowa County, Kansas, where Greensburg is located, is \$38,750.<sup>103</sup> On May 4, 2007, an EF-5 tornado—the highest level—hit the town, leaving enormous amounts of

---

*Than Apartment Dwellers*, L.A. TIMES, Mar. 2, 1994, [http://articles.latimes.com/1994-03-02/news/mn-28984\\_1\\_bay-area-quake](http://articles.latimes.com/1994-03-02/news/mn-28984_1_bay-area-quake).

96. *Id.* (explaining findings of the UC Berkeley study). The study offered some suggested recommendations for improving the aid process: distribute aid more evenly between houses and apartments, streamline the application process, and offer incentives to encourage rapid repair of rental housing after disasters. *Id.*

97. *Declared Disasters by Year or State*, *supra* note 20.

98. *U.S. Tornado Climatology*, NAT'L CLIMATIC DATA CTR., <http://www.ncdc.noaa.gov/oa/climate/severeweather/tornadoes.html> (last updated Feb. 23, 2011).

99. *Id.*

100. *Id.*

101. *Id.*

102. U.S. CENSUS BUREAU, 2005-2009 AMERICAN COMMUNITY SURVEY (2009), available at [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (under "Fast Access to Information," enter "Greensburg City" in the city/town text box, select Kansas from the state dropdown and then click on "Go"). In Greensburg, the 2009 per capita income was \$21,248; in the United States, the per capita income for the same year was \$27,041. *Id.*

103. *Id.*

destruction.<sup>104</sup> Town landmarks, a school, a water tower, a hospital, city hall, and a power plant were destroyed, as were homes and businesses.<sup>105</sup> The damage was so widespread that townspeople, many of them with low or moderate incomes, had to relocate, causing the population of Greensburg to plummet.<sup>106</sup> Steve Hewitt, the city administrator, said the town was working-class: “Before, it was the typical small town . . . . We were just trying to hang in there and get by. We were dealing with life day to day.”<sup>107</sup> The Greensburg tornado illustrates how tornadoes often affect low-income, rural residents already living on the edge of survival and who can be pushed to the brink of financial devastation if the government discriminates against them during recovery.

After the Greensburg tornado FEMA charged Greensburg residents to live in temporary trailers. This prompted the White, low-income victims there to accuse the government of racism because Black, low-income victims of Hurricane Katrina were not required to pay a similar rental fee.<sup>108</sup> Regardless of its veracity, such an allegation illuminates the bitter feelings and anger that some low-income people have when they perceive FEMA’s actions to be in some way discriminatory.<sup>109</sup>

In every kind of natural disaster, domestic or foreign, poor people are in the worst possible position to withstand discrimination when a disaster strikes. They are the least likely to have savings, insurance, and other aid to buffer them from the harsh results of a natural disaster.<sup>110</sup> A World Development report in 2000 interviewed poor people who were victims of natural disaster and relayed one victim’s thought: “[Security is] the ability of persons to cope with disasters.”<sup>111</sup> Without the ability to buy food, secure shelter, find a job, and pay for medical care, coping with disaster is exceedingly difficult, and victims’ lives are plunged into uncertainty.<sup>112</sup>

---

104. Beccy Tanner, *On Tornado Anniversary, Greensburg Reflects*, THE WICHITA EAGLE, Apr. 20, 2010, <http://www.kansas.com/2010/04/20/1277208/on-tornado-anniversary-town-reflects.html>.

105. *Id.*

106. *Id.* The population fell by approximately 500. *Id.*

107. *Id.*

108. *Why Would FEMA Charge the Victims of the Greensburg Kansas Tornado \$667 Per Month Rental on the RV Trailers?*, RENT AN RV BLOG, (May 19, 2010, 5:35 AM), <http://www.rentanrv.org/travel-trailer-rental/why-would-fema-charge-the-victims-of-the-greensburg-kansas-tornado-667-per-month-rental-on-the-rv-trailers>.

109. *Id.*

110. WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY 162 (2001), available at <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/English-Full-Text-Report/ch9.pdf>.

111. *Id.* at 161.

112. *Id.* at 162.

### iii. Bureaucratic Roadblocks Contribute to Discrimination

Perhaps the seemingly discriminatory actions of the federal government in distributing aid and helping in recovery are a result of inefficient bureaucracy rather than blatant malice or intentional discrimination on the part of government workers. FEMA has limited resources and must allocate the resources Congress gives it with great care.<sup>113</sup> If the agency must make sure it distributes money in the wisest way possible, then it must necessarily not distribute money to every homeowner, business, or citizen who claims to have suffered a loss in a natural disaster.

In 2010, the director of FEMA warned that the agency's emergency funds had been depleted from a string of disasters, including flooding in Tennessee and tornadoes elsewhere.<sup>114</sup> FEMA Director Craig Fugate said he would have to ask for supplemental budget money from Congress simply to pay for the spring disasters and ensure that some money remained for potential hurricanes during the summer and fall.<sup>115</sup> The agency had to cut back on some of its normal operations until the supplemental bill was passed later in the spring.<sup>116</sup> "So we have limited our funds to just those things that are necessary to do a response, to meet initial needs, take care of individuals, the survivors of disaster, but we have stopped all of our permanent work until we get a supplemental to support that," Fugate said.<sup>117</sup> As with funds, FEMA employees' time is limited, and their outstanding caseloads can lead to less-than-perfect distribution of funds.<sup>118</sup> Therefore, allegations of discrimination against FEMA should be considered alongside the agency's limited resources.<sup>119</sup>

Another possible bureaucratic roadblock to fair and equal distribution of emergency funds after a natural disaster involves the lack of inter-agency cooperation in natural disasters. Specifically, Congress has made it difficult for the President to use all of the resources at his disposal in

---

113. See generally FEDERAL EMERGENCY MANAGEMENT AGENCY, FY 2010 BUDGET REQUEST (2009), available at <http://www.apco911.org/new/commcenter911/downloads/FEMA%20FY2010%20Association%20Rollout%20Slides.pdf> (outlining the budget proposal for 2010). FEMA requested almost \$10.5 billion in appropriations from Congress for Fiscal Year 2010. *Id.*

114. Sam Youngman, *FEMA Director Says Emergency Relief Funds are Running Low*, THE HILL, May 11, 2010, <http://thehill.com/homenews/administration/97303-fema-director-says-emergency-funds-running-low>.

115. *Id.*

116. *Id.*

117. *Id.*

118. See *McWaters v. Fed. Emergency Mgmt. Agency*, 436 F. Supp.2d 802, 805 (E.D. La. 2006) (providing that all thirteen plaintiffs did not receive any assistance after Hurricane Katrina, even at the time this case was filed).

119. See *id.* (identifying the plaintiffs' attempt to claim that FEMA violated the Stafford Act in their course of dealing with Hurricane Katrina).

responding to natural disasters.<sup>120</sup> The government could respond more effectively to natural disasters if the President were authorized to order the Reserve troops to help domestic disaster response in addition to the National Guard troops that he is already authorized deploy in such circumstances.<sup>121</sup>

Although the Reserve has responded in small ways to disasters such as Hurricane Katrina and the 2007 California wildfires, its response has been minimal and leaves many resources left unused even as people suffer from a disaster.<sup>122</sup> Colonel Kevin Cieply, author of a law review article titled *Charting a New Role for Title 10 Reserve Forces*, argues that “[t]he Reserve’s relatively small contribution to natural disaster relief in the past, however, does not reflect its vast potential to serve the nation in the future during times of natural catastrophe.”<sup>123</sup> It is especially important that the nation be able to use all available response resources in today’s world where diseases can spread rapidly, climate change threatens more natural disasters, and the nation’s aging infrastructure poses dangers.<sup>124</sup>

In this atmosphere, “it is imperative for the military to bring its plethora of military capabilities to bear on *all* contingencies in support of civil authorities.”<sup>125</sup> Cieply does not make a discrimination argument, but the lack of integrated disaster response arguably has a discriminatory effect on the poorest disaster victims because they have less to lose when government fails to respond efficiently; they hit rock bottom faster.<sup>126</sup> If a tornado victim who is a waitress in rural Oklahoma with only \$100 in her bank account and a ruined home has to wait for two weeks for the government to arrive with a temporary trailer or tent, she will be homeless and destitute during that time. By comparison, a wealthy oil magnate in Tulsa, Oklahoma, who loses his house to a tornado will never be homeless or destitute but will pay for a hotel, fly to another city, or stay with wealthy friends. In short, the wealthy oil magnate will in no way suffer if federal officials’ response is delayed, whereas the low-income waitress will rely on the government aid as the only buffer standing between her

---

120. Kevin Cieply, *Charting a New Role for Title 10 Reserve Forces: A Total Force Response to Natural Disasters*, 196 MIL. L. REV. 1, 3, 6–8 (2008).

121. *Id.* at 11–14. Cieply argues that the law “discriminates against the reserve, making it difficult—although not impossible—for the reserve to deploy for natural disaster response.” *Id.* at 2.

122. *Id.* at 6.

123. *Id.*

124. *Id.*

125. Cieply, *supra* note 120, at 6.

126. *See generally id.* at 1 (identifying a natural disaster victim’s urgent need for assistance).

and homelessness. Therefore, if implemented, Cieply's argument that the President should be allowed to use Reserve troops to help respond would necessarily help low-income disaster victims more than wealthy victims.<sup>127</sup>

iv. Congress Has Explicitly Ordered Parity in Treatment of Disaster Victims

Economic discrimination against disaster victims is not systemic in American government, but rather the result of poorly executed administrative policy. As evidence, Congress specifically forbids economic discrimination in the distribution of federal disaster aid under the Stafford Act, which establishes the groundwork for disaster aid:

The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or *economic status*.<sup>128</sup>

Courts have interpreted 42 U.S.C. § 5151 to mean that no economic discrimination is acceptable, even if the discrimination disfavors someone because of his or her elevated financial status.<sup>129</sup> Under the Stafford Act, government officials can no more discriminate against a person for his or her "successfulness" than they can discriminate against a person for his or her low income.<sup>130</sup>

Other non-disaster statutes are also instructive because they demonstrate that Congress has a history of insisting that low-income people should not be disfavored when federal funds are distributed for certain programs. For example, the federal government does not allow medical providers who received federal public-health scholarships to discriminate

---

127. *See generally id.* (recognizing the importance of allowing the President to use Reserve troops when responding to a natural disaster).

128. 42 U.S.C. § 5151(a) (2010) (emphasis added).

129. *Maleche v. Solis*, 692 F. Supp. 2d 679, 691–92 (S.D. Tex. 2010) (holding that the Stafford Act disallows discrimination based on economic status even when the plaintiff claims he was discriminated against for his "successfulness"). However, the court granted summary judgment on other grounds.

130. *Id.* at 693.

against low-income patients in their health practices.<sup>131</sup> Similarly, Congress has prohibited employers who offer legal benefit plans to their employees from discriminating in favor of the workers who make the most money.<sup>132</sup>

Federal housing policy also demonstrates a preference for those with low incomes. For example, a low-income housing program gives preference to those with limited incomes with the goal of “aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.”<sup>133</sup> These policies favoring the poor in the areas of health care, legal aid, and housing demonstrate Congress’s aversion to express discrimination against low-income individuals. In fact, a great number of government programs are designed to favor low-income individuals who Congress has determined deserve additional help because they have suffered historic discrimination or because of other factors.<sup>134</sup>

Furthermore, following Congress’s lead, federal agencies have implemented their own rules that expressly forbid discrimination along economic lines. As shown above, FEMA has repeatedly been accused of treating the poor differently than the wealthy, and at least one court agreed with those making the allegations.<sup>135</sup> However, if the agency were to follow its own codified rules it would not engage in such discrimination.<sup>136</sup> For example, 44 C.F.R. § 206.11(b), promulgated by FEMA, states that economic discrimination in distributing disaster aid is prohibited.<sup>137</sup> All government employees or organizations working with the government to distribute aid “shall perform their work in an equitable and impartial manner, without discrimination on the grounds of race,

---

131. 42 U.S.C. § 254n (2006) (relating to the rules under which recipients of the money must conduct their practices). The 2000 version of the statute explains that “the individual in providing health services in connection with such practice (i) shall not discriminate against any person on the basis of such person’s ability to pay for such services or because payment for the health services.” § 254n (b)(1)(B).

132. 26 U.S.C. § 120(c)(1) (2006) (prohibiting discrimination in favor of highly compensated workers).

133. 42 U.S.C. § 1437f(a) (2006) (explaining authorization for payments under low-income housing assistance programs).

134. *See* 42 U.S.C. § 254 (2006) (listing various programs, including health care, addressing lack of health care in certain areas, etc.); § 1437f(a) (providing a program for economically disadvantaged individuals to obtain housing assistance).

135. *See* *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727 (5th Cir. 2008) (holding plaintiffs’ constitutional and statutory claims against FEMA to be without merit, but cautioning FEMA to be clearer and more timely in communicating their decision regarding housing assistance).

136. 44 C.F.R. § 206.11(a)–(b) (2010) (conditioning federal aid to states on “full compliance with 44 CFR part 7, Nondiscrimination in Federally-Assisted Programs”).

137. § 206.11(b).

color, religion, nationality, sex, age, or economic status.”<sup>138</sup> The very existence of the rule suggests that FEMA is not engaging in malicious discrimination, but rather is not implementing its own rules in a non-discriminatory manner for various reasons.<sup>139</sup> Because FEMA rules forbid economic discrimination and the “insufficient damage” rule furthers discrimination, the agency is acting contrary to its own rules.

#### IV. RECOMMENDATIONS

##### A. *Congress Must Join Governments of Other Nations in Recognizing Housing as a Human Right*

Congress should recognize that all people have a right to shelter.<sup>140</sup> Long before the dawn of modern government, humans have needed shelter to survive and reach their potential.<sup>141</sup> For example, Maslow’s famous hierarchy of human needs places shelter somewhere in either the first or second level of natural priorities for humans, depending on how one defines shelter.<sup>142</sup> Humans have expressed their intense need for some type of cover from the elements from biblical times. In *Psalms* 91, the Bible promises that, for those who live with and trust the Lord, “God will rescue you from the fowler’s snare, from the destroying plague, Will shelter you with pinions, spread wings that you may take refuge . . . .”<sup>143</sup> Modern humans are all too cognizant of the need for shelter, as well as a reality that is apparent in advocacy movements to end homelessness.<sup>144</sup> The im-

138. *Id.*

139. *See id.* (requiring only that FEMA not discriminate, and not requiring any proactive measures to be taken on their part to prevent discrimination).

140. *See* Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the United States*, 20 HARV. HUM. RTS. J. 35, 37 (2007) (recognizing the lack of guaranteed housing for homeless individuals).

141. W. Huitt, *Maslow’s Hierarchy of Needs*, EDUC. PSYCHOL. INTERACTIVE (2007), available at <http://www.edpsycinteractive.org/topics/regsys/maslow.html> (last visited July 3, 2011). Maslow’s widely accepted theory states that humans must first secure their physiological needs, such as hunger, thirst, and bodily comforts (shelter), before they can pursue other needs. *Id.*

142. *Id.* Maslow’s first level includes “physiological needs,” which could include shelter because obtaining shelter helps one attain the physiological need to control his or her body temperature. *Id.* However, Maslow’s second level is “safety and security.” *Id.* This second level could also be interpreted to include shelter.

143. *Psalms* 91:1.

144. *See, e.g.,* Michael J. Carden, *Federal Council Proposes Plans to End Homelessness*, U.S. DEP’T OF DEF. (June 23, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=59751> (reporting on a program designed to help veterans who are homeless); ERACE HOMELESSNESS, <http://www.eracehomelessness.org> (last visited Aug. 7, 2011). Senior Support Services organizes an annual 5K and 2K walk to fund its mission to “make each day better and safer for Denver’s homeless and hungry seniors.” SENIOR SUPPORT SERVICES, <http://www.seniorsupportservices.org/index.htm> (last visited June 18, 2011).

portance of shelter also appears in popular culture. Mick Jagger and Keith Richards sang about their visceral need for shelter when they wrote: “If I don’t get some shelter, oh yeah, I’m gonna fade away.”<sup>145</sup> Similarly, Bob Dylan wrote of his yearning for a time when a woman “walked up to me so gracefully and took my crown of thorns. ‘Come in,’ she said, ‘I’ll give you shelter from the storm.’”<sup>146</sup> Of course, not all people have an absolute right to live in luxurious housing; a high-end condominium in a posh neighborhood is not the minimum standard to meet basic human needs, whereas a basic roof and four walls, even a tent—especially in a time of crisis—could qualify as adequate and necessary shelter.<sup>147</sup>

Despite its critical importance to human survival, the U.S. Constitution does not recognize the right to housing.<sup>148</sup> Government agencies do little to help since no entitlement programs for housing exist.<sup>149</sup> Of course, Congress funds programs with the goal of providing better housing, but those programs have suffered major cuts in recent decades and, even when they were more heavily funded, have never enjoyed broad Congressional support.<sup>150</sup> To compensate for paltry funding from Congress, housing advocates have in recent years begun using a “human rights” justification to effect change.<sup>151</sup> The strategy has not been unique to housing, but rather has brought change and broader public attention in the areas of other civil and political rights.<sup>152</sup> Congress should recognize housing as a human right because shelter is essential to survival,<sup>153</sup> because thousands of Americans lack proper housing,<sup>154</sup> and because in-

145. THE ROLLING STONES, *Gimme Shelter*, on LET IT BLEED (London Records 1969).

146. BOB DYLAN, *Shelter From the Storm*, on HARD RAIN (Ram’s Horn Music 1974).

147. *But see* John F. Cogan, U.S. Census Bureau, *Dissent to PANEL ON POVERTY AND FAMILY ASSISTANCE 386* (1995), available at <http://www.census.gov/hhes/povmeas/methodology/nas/files/appa.pdf> (disagreeing with the panel’s methodology for measuring the poverty line). While Cogan does rule out shelter as a necessity, he cautions against listing necessities without qualifications. *Id.* at 387. He asks whether there is scientific evidence to show that “designer tennis shoes are a basic need but that the services of primary care physicians are not.” *Id.* By analogy to Cogan’s question, one might ask whether an apartment in a safe neighborhood with good schools is a basic need, or whether a tent in a park would suffice. *See id.*

148. Maria Foscarinis, *supra* note 140.

149. Maria Foscarinis, *Advocating for the Human Right to Housing: Notes From the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 466 (2006).

150. *Id.* at 465.

151. *Id.* at 448.

152. *Id.*

153. Huitt, *supra* note 141.

154. *Snapshot of Homelessness*, NAT’L ALLIANCE TO END HOMELESSNESS, [http://www.endhomelessness.org/section/about\\_homelessness/snapshot\\_of\\_homelessness](http://www.endhomelessness.org/section/about_homelessness/snapshot_of_homelessness) (last

creasingly, the United States stands alone among developed nations in not recognizing housing as a human right.<sup>155</sup>

Congress should recognize that housing is a human right under any circumstance, but the right is particularly acute following a natural disaster.<sup>156</sup> Recognition from Congress is important for four main reasons. First, after a natural disaster, nearly every aspect of a victim's life is in utter disarray: property is lost, documents are gone, children are scattered, violence sometimes results, and government aid is slow to come.<sup>157</sup> Many of the difficulties represent human-rights violations that surface specifically because of the natural disaster and the resulting recovery effort.<sup>158</sup> Natural disasters highlight historical injustices against certain groups that are "at the intersection of multiple avenues of historical injustice—women and religion, for example, or minorities and housing."<sup>159</sup>

Second, natural disasters are increasing in scale and size.<sup>160</sup> As natural disasters become more prevalent and more damaging to a greater population of the country and world, responses from governmental agencies will play a greater role in helping victims recover from the disasters. The third reason is a historical one. In the past, there has not been widespread attention paid to human-rights violations following a natural disaster.<sup>161</sup> Instead, much human-rights research has focused its attention on violations following conflicts or wars.<sup>162</sup> Government acknowledgment of human-rights violations will be necessary in preventing and finding solutions to such violations.<sup>163</sup>

Fourth, if Congress recognizes housing as a human right, it could help shift the framework of discussion following disasters from one of charity to one of necessity.<sup>164</sup> Consider the outpouring of charitable contributions following the January 2010 earthquake in Haiti.<sup>165</sup> People around the world gave money to help earthquake victims not because they necessarily believed that housing was a human right, but they gave under the

---

visited June 1, 2011). On any night in the United States, more than 643,000 people are homeless. *Id.*

155. Foscarinis, *supra* note 140, at 47.

156. Gould, *supra* note 90, at 171.

157. *Id.* at 169.

158. *Id.*

159. *Id.*

160. *Id.* at 170.

161. Gould, *supra* note 90, at 170.

162. *Id.*

163. *Id.*

164. *Id.* at 173.

165. *See, e.g.*, CLINTON BUSH HAITI FUND (Nov. 30, 2010), <http://www.clintonbushhaitifund.org/> (encouraging Americans to donate to the fund to help the victims of the 2010 earthquake in Haiti).

express notion that they were acting as charitable donors.<sup>166</sup> This mindset must change. Charles W. Gould, former president and chief executive officer of Volunteers of America, argues that thinking of housing as a human right “empowers people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance where needed.”<sup>167</sup> Furthermore, if one thinks about the ordeal of recovering from a natural disaster from the standpoint of human rights, it “shifts the moral framework for action from charity to justice . . . .”<sup>168</sup>

B. *Congress Should Write Legislation More Specifically Prohibiting and More Harshly Punishing Economic Discrimination Following Natural Disasters*

Another possible solution to the problem of economic discrimination following natural disasters is for Congress to voice with great specificity its prohibition on such discrimination. To ensure effective deterrence, Congress should not only prohibit the discrimination, as it already has in some circumstances, but also provide strict penalties for anyone who violates the prohibition.<sup>169</sup> For example, although the Stafford Act prohibits such discrimination, the prohibition applies only to funds distributed under the Stafford Act.<sup>170</sup> However, Congress could take its condemnation a step further by specifically prohibiting all discrimination based on economic status in any situation where the victim recently endured severe hardship as a result of a natural disaster. Congress could withhold government assistance from anyone who participated in economic discrimination against a natural disaster victim, ban the discriminating party from receiving government contracts to perform disaster aid in the future, and provide for stiff fines and possible incarceration for those who violate the prohibition.

Natural disasters, in some respects, are entirely nondiscriminatory, wreaking havoc on humans of all incomes, locations, races, and nationalities. When a tragedy strikes, it can devastate a poor community just as it can devastate a wealthy one. However, wealthy and middle-class communities are more able to withstand and rebuild from the effects of disaster

---

166. *See id.* (raising \$52 million in donations).

167. Gould, *supra* note 90, at 173 (quoting U.N. Secretary General, *Annual Report of the Secretary General on the Work of the Organization, delivered to the General Assembly*, ¶ 174, U.N. Doc. A/53/1 (Aug. 27, 1998), available at <http://www.un.org/Docs/SG/Report98/ch5.htm>).

168. *Id.*

169. *See* 44 C.F.R. § 206.11(a) (2010) (requiring that FEMA distribute money without discriminating based on economic status).

170. 44 C.F.R. § 206.11(c) (2010).

because the wealthy and the middle class have a greater cushion from harm in the form of financial resources.

With clarification of the FEMA policy, stiffer penalties for economic discrimination and recognition by Congress that all people have a basic human right to housing, natural disasters will not result in double disaster for low-income individuals. Natural disasters cause sufficient damage on their own, without government actions or omissions exacerbating the problems. With these policy modifications, the poor will suffer at the hands of nature alone, rather than the hands of their own government.

## V. CONCLUSION

In order to solve the discriminatory distribution of aid, Congress should provide for specific penalties against those who discriminate. To ensure effective deterrence, Congress should not only prohibit the discrimination, as it already has in some circumstances, but also provide strict penalties for anyone who violates the prohibition.<sup>171</sup> For example, although the Stafford Act prohibits such discrimination, the prohibition applies only to funds distributed under the Stafford Act.<sup>172</sup> However, Congress could take its prohibition a step further by specifically prohibiting all discrimination based on economic status in any situation where the victim recently endured severe hardship as a result of a natural disaster.

Those people who suffer the most after natural disasters are very often the very same people who suffer the most in everyday life. Low-income people throughout the world often suffer from disasters because of the natural surroundings of their communities and their low standard of living before disaster strikes.<sup>173</sup> This Comment demonstrated that victims of natural disasters are discriminated against by the government in several ways.

First, this Comment showed that the impermissibly vague FEMA policy is one example of how the government discriminates against low-income disaster victims. FEMA's "insufficient damage" policy is discriminatorily vague when analyzed according to courts' assessments of both agency rules and statutes. Courts have frowned upon rules that are

---

171. See 42 U.S.C. § 5151(b) (2006) (conditioning "participation in the distribution of assistance or supplies . . . or of receiving assistance under this chapter" on compliance with nondiscrimination regulations). The Stafford Act requires that: "the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of . . . economic status." *Id.* § 5151(a).

172. § 5151(a)-(b) (explaining rules for impartial disaster relief).

173. George Martine & Jose Miguel Guzman, *Population, Poverty and Vulnerability: Mitigating the Effects of Natural Disasters, Part 1*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS (Dec. 1999), <http://www.fao.org/sd/wpdirect/wpan0042.htm>.

impermissibly vague.<sup>174</sup> Additionally, courts' decisions regarding statutory vagueness are closely analogous to the present issue because in statutory analysis—as with rule analysis—the courts are considering fairness to the public and discretionary limits of an agency. In short, the danger in vagueness is that parties do not have a clear sense of the rules before they violate them. Here, the danger is that victims of natural disasters do not know the specifics of aid distribution when they apply for housing assistance.<sup>175</sup>

Furthermore, if courts applied the ordinary meaning of “insufficient damage,” they would find that FEMA’s policy does not follow the ordinary meaning of the term. Agencies must apply the ordinary meaning of a term if that term is not defined in statute.<sup>176</sup> Here, the ordinary meaning of the term “insufficient damage” suggests that the damage is minimal, or too insignificant to warrant repair.<sup>177</sup> Admittedly, courts have given administrative agencies broad discretion when implementing laws. However, FEMA took discretion normally granted to agencies and brought it to impermissible levels, as illustrated in *La Union Del Pueblo Entero v. FEMA*, making its “insufficient damage” regulation so vague as to be discriminatory.<sup>178</sup>

Second, this Comment demonstrated that FEMA’s response to Hurricane Dolly was not the only instance in which the government actions resulted in problems for low-income victims but not victims with greater financial resources. Because income itself is not a protected status under the U.S. Constitution, income-based discrimination is best demonstrated by analogy through race-based challenges. For example, the federal government’s delayed response to helping the predominantly African-American city of New Orleans after Hurricane Katrina could mean that it violated the Equal Protection clause of the Constitution.<sup>179</sup> Therefore, the government has discriminated against low-income disaster victims be-

---

174. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 518, 525 (1994) (Thomas, J., dissenting); *Fed. Trade Comm’n v. Atlantic Richfield Co.*, 567 F.2d 96, 103 (D.C. Cir. 1977) (instructing the Trade Commission to develop a definitive interpretation of its procedural rule). An agency must provide clear interpretations of its rules so that those who rely upon the rules have appropriate notice as to the agency’s intentions in enforcing them. *Fed. Trade Comm’n*, 567 F.2d at 103.

175. 16B AM. JUR. 2D, *supra* note 48.

176. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994).

177. See *Insufficient Definition*, MERRIAM-WEBSTER.COM, *supra* note 53.

178. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, No. B-08-487, 2009 WL 1346030, at \*7 (S.D. Tex. May 13, 2009), *vacated*, 608 F.3d 217 (5th Cir. 2010), *cert denied*, 562 U.S. \_\_\_, 131 S.Ct. 525 (2010).

179. Kogut, *supra* note 65, 128–29.

cause it has discriminated against minority disaster victims, and minority disaster victims often have disproportionately low incomes.<sup>180</sup>

Perhaps such perceived discrimination is more the result of inefficient bureaucracy rather than blatant malice or intentional discrimination on the part of government workers. FEMA has limited resources and must allocate the resources Congress gives it with great care.<sup>181</sup> Furthermore, Congress has created a disaster-response system that makes it difficult for agencies to cooperate in the most effective manner.

Third, despite agency actions to the contrary, Congress has specifically ordered agencies to treat disaster victims with equity. Such clear direction suggests that discriminatory agency actions happen in spite of, not because of, Congressional direction on the subject. Congress specifically prohibited the government from discriminating based on “economic status.”<sup>182</sup> Furthermore, following Congress’s lead, federal agencies have implemented their own rules that expressly forbid discrimination along economic lines.

---

180. *Id.*

181. FED. EMERGENCY MGMT. AGENCY, *supra* note 113.

182. 42 U.S.C. § 5151(a) (2010).