

2006

The Continuing Storm: How Disaster Recovery Excludes Those Most in Need

Jonathan P. Hooks

Trisha B. Miller

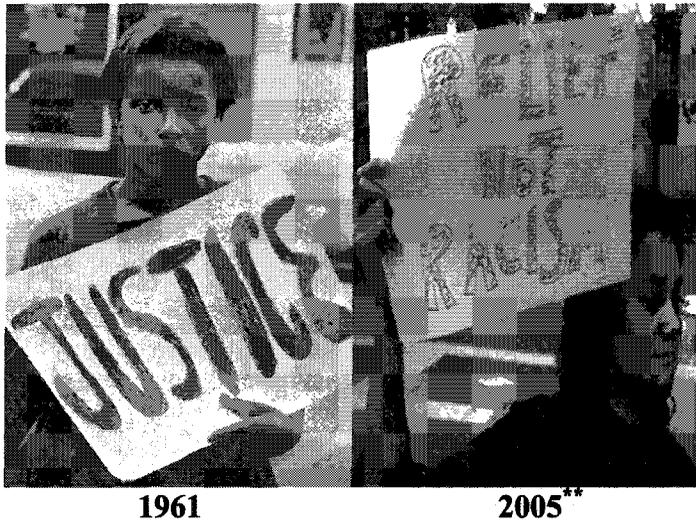
Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Hooks, Jonathan P. and Miller, Trisha B. (2006) "The Continuing Storm: How Disaster Recovery Excludes Those Most in Need," *California Western Law Review*: Vol. 43 : No. 1 , Article 4.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol43/iss1/4>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

THE CONTINUING STORM: HOW DISASTER RECOVERY EXCLUDES THOSE MOST IN NEED *



JONATHAN P. HOOKS AND TRISHA B. MILLER ***

I. INTRODUCTION

Most Americans have emblazoned in their memory an image of a category five hurricane roaring across the Gulf Coast of Louisiana,

* This essay is published in the *California Western Law Review* along with other Essays from the 2006 Western Law Professors of Color Conference, entitled "Pale Promises: Confronting the Rights Deficit."

** The 1961 photograph is by Declan Haun and is used with the permission of the Chicago History Museum (ICHi-35488). The 2005 photograph is by David Bacon and is used with the permission of *Street Spirit*.

Mississippi, and Alabama, hurling casinos in the air, crumbling century-old buildings, and devastating thousands of homes—and even more lives—under a massive tidal surge.¹ When Katrina made landfall, it instantly became the worst natural disaster in over 200 years.² In Mississippi, it destroyed 70,000 homes and damaged 160,000 more.³ Water inundated nearly every structure hugging the seventy-mile coastline, including a local Emergency Operations

*** Counsel in the Fair Housing and Community Development Project of the Lawyers' Committee for Civil Rights Under Law. As described below, building on relationships with community clients and legal advocates in the Gulf Coast, the Lawyers' Committee has been actively involved in responding to the legal needs of families affected by Hurricane Katrina. From October 2005 through September 2006, the Lawyers' Committee hosted over twenty-five free legal clinics for hurricane survivors in Gulfport, Biloxi, Bay St. Louis, Waveland, Gautier, and D'Iberville, Mississippi, as well as New Orleans. The legal clinics served over 1,500 families, primarily in Mississippi Gulf Coast communities of color, such as North Gulfport and East Biloxi. At the legal clinics, public interest attorneys and volunteer attorneys answered questions about issues ranging from FEMA benefits to insurance to programs available to fund home repair. The legal clinics also led to the creation of a FEMA Appeals program, which has placed over 350 cases with pro bono attorneys for ongoing individual representation. To better support these clients and others, the Lawyers' Committee has also sought policy reform from FEMA through both advocacy and impact litigation.

We wish to thank our colleagues at the Lawyers' Committee, the Mississippi Center for Justice, and pro bono counsel from law firms too numerous to mention. We are honored to work with many individual families and community advocates in the Gulf Coast and particularly extend our gratitude to Rose Johnson, Derrick Evans, Reilly Morse, John Jopling, Karen Lash, Jeanne Backstrom, Emilie Miller, and countless others who help rebuild communities and make our work possible.

1. OFFICE OF GOVERNOR HALEY BARBOUR, ONE YEAR AFTER KATRINA: PROGRESS REPORT ON RECOVERY, REBUILDING AND RENEWAL 5-6 (2006) [hereinafter ONE YEAR AFTER KATRINA], *available at* <http://www.governorbarbour.com/documents/oneyearafterkatrina.pdf>; MARK A. BERNSTEIN ET AL., REBUILDING HOUSING ALONG THE MISSISSIPPI COAST: IDEAS FOR ENSURING AN ADEQUATE SUPPLY OF AFFORDABLE HOUSING, at xi (2006), *available at* http://www.rand.org/pubs/occasional_papers/2006/RAND_OP162.pdf; GOVERNOR'S COMM'N ON RECOVERY, REBUILDING, & RENEWAL, AFTER KATRINA: BUILDING BACK BETTER THAN EVER, at ii (2005) [hereinafter GOVERNOR'S COMMISSION REPORT]; RICHARD D. KNABB ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 9 (2006), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.

2. *See* Editorial, *Mississippi's Invisible Coast*, SUN HERALD (Biloxi), Dec. 14, 2005, at A1.

3. ONE YEAR AFTER KATRINA, *supra* note 1, at 15.

Center, which sits thirty feet above sea level, casting emergency workers out into the sea.⁴ Families recall how the flooding reached as high as the rafters in their homes and how buildings disintegrated while winds ripped away roofs.⁵ With such staggering devastation, much attention focused on the immediate aftermath of Katrina and the failures of the federal emergency response,⁶ burning into our national consciousness images of elderly and poor people, mostly black, literally abandoned by their government.⁷

But Katrina has truly been a continuing storm: just as many poor communities were marginalized, segregated, and abandoned before the storm came ashore, they remain left out of the recovery and rebuilding effort.⁸ For notwithstanding President Bush's pronouncement days after the storm in Jackson Square that "[t]he

4. Posting of Anita Lee, Don Hammack & Scott Dodd to Eyes on Katrina, Our Main Katrina Story, http://eyesonkatrina.blogspot.com/2005_08_30_eyesonkatrina_archive.html (Aug. 30, 2005, 09:30 CST).

5. DOUGLAS BRINKLEY, *THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 148-49 (2006).

6. See H.R. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* (2006), available at <http://www.gpoaccess.gov/katrinareport/fullreport.pdf>.

7. See, e.g., *Anderson Cooper 360 Degrees: Special Edition: Hurricane Katrina* (CNN television broadcast Sept. 1, 2005), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/01/acd.01.html>; *Meet the Press* (NBC television broadcast Sept. 4, 2005), transcript available at <http://www.msnbc.msn.com/id/9179790/>. Aaron Broussard, Jefferson Parish President, stated:

We have been abandoned by our own country. Hurricane Katrina will go down in history as one of the worst storms ever to hit an American coast, but the aftermath of Hurricane Katrina will go down as one of the worst abandonments of Americans on American soil ever in U.S. history.

Meet the Press, supra.

8. See Video: The New Homeless: The Affordable Housing Crisis on the Gulf Coast (Lawyers' Committee for Civil Rights Under Law 2006), <http://www.lawyerscomm.org/2005website/home/video/thenewhomeless.html> [hereinafter *The New Homeless*]; Trisha Miller, *After Katrina: Fighting To Survive*, SHELTERFORCE, Sept.-Oct. 2005, at 19. For background on race and poverty issues in Gulfport, Mississippi, see generally Trisha Miller, *Crossing Muddy Waters*, SHELTERFORCE, July-Aug. 2005, at 9-10.

storm didn't discriminate, and neither will the recovery effort,"⁹ far too many families, and especially far too many of those most in need, are still being left behind. Indeed, six months after Katrina, tens of thousands of families were still waiting for Federal Emergency Management Agency (FEMA) trailers.¹⁰ As of August 2006—one year after the storm—only a few thousand homes in coastal Mississippi have been rebuilt,¹¹ and over 38,000 Mississippi families are living in trailers.¹² The story did not end with the Superdome. Rather, FEMA continued in its failure to help those with the least resources to rebuild their lives and communities.

While there are many failures in the programmatic response to Hurricane Katrina at the local, state, and federal levels, this article addresses the specific ways in which FEMA's emergency disaster

9. *Bush Gets Ground Tour of Katrina Damage*, CNN, Sept. 12, 2005, <http://www.cnn.com/2005/US/09/12/katrina.impact/>.

10. Press Release, Office of the House Democratic Leader Nancy Pelosi, Six Months After Katrina: An Overview: Tens of Thousands of Katrina Survivors Are Still Suffering and the Future of Gulf Coast Remains Unclear (Feb. 28, 2006), available at <http://democraticleader.house.gov/30something/docs/katrinasisix.doc>. Underscoring the staggering level of housing need long after Katrina, FEMA reported that, even as of March 29, 2006 (seven months after the storm), there were "1,297 applicants who still need[ed] temporary housing in [FEMA] commercial sites" just in Harrison County, one of Mississippi's three coastal counties. Memorandum from Bobby Weaver, Operations Chief, Harrison County Incident Mgmt. Team, to the Exec. Comm. Members of the Harrison County Incident Mgmt. Team (Apr. 7, 2006) (on file with authors). Troublingly, the report also noted that even "if these [then-] projected sites become reality, there is still not enough housing to meet identified needs." *Id.*

11. For example, as of August 25, 2006, only some 2,966 building permits have been issued in the disaster-affected areas. Press Release, Governor's Office of Recovery and Renewal, Mississippi Recovery Fact Sheet (Aug. 25, 2006) (on file with author). Of those permits, virtually all were for repair or construction of single-family homes—only sixty were for multi-family repair and construction. *Id.*

12. Shaila Dewan, *FEMA Halts Evictions from Trailers in Mississippi*, N.Y. TIMES, June 22, 2006, at A16 (detailing the number of families receiving FEMA travel trailers and mobile homes in Mississippi); see Don Hammack, *Event Answers FEMA Queries: Center Hopes To Help Evicted Residents*, SUN HERALD (Biloxi), May 10, 2006, at A7; see also *GCN Recovery News Report*, GULF COAST NEWS, http://gulfoastnews.com/Katrina/GCN_Local_News_Update.htm (last visited Oct. 24, 2006) ("[N]early 93,000 people are still housed in 34,552 FEMA provided trailers in Mississippi. Since the FEMA trailers have been issued, 12,224 have been returned . . .").

relief and housing assistance have proved particularly, almost deliberately, ineffective for the most vulnerable and marginalized families—those in predominantly minority communities, those with lower incomes and limited savings, and renters.¹³ In Part I, we describe the scope of the storm's impact on low-income and marginalized groups. In Part II, we summarize the myriad legal issues low-income families encountered and how advocates at the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) sought to address them. In Part III, we critique the limits of disaster response in the wake of Katrina. Specifically, we emphasize how substantive and procedural aspects of FEMA's disaster assistance programs failed low-income families—unnecessarily delaying assistance to them, utilizing unclear and ineffectual rules, or establishing barriers that denied assistance altogether. In essence, we argue that FEMA fails to consider the impact of policies that exclude those most in need. In conclusion, we summarize the progress made to date in correcting these deficiencies and identify further policy reforms needed to ensure equitable emergency response that works for *all* families recovering from the storm.

13. Neglect and exclusion of low-income renters has characterized Mississippi's plans for its special allocation of federal recovery and rebuilding funds. In December 2005, Congress approved a special Katrina Community Development Block Grant (CDBG) allocation for rebuilding, with \$6.2 billion in CDBG funds awarded to Louisiana and \$5.05 billion to Mississippi in February. *See* Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 71 Fed. Reg. 7666, 7666 (Feb. 13, 2006). Notwithstanding legal requirements mandating that the state target at least 50% of those funds for the benefit of low- and moderate-income families, very little, if any, of the funds have reached them. Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2780 (2005) (setting low- and moderate-income targeting requirements). Indeed, more than a year after the storm, Mississippi has proposed using less than 5% of the funds for affordable rental housing. *See* Press Release, Miss. Governor Haley Barbour, Governor Barbour's Comprehensive Plan for Gulf Coast Housing (Sept. 21, 2006), *available at* <http://www.Governorbarbour.com/recovery/news/2006/sep/GHBcomprehensivehousingplan.htm>. While much can, and will, be written on this topic, a full discussion of such other relief and recovery programs is beyond the scope of this article.

II. THE AFTERMATH

A. *Low-Income Households Suffered Severe, Even Disproportionate, Losses in the Storm*

With the popular press preoccupied with the overwhelming devastation caused by the levee breach in New Orleans,¹⁴ humanitarian organizations,¹⁵ the Mississippi Governor's Commission,¹⁶ and the Congressional Research Service recorded the extent of damage along Mississippi's invisible coast, noting that the damage was borne in significant part by low-income residents.¹⁷ The

14. Michael Newsom, *Media Chased the Sexy Katrina Story, Leaving Coast Behind*, SUN HERALD (Biloxi), Aug. 26, 2006, Special Edition, at 30 ("The story of Katrina's damage in Mississippi quickly took second place to a levee breach in New Orleans that flooded the lower Ninth Ward and St. Bernard Parish. But because the two happened within hours of one another, the national media mixed the two into one story and New Orleans became the focus of the hurricane coverage."); see Editorial, *supra* note 2 ("As Aug. 29 recedes into the conscious time of many Americans, the great storm that devastated 70 miles of Mississippi's Coast, destroying the homes and lives of hundreds of thousands, fades into a black hole of media obscurity."). As the editor of the *Sun Herald* newspaper in Biloxi noted, "It became impossible not to note that we had become a footnote to the larger story" Mark Boyer, *The Newspaper That the National Media Forgot*, CJR DAILY, Oct. 4, 2006, http://www.cjrdaily.org/behind_the_news/the_newspaper_that_the_nationa.php (noting editorials "that admonished the national media for largely ignoring the devastation that had been visited on the residents of southern Mississippi").

15. For example, Oxfam America established an immediate disaster response unit in Biloxi, Mississippi, in September 2005. OXFAM AMERICA, RECOVERING STATES? THE GULF COAST SIX MONTHS AFTER THE STORMS 4 (2006) [hereinafter RECOVERING STATES]. Oxfam America catalogued the lack of political will and the poor policy decisions that have contributed to this housing crisis in their comprehensive report, OXFAM AMERICA, FORGOTTEN COMMUNITIES, UNMET PROMISES: AN UNFOLDING TRAGEDY ON THE GULF COAST (2006), available at <http://www.reliefweb.int/library/documents/2006/oxfam-usa-23aug.pdf>.

16. Shortly after Hurricane Katrina hit, Governor Barbour announced the formation of the Governor's Commission on Recovery, Rebuilding and Renewal to develop a broad vision for a better Gulf Coast and South Mississippi; the Commission produced a final report in December 2005 that summarized ideas for rebuilding these communities and presented data on the extent of the destruction throughout southern Mississippi. See generally GOVERNOR'S COMMISSION REPORT, *supra* note 1.

17. See THOMAS GABE ET AL., CONG. RESEARCH SERV., HURRICANE KATRINA:

2000 Census shows that in the three coastal counties of Mississippi (Hancock, Harrison, and Jackson), approximately 51,432 households are at or below 80% of Area Median Income (AMI), those defined as low-income.¹⁸ Of these low-income households, 45.5% are renters and 54.5% are homeowners.¹⁹ As the Governor's Commission Report notes, there were many lower-income households in the hurricane-devastated areas: "about 65 percent of the housing units exposed to the surge and over 57 percent of the units exposed to flooding were occupied by households with incomes below the U.S. median household income level."²⁰ "In Hancock and Harrison counties alone, almost 75 percent of the housing units were occupied by households living below the U.S. median income level."²¹

While Katrina indiscriminately leveled coastal communities across the Gulf, the data suggest that, if anything, lower-income households were disproportionately impacted.²² For example, households at or below 150% of the Federal Poverty Line (FPL)²³ comprised some 10% of pre-Katrina households, yet such households represented 13.5% of those within Katrina's Surge Inundation Limit (SIL) (10,228 of 75,733).²⁴ Calculations comparing census data with

SOCIAL-DEMOGRAPHIC CHARACTERISTICS OF IMPACTED AREAS 14 (2005), *available at* <http://www.gnocdc.org/reports/crsrept.pdf>.

18. Income and Housing Data for Coastal Mississippi Counties (Nat'l Low Income Hous. Coal., 2006) (on file with authors).

19. *Id.*

20. GOVERNOR'S COMMISSION REPORT, *supra* note 1, at 54. "About two-thirds of the housing units in [Harrison, Hancock, and Jackson] counties were occupied by households with income below the U.S. median level (approximately \$42,000 as of the year 2000)." *Id.* at 51.

21. *Id.*

22. See JOHN LOGAN, THE IMPACT OF KATRINA: RACE AND CLASS IN STORM-DAMAGED NEIGHBORHOODS 1 (2006), <http://www.s4.brown.edu/Katrina/report.pdf>. While this article focuses on Mississippi, the losses in New Orleans were even more disproportionately felt by minorities, renters, and low-income households. *Id.*

23. The Federal Poverty Line, published annually, is the federal government's official statistical measure of poverty. See U.S. Dep't of Health & Human Servs., Frequently Asked Questions Relating to the Poverty Guidelines and Poverty, <http://aspe.hhs.gov/poverty/faq.shtml#definition> (last visited Nov. 16, 2006).

24. GOVERNOR'S COMMISSION REPORT, *supra* note 1, at 53 tbl.2. "[I]n 2005, the income for a family of four at 150 percent FPL [was] \$29,000 per year." *Id.* at 52.

FEMA flood maps similarly suggest that while low-income households (those below 80% AMI) were about 38.18% of households in Mississippi's three coastal counties, they constituted 43%, 41%, and 39% of households suffering storm surge damage in Hancock, Harrison, and Jackson counties respectively.²⁵ Moreover, the Mississippi Regional Housing Authority reported that 80% of the subsidized housing in coastal Mississippi was damaged or completely destroyed.²⁶ The loss of affordable housing, coupled with the skyrocketing post-Katrina rental market, left low-income families without adequate housing alternatives.

In addition to these inequities, lower-income homeowners are less likely to have the financial resources necessary to bridge the gap between the value of their damaged or destroyed home and the cost of rebuilding. Many low-income households are underinsured or lack the cushion of insurance altogether, which is doubly disastrous when insurance becomes a prerequisite for certain forms of programmatic assistance.²⁷ Income has a significant bearing on whether homeowners purchase insurance, and research reveals that

25. See *Income and Housing Data for Coastal Mississippi Counties*, *supra* note 18. Overall statistics on the number of units impacted may actually *understate* the effect of Katrina on low-income households. Low-income families are more likely to reside in older and substandard housing, which sustained greater wind and water damage from the hurricane. See, e.g., *RECOVERING STATES*, *supra* note 15, at 11 (“Studies also show that low-income and minority housing units are often older and more subject to damage than other housing . . .”).

26. Michael Kunzelman, *Unhabitable Habitats: Tenants Living in Squalor*, *SUN HERALD* (Biloxi), Apr. 16, 2006, at A19 (“Before Katrina, the coastal office of the Mississippi Regional Housing Authority had 1,592 units of affordable housing. The hurricane damaged roughly 80 percent of those units, displacing 800 families . . .”).

27. For example, Mississippi's initial plans for its special allocation of federal rebuilding funds, *see supra* note 13, created a grant program to assist homeowners outside of flood plains who lacked flood insurance—but homeowners were only eligible if they maintained homeowners' insurance. See *MISS. DEV. AUTH., PARTIAL ACTION PLAN FOR KATRINA RECOVERY HOMEOWNER GRANT PROGRAM 4-6* (2006), http://www.mississippi.org/UserFiles/File/Home_Owners_Assistance_Program/hap_3606%20final.pdf; *see also* Memorandum from Will Fischer & Barbara Sard, Ctr. on Budget & Policy Priorities, *Key State Decisions Regarding Use of CDBG and LIHTC Funds in Mississippi* (Jan. 9, 2006) (on file with authors) (“[The Governor's plan] limits assistance to the lower of \$150,000 or the property's insured value, and requires homeowners to rebuild to higher building standards than were in place before the storm and maintain flood insurance in the future.”).

“percentages of homeowners with insurance dropped as household incomes decreased.”²⁸ As an Oxfam America report notes, “[M]ore affluent people are more likely to purchase flood insurance from the National Flood Insurance Program (NFIP) and purchase greater amounts of insurance than poorer people.”²⁹ It is axiomatic that, given their financial constraints, many elderly, fixed-income, and low-income households simply do not purchase or maintain insurance. Without adequate insurance coverage, low-income homeowners living in the seventy-mile flood zone simply could not afford to rebuild.

B. *Renters, Particularly Low-Income Renters,
Face Additional Barriers*

Katrina erased a surplus in market-rate rental units and created a nightmare for tenants facing skyrocketing rents and a wave of illegal, pretextual evictions. The Mississippi Center for Justice, along with the Mississippi Center for Legal Services, conducted a field inspection of large apartment complexes in Harrison, Jackson, and Hancock counties.³⁰ The study revealed that over fifty percent of subsidized rental housing on the Gulf Coast was uninhabitable.³¹ Renters are increasingly vulnerable to poor housing conditions because of the rental housing crisis and the fact that they have been excluded from various forms of governmental rebuilding assistance—especially the

28. RECOVERING STATES, *supra* note 15, at 16.

29. *Id.* at 15.

30. Richard Fausset, *30 Days' Notice at the FEMA Trailer: Eviction Letters Go Out to About 3,000 Katrina Victims, Who Are Told They're Ineligible*, L.A. TIMES, May 20, 2006, at A1 (“More than half the coast’s subsidized housing stock was uninhabitable as of mid-April, according to a survey by the Mississippi Center for Justice, a public interest law firm.”); Dita McCarthy, Miss. Ctr. for Legal Servs., John Jopling & Reilly Morse, Miss. Ctr. for Justice, Preliminary Results of Survey of Subsidized Housing on Mississippi Coast (Apr. 17, 2006) [hereinafter Survey of Subsidized Housing] (on file with authors) (described in Priscilla Frulla, *Apartment Losses Near 50%: 10,000 Units Fell Victim to Katrina*, SUN HERALD (Biloxi), Oct. 31, 2006, at B8); see also ONE YEAR AFTER KATRINA, *supra* note 1, at 20 (“The Gulfport-based Mississippi Regional Housing Authority No. VIII and public housing authorities in Bay St. Louis, Biloxi, Waveland and Long Beach sustained damage to more than 90 percent of their nearly 2,700 public housing units, with approximately 10 percent of their units being totally destroyed.”).

31. Survey of Subsidized Housing, *supra* note 30; see also Frulla, *supra* note 30.

Homeowner Grant Assistance Program developed by the state for its federal rebuilding allocation.³² While renters can receive compensation under FEMA's disaster assistance program for personal property loss and temporary housing assistance (the Individual and Households Program described *infra* in Part IV.A.), only homeowners can receive compensation for home repair.³³ As a result, low-income renters subsist in substandard apartment buildings and find themselves increasingly exposed to threats of eviction.

The loss of such a huge share of rental housing, and serious damage to more, put low-income tenants on the verge of homelessness long after the storm. Unfortunately, substandard and uninhabitable conditions, illegal evictions, and spiking rents became commonplace.³⁴ Throughout coastal Mississippi, unscrupulous landlords sought to empty developments full of low-income tenants to take advantage of increasing rents in a market with little remaining affordable rental housing.³⁵

32. See *supra* note 13 (describing Mississippi's plans for federal reconstruction funds to date). Mississippi's plan for its federal reconstruction allocation creates concern that many Mississippians will be left behind, particularly persons with disabilities, low-income homeowners, and renters. Memorandum from Will Fischer & Barbara Sard, *supra* note 27, at 2-3. For program details, see MISS. DEV. AUTH., *supra* note 27.

33. See 44 C.F.R. § 206.117(b)(2) (2005); FEMA, HELP AFTER A DISASTER: APPLICANT'S GUIDE TO THE INDIVIDUALS & HOUSEHOLDS PROGRAM 1-2 (2005) [hereinafter FEMA, HELP AFTER A DISASTER], available at http://www.fema.gov/pdf/assistance/process/help_after_disaster_english.pdf (describing assistance programs for households).

34. See *infra* note 61 (discussing rent increases). The Lawyers' Committee hosted over twenty-five free legal clinics for hurricane survivors in the disaster-devastated Gulf Coast from October 2005 through September 2006. Many of the interviews with hurricane survivors, regarding poor housing conditions, evictions, and increased rents can be viewed in the documentary film, *The New Homeless*, *supra* note 8. In addition, the Lawyers' Committee and the Mississippi Center for Justice intervened to prevent two illegal threats of eviction at Edgewood Manor Apartments and Waters Mark Apartments in Gulfport, Mississippi. Letter from John Jopling, Miss. Ctr. for Justice, & Joseph D. Rich, Lawyers' Comm. for Civil Rights Under Law, to Rodger Ates, Jr., Resident Manager, Edgewood Manor Apts. (Oct. 28, 2005) (on file with authors); Letter from John Jopling, Miss. Ctr. for Justice, & Jonathan P. Hooks, Lawyers' Comm. for Civil Rights Under Law, to Sandalwood Mgmt., Inc. (Dec. 21, 2005) (on file with authors).

35. See Trisha Miller, *The Second Storm: Mass Evictions Threaten Gulf Coast Tenants*, SHELTERFORCE, Summer 2006, at 33, available at <http://www.s>

A jarring example of this scenario occurred at Edgewood Manor, a federally-subsidized apartment complex in Gulfport. Following Katrina, over fifty families at Edgewood Manor were simply deserted by their property manager.³⁶ The management company reported that the building had been “totally destroyed” by the storm.³⁷ Meanwhile, residents were left behind without roofs, running water, trash pickup, and in some cases, basic plumbing.³⁸ Christine Brice, a North Gulfport resident, witnessed families in Edgewood Manor starting a fire in a bucket in order to keep warm, while others relied on gas stoves to heat their apartments.³⁹ On top of these deplorable housing conditions, tenants dreaded a mass eviction. In October 2005, just a month after the storm, security guards told residents that the apartment gates would be welded shut, blocking any reentry into the complex.⁴⁰ On the residents’ behalf, the Lawyers’ Committee for Civil Rights and the Mississippi Center for Justice forced the landlord to cease eviction threats and allow tenants to remain at Edgewood Manor.⁴¹

nhi.org/online/issues/146/secondstorm.html; Ana Radelat, *Many Coast Renters Face New Eviction: Low-Income Katrina Victims Unable To Afford Higher Payments*, CLARION-LEDGER (Jackson, Miss.), Dec. 3, 2005, at 1A (“Community activists and legal aid groups say they’re battling a wave of evictions of low-income Katrina victims. They say landlords are eager to replace those tenants with people who are willing, and able, to pay much higher rents because housing is scarce in the Katrina-wrecked region.”). See also *The New Homeless*, *supra* note 8. For a discussion of increased rents, see *infra* note 61 and accompanying text.

36. Miller, *supra* note 35, at 33; Letter from John Jopling & Joseph D. Rich to Rodger Ates, Jr., *supra* note 34.

37. Facsimile from Bill Mays, Southland Mgmt. Co., to U.S. Dep’t of Hous. & Urban Dev. (Sept. 1, 2005) (on file with authors).

38. Tom Wilemon, *No Place Else To Go: Edgewood Manor Tenants Tangled in Red Tape*, SUN HERALD (Biloxi), Jan. 28, 2006, at A1 (“Five months after Hurricane Katrina, damage to [Edgewood Manor] has not been repaired. People live in apartments with partial roofs. One person subsists without running water due to damaged plumbing.”); Radelat, *supra* note 35 (“While some tenants were forced to leave because their apartments were so heavily damaged, those who stayed felt that was their best option.”).

39. Interviews with residents, at Lawyers’ Committee Disaster Relief Legal Clinic, Gulfport, Miss. (Oct. 27, 2005); *The New Homeless*, *supra* note 8.

40. Interviews with residents, *supra* note 39.

41. Letter from John Jopling & Joseph D. Rich to Rodger Ates, Jr., *supra* note 34.

Even private housing that survived the storm in reasonably good condition provided no panacea, as many landlords preferred to remove old tenants (at pre-Katrina rents) and bring in new tenants at higher prices. At Gulfport's Waters Mark apartment complex, tenants—even those with habitable premises and leases running well into 2006—received eviction notices in November 2005 telling them to move out on December 31, 2005.⁴² Though the notices claimed the evictions were necessary due to pervasive storm damage at the complex that needed repair, the landlord was simultaneously advertising vacant apartments for rent in January 2006—presumably at a new and higher price.⁴³ As lawyers for the tenants, the Lawyers' Committee and Mississippi Center for Justice were able to correct this injustice, if only for the term of tenants' leases.

Individual tenants also face ongoing threats of eviction.⁴⁴ For example, Biloxi resident Howard Reynolds, who had been living out of his car after the storm, finally located an apartment for rent in November 2005.⁴⁵ While the apartment lacked sheetrock and a permanent ceiling, Mr. Reynolds agreed to pay full rent while the landlord remodeled the apartment.⁴⁶ After several months, no repairs had been made, and the landlord began demanding additional rent.⁴⁷ When Mr. Reynolds refused to pay, the landlord began the common practice known as a “self-help” eviction,⁴⁸ removing the locks and

42. See Letter from John Jopling and Jonathan P. Hooks to Sandalwood Mgmt., Inc., *supra* note 34.

43. See Mike Keller, *Renters Contest Eviction: Waters Mark Says It Wants To Make Repairs*, SUN HERALD (Biloxi), Dec. 24, 2005, at B8.

44. See, e.g., Radelat, *supra* note 35 (“[Greg Dedeaux] spent two weeks living in his car before returning to his unit at the Tonya Apartments with his mother, also displaced by the storm, once repairs were made to the roof of the complex. But like many low-income tenants on the Gulf Coast and in New Orleans, Dedeaux now faces eviction for nonpayment of rent.”).

45. All individual clients have been given pseudonyms for the purpose of this article. Mr. Reynolds was interviewed by a *pro bono* attorney at a Lawyers' Committee disaster relief legal clinic in Biloxi, Mississippi on April 10, 2006, and his case was referred to the Mississippi Center for Justice for representation.

46. *Id.*

47. *Id.*

48. “Self-help eviction” refers to the practice whereby a landlord evicts a tenant outside the legal system, without the use or oversight of officers designated by the court system to ensure orderly, non-violent evictions. See *Bender v. N.*

shutting off all utilities.⁴⁹ Overnight, Mr. Reynolds joined the ranks of thousands of low-income renters with no place to go.

Ultimately, the rash of evictions on the pretext of storm damage became so severe that the Gulfport City Attorney took the extraordinary step of issuing a letter warning landlords that such evictions were illegal, absent a government determination that the unit was unsafe.⁵⁰

Unfortunately, coastal Mississippi had a high percentage of renters, particularly in areas damaged by Katrina: “The Mississippi Gulf Coast has a higher percentage of renters than the rest of the state In low-income communities on the coast, fully half of the residents were renters.”⁵¹ Low-income persons in the disaster area are also more likely to be renters.⁵² In communities like Biloxi, catastrophic damage besieged these individuals, and meeting their needs is all the more imperative to reviving the community.⁵³ A year

Meridian Mobile Home Park, 636 So. 2d 385, 388-89 (Miss. 1994) (describing self-help eviction method and allowing such evictions if permitted under lease agreement). In practice, the landlord engaging in self-help eviction simply changes the locks on the rental unit and disposes of the tenant’s personal property. *Id.*

49. Conversation with *pro bono* attorney at Lawyers’ Committee legal clinic in Biloxi, Mississippi (Apr. 10, 2006).

50. See Letter from Harry P. Hewes, Gulfport City Attorney, to All Owners and Rental Agents of Residential Property in the City of Gulfport (Sept. 2005) (on file with authors) (stating that “[u]nless a residential unit is determined by proper authorities to be unsafe for occupancy, it is unlawful to dispossess a tenant in rightful possession of his/her rental home”).

51. RECOVERING STATES, *supra* note 15, at 13. The Governor’s Commission Report notes low rates of homeownership in these areas. GOVERNOR’S COMMISSION REPORT, *supra* note 1, at 50. While renters were 28% of all pre-Katrina households in Hancock, Harrison, and Jackson Counties, they were 30% of households within Katrina’s Surge Inundation Limit (SIL). See *id.* at 53 tbl.2. Conversely, while homeowners were 62% of all pre-Katrina households, they were 57% of those within the SIL (43,226 of 75,733). *Id.*

52. In the disaster areas, there is a much lower rate of homeownership for those below the poverty line (27%) than for those above it (62%). See GABE ET AL., *supra* note 17, at 24. According to the National Low Income Housing Coalition, more than half the housing destroyed by Katrina was rentals, and about 70% was affordable to lower-income renters—those making 80% or less of the Area Median Income. See Sue Kirchhoff, *Rebuilding After Katrina To Take Monumental Effort*, USA TODAY, Oct. 6, 2005, at 1B.

53. For example, the Governor’s Commission Report describes the peninsular tip of Biloxi (East Biloxi), noting that in a sample of 6,404 housing units, nearly all

after Katrina, the population who weathered the storm without the financial and emotional asset of homeownership remains saddled with a prolonged recovery period and inadequate housing alternatives.

C. *Minority Communities Can Be Particularly Vulnerable*

Lower-income and higher poverty populations within the disaster area are disproportionately communities of color. For example, nearly one in three African-American Katrina survivors is at or below the poverty level, leaving thousands of minority families without financial resources to rebuild.⁵⁴ Significantly, poverty and homeownership rates among racial minorities are pronounced: of the many renters in the coastal counties, a disproportionate number were African Americans.⁵⁵ Throughout the Mississippi Gulf Coast, the African-American poverty rate is 27.1% compared to 10.4% for whites.⁵⁶ The homeownership rate is 49.8% for African Americans compared to 74.0% for whites, with some communities having an even greater

households fell below the U.S. median income level. GOVERNOR'S COMMISSION REPORT, *supra* note 1, at 54. Extensive or catastrophic damage was reported in over 80% of these homes. *Id.* Less than 40% of housing units in this area were owner-occupied, and the vast majority of the rental units were extensively or catastrophically damaged. *Id.* In short, whole communities like East Biloxi can be left behind in the rebuilding if resources do not effectively reach low-income families.

54. RECOVERING STATES, *supra* note 15, at 8 tb1.1 (citing U.S. Census Bureau Census 2000 data).

African-American households in Mississippi are disproportionately impoverished. According to the 2000 U.S. Census, African-American populations have higher poverty rates and lower homeownership rates than white populations in the hurricane-affected areas This holds true on the Gulf Coast generally, in rural areas (Jones County), and in five of the hardest hit urban areas—Biloxi, Gulfport, Moss Point, Pascagoula, and Pass Christian. In Pascagoula, where the disparity is particularly stark, the poverty rate for African-American households at 42 percent is almost four times that of white households at 11 percent.

Id. at 7 (citing U.S. Census Bureau Census 2000 data).

55. *Id.* at 13. "In low-income communities on the coast, fully half of the residents were renters. African-Americans in those [Gulf Coast] communities are even more likely to be renters, particularly in Gulfport and Moss Point/Pascagoula where the prevalence of renters is 63 percent and 67 percent respectively." *Id.*

56. *Id.* at 8 tb1.1 (citing U.S. Census Bureau Census 2000 data).

disparity.⁵⁷ In addition, according to Oxfam America, “[S]tudies indicate that there are marked ethnic and racial inequalities in adequate insurance coverage.”⁵⁸ Other marginalized groups, such as Vietnamese immigrants⁵⁹ and disabled persons,⁶⁰ also face especially high hurdles in the recovery process.

The Mississippi Gulf Coast is only a portion of the disaster-devastated area. But the tenuous position of lower-income and minority populations, particularly renters, is endemic. As the supply of rental housing dwindled due to storm damage, rental prices in coastal Mississippi skyrocketed over the pre-Katrina rates.⁶¹ Inflated

57. *Id.*

58. *Id.* at 11. Further, studies show that these inequities are reinforced by discrimination within the insurance industry. Testers found, for example, that insurance agents who identified a non-white voice on the phone were more likely to ask the location of the home earlier in the conversation. Gregory D. Squires, *Linguistic Profiling: A Continuing Tradition of Discrimination in the Home Insurance Industry?*, 41 URB. AFF. REV. 400, 403 (2006).

59. “About 2,000 Vietnamese Americans live in East Biloxi alone, making up almost 20% of the area’s 8,500 residents.” UYEN LE, NAT’L ALLIANCE OF VIETNAMESE AM. SERV. AGENCIES, *THE INVISIBLE TIDE: VIETNAMESE AMERICANS IN BILOXI, MS: AN UPDATE ONE YEAR AFTER HURRICANE KATRINA 3* (2006), available at <http://www.navasa.org/pdf/BiloxiReport.pdf>. “A recent (2006) mapping of the Vietnamese-owned properties in East Biloxi showed that 70% of the Vietnamese community lived inside the 100-year flood zone” (i.e., an area disproportionately hit by Katrina storm surge). *Id.* at 12. In addition, immigrant groups face obvious language and cultural barriers to accessing benefits.

60. Compared with the non-disabled, persons with disabilities are disproportionately poor. U.S. Census Bureau, American FactFinder, *People: Disability*, http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=tp4_disability (last visited Nov. 9, 2006) (“In 2000, 8.7 million people with disabilities were poor—a substantially higher proportion (17.6 percent) than was found among people without disabilities (10.6 percent).”); U.S. Census Bureau, *Disability Status, Employment, and Annual Earnings: Individuals 21 to 64 Years Old: 2002*, available at <http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t5.pdf> (illustrating that people with disabilities have mean annual earnings of \$23,034, and non-disabled persons earn \$32,870 per year). In addition, many of the communities impacted by Katrina have high rates of people with disabilities (23.2% in New Orleans, Louisiana; 23.4% in St. Bernard Parish, Louisiana; 21% in Jefferson Parish, Louisiana; 27.1% in Hancock County, Mississippi; and 21.3% in Jackson County, Mississippi). Press Release, Nat’l Council on Indep. Living, NCIL Action Alert: NCIL Principles on Housing Policy in Light of Hurricanes Katrina and Rita (Oct. 13, 2005), available at <http://www.ncil.org/news/katrinahousing.html>.

61. “Rents have soared about 25% to 30%, according to the Biloxi Ocean

market rents—and the loss of public and subsidized housing—effectively eliminated much of the affordable rental housing on the Gulf Coast.⁶² These factors, exacerbated by the sluggish pace of new construction, leave many vulnerable families in a precarious position when FEMA’s disaster assistance is delayed or denied.

III. LEGAL RESPONSE TO THE DISASTER

The sheer loss of affordable housing and the alarming number of post-disaster evictions threaten to create an entire new homeless population in Mississippi, one of the poorest states in the nation.⁶³ In addition to causing emotional and physical devastation, the storm left behind myriad legal hurdles for Katrina survivors. Meanwhile, the local legal services infrastructure was paralyzed in the aftermath.⁶⁴ Even before the storm, few local attorneys provided services to the lowest-income families.⁶⁵ After the storm, many remaining attorneys,

Springs Assn. of Realtors.” Fausset, *supra* note 30. *See also* RECOVERING STATES, *supra* note 15, at 14 (“Housing shortages after a disaster have a tendency to inflate rents, which adds to the burden of already vulnerable victims’ ability to recover at a time when affordable housing is most needed. Renters will have few resources with which to rebuild their lives, and few housing options in their communities without assistance and resources dedicated to bringing back affordable rental units.”). The local housing authority reports that even displaced families with Section 8 vouchers paying up to Fair Market Rent for the coastal areas are finding it nearly impossible to locate rental units at the former rent levels. Telephone Interview by Jesse Lawson-McCreedy with Mark Creech, Ass’t Dir., Miss. Reg’l Hous. Auth. for Region VIII (Oct. 25, 2006). Creech informed legal services advocates that out of 1,374 Section 8 voucher-holders displaced by Katrina, virtually none had been able to reuse their housing subsidies in the Gulf Coast. *Id.* Instead, some 900 or more are in FEMA trailers, and 300 or more are spread out over 42 states using HUD Disaster Vouchers in lieu of Section 8 vouchers. *Id.*

62. *See, e.g.*, Keller, *supra* note 43; Kunzelman, *supra* note 26.

63. Mississippi has the lowest median household income in the country. *See* U.S. Census Bureau, Income 2005—Three-Year-Average Median Household Income by State: 2003-2005, <http://www.census.gov/hhes/www/income/income05/statemhi3.html> (last visited Nov. 17, 2006).

64. For the comments of Sam Buchanan, Director of Mississippi Legal Services, see Video: MCJ on the Post-Katrina Coast (Miss. Ctr. for Justice 2006), <http://www.mscenterforjustice.org/gallery/gallery.html> (last visited Nov. 17, 2006).

65. *See* Video: Rebuilding Lives: Lawyers’ Committee Provides Hurricane Relief in Coastal Mississippi (Lawyers’ Committee for Civil Rights Under Law 2006), <http://www.lawyerscommittee.org/2005website/home/video/quicktime.html>.

hurricane survivors themselves, had lost their offices and were unable to provide these services alone.⁶⁶ While the most pressing needs after the storm—food, shelter, medical care—were outside the expertise of attorneys, without legal representation, the marginalized communities on the Gulf Coast could all too easily be deprived, once again, of the benefits enjoyed by higher-income families.

Weeks after the disaster, Lawyers' Committee attorneys and other volunteers headed to Gulfport, Mississippi, with legal guides and emergency supplies to serve in the first wave of legal responders. What we found was a chaotic process with rules ill-designed to meet the real needs of low-income families. Because FEMA was slow to open Disaster Recovery Centers (DRCs),⁶⁷ families were forced to register for FEMA benefits by phone or internet.⁶⁸ Yet, the hundreds of families we saw at the emergency shelter area in North Gulfport had no access to working phone lines or internet connections. The few that found a donated cell phone would have to remain on hold throughout the night, awaiting a FEMA phone representative.

As a result, FEMA assistance was the hardest to access by the group that needed it most: poor families without savings of their own to turn to as they awaited emergency aid. Those who could not afford to evacuate remained in isolation for several weeks following the storm. Often, they remained unregistered with the agency since the phone lines to which families were directed remained constantly jammed and inaccessible. Ongoing individual representation was desperately needed.

In response, the Lawyers' Committee developed a series of legal clinics designed to educate predominantly low-income and minority communities about their rights and assist them in the FEMA benefits process.⁶⁹ Our legal clinics in North Gulfport, East Biloxi, and

"Before the storm, there were only two legal services attorneys for every 10,000 Mississippians who qualified for legal services." *Id.* (quoting John Jopling of the Mississippi Center for Justice).

66. *See, e.g.*, John Ryan, *Washed Away*, LAWDRAGON, Winter 2006, at 28; MCJ on the Post-Katrina Coast, *supra* note 64.

67. *See infra* Part IV.B.2.b.

68. *See* FEMA: Disaster Assistance Frequently Asked Questions, <http://www.fema.gov/assistance/dafaq.shtm#1> (last visited Nov. 9, 2006).

69. *See, e.g.*, Hammack, *supra* note 12 (stating that a legal clinic will provide "an assembly-line style setup to help process people with questions about 30-day

elsewhere reached over 1500 families in core disaster areas, providing assistance with registering for FEMA benefits and resolving insurance and mortgage problems and landlord-tenant disputes. Volunteer lawyers worked one-on-one with disaster survivors to address these issues, as well as employment, small business, and home repair issues. The obstacles to accessing FEMA's Individuals and Households Program, which assists families displaced by disasters, proved difficult to navigate—often even for the advocates themselves, confronted with unclear explanations from FEMA and inconsistent application of ill-defined and unpublished rules. As became apparent, many families needed ongoing individualized representation to overcome the FEMA barriers described in this article. Stemming from the legal clinics, the Lawyers' Committee and law firms working *pro bono* created a FEMA Appeals project that provided continuing representation to over 350 families, many of whose stories are included here.

To address FEMA's unresponsiveness to the needs of displaced families on a larger scale, the Lawyers' Committee, in conjunction with other lawyers, brought a class action on November 10, 2005, on behalf of all displaced persons who had applied or were applying for FEMA assistance.⁷⁰ Among other things, the suit alleged that FEMA's response to Katrina violated the Stafford Act, which governs FEMA's disaster response, and FEMA's constitutional due process obligations.⁷¹ Specifically, the suit challenged procedural burdens (described below) that delayed or denied benefits to families, such as FEMA's application of the "shared household rule," which rendered many applicants ineligible if they shared an address with other applicants before the storm, but established separate households after the disaster,⁷² and FEMA's requirement of a Small Business Administration loan application prior to receipt of FEMA housing assistance.⁷³ In addition, the suit addressed FEMA's denial or suspension of benefits under circumstances created by its own failure

termination notices and other FEMA issues").

70. *McWaters v. FEMA (McWaters I)*, 408 F. Supp. 2d 221, 225-27 (E.D. La. 2006).

71. *Id.* at 226.

72. *Id.*

73. *Id.*

to inform applicants of their rights and obligations and the effective denial of benefits to numerous households due to FEMA's excessive delays, including 80,000 applications still listed as "pending" three months after the storm.⁷⁴

The first successful ruling on *McWaters* came on December 12, 2005, when the court enjoined FEMA's arbitrarily threatened termination of all households residing in hotels through FEMA's emergency housing program.⁷⁵ The injunction ensured a more orderly process. Just before Thanksgiving 2005, FEMA proposed to displace all such families on a handful of days' notice, even though many families had yet to receive a determination from FEMA as to whether they were entitled to continued housing assistance in the form of rent or a trailer.⁷⁶ In other words, FEMA proposed to displace families before they could demonstrate they were entitled to continuing shelter. In entering a preliminary injunction against FEMA's actions, the court described FEMA's insensitivity towards the needs of low-income households, bemoaning its sudden changes in policy combined with a lack of clarity for those it was charged to assist.⁷⁷ Finding that "these

74. *Id.* at 226-27.

75. *Id.* at 236-37.

76. *Id.* at 225, 233-36.

77. *Id.* at 233-34. Displaced families were threatened with eviction initially on November 30, 2005, then December 15, 2005, then January 7, 2006, and remained ill-informed as to how they could obtain eligibility for continuing housing assistance from FEMA. As the Court recounted:

FEMA's actions in reference to its subsidy of hotels and motels have been notoriously erratic and numbingly insensitive [T]hese victims have been told by FEMA that they would have to leave their respective hotels or motels on November 30, 2005, then December 15, 2005. They were then told that *some* would have to leave on December 15, 2005 whereas others would have until January 7, 2005 [sic]. As of December 9, 2005, the date of the instant hearing, FEMA provided a letter which in essence stated that in the event an applicant had not received his or her funds by December 15, 2005 the applicant could remain at their hotel or motel. It is unimaginable what anxiety and misery these erratic and bizarre vacillations by FEMA have caused these victims, all of whom, for at least one point in time, had the very real fear of being without shelter for Christmas. When Michael Hirsch, Individual Assistance Branch Chief of FEMA's Recovery Division, was asked as to the rationale for this termination of benefits, he seemed as bewildered as this Court and basically stated he did not know.

actions by FEMA . . . discriminate against victims based on the grounds of economic status and prohibited in the Stafford Act,”⁷⁸ the court enjoined the evictions and mandated a more open and fair process.⁷⁹ Specifically, prior to displacing any family, FEMA had to determine the family’s eligibility for continuing housing benefits and provide at least two weeks notice.⁸⁰ As a result of the order, tens of thousands of evacuees remained in hotels and motels during the holidays and some until the following spring.⁸¹

The court also preliminarily enjoined FEMA from imposing the onerous and unnecessary requirement that applicants for temporary housing assistance complete a Small Business Administration (SBA) loan application, one of the primary barriers delaying needed benefits.⁸² The full impact of this barrier, particularly for low-income households, is described *infra* at Part IV.B.2.b. Overall, the *McWaters* case complemented individual representation efforts by attacking systematic barriers. Even on claims where the case did not succeed *legally*, such as the challenges to the “shared household rule,” it continued to put in sharp relief the *policy* areas where FEMA’s programs fell short of helping those most in need.⁸³ Indeed, as noted

Id. (citation omitted). Unfortunately, FEMA’s contradictory and confusing, even terrifying, pattern of informing applicants about denial or termination of their benefits was repeated later. FEMA’s decision to terminate trailer assistance to thousands of families with limited review of whether they were, in fact, eligible to continue to reside there is one prominent example. *See* Dewan, *supra* note 12 (“For several months, FEMA has repeatedly changed deadlines, sent conflicting letters to applicants, and declared people ineligible for housing assistance for the lack of signatures or failures to appear in person for property inspections.”); *infra* notes 120-25 and accompanying text.

78. *McWaters I*, 408 F. Supp. 2d at 235. “[T]he majority of the persons affected by the [hotel eviction] deadline are the most disadvantaged of our citizens and/or the persons who lost virtually all of their property, economic livelihood, and in some cases, family members.” *Id.* at 234.

79. *Id.* at 236-37.

80. *Id.* at 236.

81. *See id.*; *McWaters I*, 408 F. Supp. 2d 221, 239-40 (E.D. La. 2006) (modifying order).

82. *McWaters I*, 408 F. Supp. 2d at 236-37. The court subsequently made the injunction permanent. *McWaters v. FEMA (McWaters II)*, 436 F. Supp. 2d 802, 822-23 (E.D. La. 2006).

83. Following the success of *McWaters*, other suits challenged FEMA’s administration of disaster relief in other key respects, with mixed results. *See, e.g.*,

below, the court bemoaned the same administrative chaos and impenetrable policies that bedeviled many low-income applicants trying to navigate the benefits process, even calling for legislative solutions to correct these failures.

IV. LEFT BEHIND: FEMA PROGRAMS AND LOW-INCOME FAMILIES

A. *FEMA's Disaster Assistance: How Program Design Creates Barriers*

To better understand how FEMA's Individuals and Households Program (IHP), which provides benefits to displaced families, can exclude or limit benefits available to those most in need, we first explain the types of FEMA benefits available after a disaster.⁸⁴ In describing the programs, we note how, *substantively*, they are designed for higher-income households who have assets to fall back on after the disaster. Indeed, many programs presume that families will be able to draw on resources to complement FEMA's assistance, which consequently means that poor families—or families above the poverty line, but with no savings—may be unable to effectively utilize FEMA programs or may receive fewer benefits than similarly situated but higher-income households.⁸⁵ The following section addresses the *procedural* barriers faced by families in accessing benefits.

Settlement Agreement, *Brou v. FEMA*, Case No. 06-0838 (E.D. La. entered into on Aug. 15, 2006) (settlement agreement resolving FEMA's failure to provide trailers accessible to disabled individuals), http://femaanswers.org/images/a/a6/Brou_v_fema_settlement_agmt.pdf; *Watson v. FEMA*, 437 F. Supp. 2d 638, 651 (S.D. Tex. 2006) (granting a preliminary injunction that requires FEMA to permit applicants to use Temporary Housing Assistance funds to pay utility costs), *vacated*, No. 06-20651 (5th Cir. Sept. 6, 2006), *available at* http://femaanswers.org/images/c/cb/5th_Cir_decision_Watson.pdf.

84. For FEMA's description of its assistance programs for households, see FEMA, HELP AFTER A DISASTER, *supra* note 33.

85. As one report notes, lower-income "households are much less likely than their higher income counterparts to have the resources needed to avoid hardship and, in some cases, homelessness when the erratic federal evacuee housing assistance system fails them." WILL FISCHER & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, HOUSING NEEDS OF MANY LOW-INCOME HURRICANE EVACUEES ARE NOT BEING ADEQUATELY ADDRESSED 1 (2006), http://www.cbpp.org/2-23-06_hous.pdf. The report further observes:

They also are less likely to have the necessary resources to cover gaps

1. *Emergency Assistance and Shelter*

FEMA provides immediate emergency shelter assistance to displaced people through a variety of state intermediaries such as the Red Cross and state emergency management agencies.⁸⁶ These programs, sometimes referred to as “Section 403” sheltering programs, provided a wide variety of housing types after Katrina, ranging from shelters to programs that housed displaced people in hotels or apartments which were rented on their behalf.⁸⁷ Importantly, families in these housing programs could initially enter such housing *without* needing to individually establish their eligibility for FEMA benefits.⁸⁸ Because such direct assistance did not require individualized determinations of eligibility for assistance, it initially created few problems. Nonetheless, problems arose in transitioning families from emergency assistance to FEMA’s ongoing disaster assistance (which did require individual eligibility determinations), because sudden policy changes confused and threatened families, requiring judicial intervention in the *McWaters* suit.⁸⁹

between what federal homeowner assistance is providing and the cost of rebuilding or replacing a home, or to be able to cope with the sharp increases in rental costs that have occurred in a number of the areas damaged by the hurricanes as a result of the large decline in the supply of habitable rental housing in these areas.

Id.

86. See *McWaters I*, 408 F. Supp. 2d at 225; see also Press Release, FEMA, Temporary Housing for Hurricane Katrina Evacuees Includes Cruise Ships (Sept. 4, 2005), available at <http://www.fema.gov/news/newsrelease.fema?id=18606> (describing FEMA temporary housing programs).

87. See *McWaters I*, 408 F. Supp. 2d at 225.

88. See FEMA, *Hurricane Katrina Fact Sheet: Frequently Asked Questions Section 403 Sheltering*, Sept. 29, 2005, at 2, http://www.fema.gov/pdf/government/grant/pa/faq_403_sheltering1.pdf. (“Do evacuees have to register for FEMA assistance as a condition of receiving interim housing assistance?”). Agencies operating 403 sheltering need only submit from applicants “name of head of household; number of household members; FEMA registration number (if available); address of damaged home; address of interim housing; name and mailing address of lessor; number of months evacuee resided in interim housing; term of lease in months; monthly rent; furniture costs; penalties (if claimed).” *Id.*

89. See *McWaters I*, 408 F. Supp.2d at 234-36. Though a full examination of these FEMA decisions is beyond the scope of this essay, shortly after the disaster, the process of evaluating the eligibility of displaced families in emergency sheltering programs created significant problems, particularly the threat of mass

2. FEMA's Individuals and Households Program

FEMA's Individuals and Households Program has several components, described below.

a. Temporary Housing Assistance

Beyond the immediate post-disaster period, FEMA provides temporary housing assistance for up to eighteen months after a disaster, though the deadline can be extended by FEMA.⁹⁰ Housing assistance can be indirect, through rental assistance, or direct, through provision of a physical unit such as a trailer or mobile home.

In this disaster, FEMA's rental assistance programmatically provided rent assistance of \$786 per month (in the form of a single

displacement from emergency housing. As discussed above, in late November 2005, FEMA announced it would terminate hotel assistance for thousands of families residing in hotels in New Orleans and other cities if they did not demonstrate eligibility for continuing housing assistance. *Id.* at 225. Unfortunately, the terminations were scheduled on a relatively short timeframe—a matter of less than two weeks—and the process was unclear and confusing to many displaced families. *Id.* at 225, 233-34. Indeed, as with other FEMA policy decisions, the intent appeared to be to confuse FEMA applicants and discourage them from seeking available benefits. These threatened evictions were addressed in the *McWaters* litigation, in which FEMA was ordered to extend the time to qualify for assistance prior to termination/eviction. *See id.* at 236; *see also McWaters II*, 436 F. Supp. 2d 802, 820-21 (E.D. La. 2006) (“[W]hile FEMA may not be *legally* required to notify applicants or recipients of assistance about what FEMA provides, much less provide any data regarding its availability or the requirements for obtaining such assistance, one can only wonder *why* FEMA would choose to *not* do so, as has so often been the case herein. . . . [T]he Court has seen scant evidence that any such desire for openness and clarity guided *any* of FEMA's communications, and this obfuscation has acted much to the detriment of [FEMA applicants], and indeed, the entire country.”). Similar problems have confronted terminations from other emergency sheltering programs (such as city-sponsored apartment programs in Texas), and evictions from FEMA trailers. *See* Complaint at 2, *Watson v. FEMA*, Case No. H-06-1709 (S.D. Tex., May 19, 2006) (noting 7,602 households in Houston at risk of displacement as “ineligible”; 2,121 households in the Dallas-Ft. Worth area), *available at* http://www.femaanswers.org/images/d/da/Watson_v_FEMA_-_1st_Amend_Complaint.pdf; *infra* at notes 120-25 and accompanying text (discussing trailer evictions).

90. 44 C.F.R. § 206.110(e) (2005) (stating FEMA may extend the eighteen month period if its Associate Director “determines that due to extraordinary circumstances an extension would be in the public interest.”).

check of \$2358 for three months);⁹¹ thereafter, the rent subsidy would provide support up to the HUD-established Fair Market Rent for the area.⁹² However, the program had several limitations that hampered its effectiveness for many of our clients. Households, especially those with low incomes, experienced difficulty effectively using the assistance to secure long-term housing for several reasons:

- **Inadequate Rents:** In the disaster areas of coastal Mississippi and New Orleans, the rent assistance was of limited utility since there were few rental units available after the storm—and those that remained had dramatically increased rents.⁹³
- **Lack of coverage for security deposits and utilities:** FEMA does not permit families to use the housing assistance to cover initial security deposits or ongoing utility costs, unless they are incorporated as part of the rent payments.⁹⁴ For low- or very

91. FEMA, TRANSITIONAL HOUSING ASSISTANCE PROGRAM, <http://www.fema.gov/hazard/hurricane/2005katrina/katrinatranshousing.shtml> (last visited Nov. 21, 2006).

92. NAT'L MULTI-HOUSING COUNCIL, HURRICANE HOUSING OVERVIEW: SECTION 408 ASSISTANCE, <http://www.nmhc.org/Content/ServeContent.cfm?ContentItemID=3635#408> (last visited Nov. 26, 2006).

93. *See supra* notes 30 (loss of rental units), 61 (rent increases); *see* FISCHER & SARD, *supra* note 85, at 5 (“FEMA has capped the amount of rental assistance it provides at the local Fair Market Rent (FMR), a standard that is set annually by HUD. Evidence shows that rental assistance at the FMR level is insufficient in some markets to enable families to rent an apartment, particularly in markets where rental costs have risen sharply in recent months because the hurricanes substantially reduced the stock of inhabitable rental housing, or because an influx of evacuees seeking housing has pushed rental prices upward. Rental assistance that is limited to the local Fair Market Rent level also is frequently inadequate for certain types of households, such as people with disabilities who may need modestly more expensive housing with special accommodations.”).

94. 44 C.F.R. § 206.117(b)(1)(i)(C), (D) (2005) (“All utility costs and utility security deposits are the responsibility of the occupant except where the utility does not meter utility services separately and utility services are a part of the rental charge.”) (“The occupant is responsible for all housing security deposits.”); FISCHER & SARD, *supra* note 85, at 5; FEMA, Disaster Assistance Frequently Asked Questions, <http://www.fema.gov/assistance/dafaq.shtml#34> (last visited Nov. 21, 2006) (“No, FEMA cannot pay utility bills.”). In a short-lived victory for displaced families, a federal district court issued a preliminary injunction requiring FEMA to pay amounts for utilities for all recipients of Temporary Housing Assistance under the Section 408 program. *Watson v. FEMA*, 437 F. Supp. 2d 638, 651 (S.D. Tex. 2006). On September 6, 2006, the 5th Circuit vacated the injunction. *Watson v.*

low-income families without savings or income after the storm, covering those expenses posed a substantial burden at a time when many needed all their resources for immediate necessities, such as food, medical care, and other expenses.⁹⁵

- Landlord Participation: Because the program is operated as a cash subsidy paid to tenants (who then paid landlords)—rather than using the existing subsidized housing models where the government entity directly contracts with landlords for payment—families experienced some difficulty getting landlords to participate in the program.⁹⁶ Landlords were concerned about the security of their rental income and independently might ask tenants to demonstrate an income level three times the rent (a practice not uncommon in some rental markets). Naturally, many low-income tenants found they were refused rental even from landlords whose rent fell under FEMA’s cap. By contrast, HUD’s Disaster Voucher Program (available only to former residents of subsidized housing and the homeless) was operated through local housing authorities, drawing upon their existing expertise and relationships with local landlords.⁹⁷

FEMA, No. 06-20651 (5th Cir. Sept. 6, 2006), *available at* http://femaanswers.org/images/c/cb/5th_Cir_decision_Watson.pdf.

95. The failure to cover utilities has been addressed by a recent Stafford Act reform bill. *See infra* at Part V.

96. One displaced woman complained that, regardless of the FEMA rent subsidy, landlords were asking her to document that her income was independently sufficient to support the rent (more specifically, that she earned three times the monthly rent). Multiple telephone conversations with client (most recently Aug. 4, 2006).

97. *See* HUD, NOTICE PIH 2006-12: DISASTER VOUCHER PROGRAM (DVP) OPERATING REQUIREMENTS 4 (2006) (describing Disaster Voucher Program), *available at* <http://www.hud.gov/offices/pih/publications/notices/06/pih2006-12.pdf>. “Under the DVP, the [local Public Housing Authority] assumes responsibility to not only provide a monthly rent subsidy on behalf of the family, but also to actively assist the family in locating an eligible unit.” *Id.* “Under the DVP housing assistance payments contract, the PHA pays a monthly rent subsidy directly to the owner on behalf of the family.” *Id.*

b. *Home Repair and Replacement*

Another part of the IHP program provides assistance for homeowners to repair or replace their homes. Limited to \$5,200 for repairs and \$10,400 for replacement, these relatively low caps pose particular problems for low-income homeowners who are less likely to have additional resources to rely on and combine with FEMA or insurance proceeds.⁹⁸ This program is also one of several systematic ways that FEMA privileges higher-income families, specifically homeowners, over renters.⁹⁹ Indeed, through this IHP program,

98. This shortcoming has been corrected in a recent reform of the Stafford Act governing FEMA assistance. *See generally infra* Part V. As noted above, during the response to Hurricane Katrina, funds for home repair had been limited to \$5,200, while funds for home replacement were limited to \$10,400. *See* 42 U.S.C.A. § 5174(c)(2)(C), (c)(3)(B) (West 2003). These dollar amounts are annually adjusted for inflation. § 5174(c)(2)(C), (c)(3)(B). These internal caps could prove troubling for homeowners if they lacked insurance or were underinsured. Specifically, the internal caps meant low-income owners were more likely to face a gap in the resources needed to repair their homes. However, the Department of Homeland Security Appropriations Act of 2007, signed into law Oct. 4, 2006, removed those caps, meaning that homeowners could receive up to the overall cap on FEMA assistance of \$26,200. Dep't of Homeland Security Appropriations Act, Pub. L. No. 109-295, 120 Stat. 1355 (2006) (Maximum Amount Under Individual Assistance Programs) (striking internal caps on repairs and replacement formerly at 42 U.S.C.A. § 5174(c)(2)(C), (c)(3)(B)); 42 U.S.C.A. § 5174(h) (setting overall cap, adjusted for inflation).

99. Not surprisingly, the average incomes of renters are lower than homeowners. For the three coastal counties in Mississippi most impacted by Katrina, the difference in median income is striking:

	Hancock	Harrison	Jackson
TOTAL	\$ 35,337	\$ 35,502	\$ 39,143
Owner	\$ 39,116	\$ 43,069	\$ 44,959
Renter	\$ 22,682	\$ 25,668	\$ 24,976

See U.S. Census Bureau, American FactFinder, Detailed Tables, HCT36. Median Household Income in 1999 (Dollars) by Tenure, http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-ds_name=DEC_2000_SF4_U&-mt_name=DEC_2000_SF4_U_HCT036&-tree_id=404&-redoLog=true&ll_geo_types=N&-caller=geoselect&-geo_id=05000US28045&-geo_id=05000US28047&-geo_id=05000US28059&-search_results=04000US28&-format=&-lang=en (last visited Nov. 26, 2006). In addition, minorities are more likely to be renters than whites, meaning the distinction has racial significance. *See supra* text accompanying note 57.

FEMA provides resources for rebuilding owner-occupied homes, but there is no analogous FEMA program to provide funds dedicated to the redevelopment of rental housing lost in the storm.¹⁰⁰ Since the effect of a disaster can significantly increase area rents, renters may actually need *more* assistance than homeowners—not less—to replace housing opportunities lost in a storm and to cope with subsequent pressure on the rental market.¹⁰¹ Indeed, anecdotal reports suggest rents on Mississippi’s Gulf Coast have increased by as much as 30%.¹⁰² But even if the issue is “ownership,” the owners of the rental property clearly lost their property just as those in owner-occupied homes did. Notably, FEMA regulations bar the construction of any “permanent housing” to assist renters, but home repair and replacement assistance for owner-occupants is, by definition, designated for rebuilding or replacement of permanent housing.¹⁰³

100. See Press Release, FEMA, Disaster Aid Scenarios (Oct. 21, 2005) (“The owner of the apartment complex cannot receive a grant from FEMA for repairs to the building because it is treated as a business.”), *available at* <http://www.fema.gov/news/newsrelease.fema?id=19882>.

101. In a different context—federal rebuilding funds for Gulf Coast states—citizens writing to the Biloxi Sun Herald argued that renters were not entitled to assistance in the same manner as homeowners. See Gary W. Brown, Letter to the Editor, *Money To Rebuild Should Go to Property Owners*, SUN HERALD (Biloxi), Mar. 19, 2006 (“This money was intended to help homeowners rebuild, not to benefit landlords who rent out homes for profit nor to give to people who had no investment in the property in the first place. To me it sounds a lot like people trying to get something for nothing . . .”).

102. “Rents have soared about 25% to 30%, according to the Biloxi Ocean Springs Assn. of Realtors.” See Fausset *supra* note 30; RECOVERING STATES, *supra* note 15, at 14 (“Housing shortages after a disaster have a tendency to inflate rents . . .”).

103. See 44 C.F.R. § 206.117(b)(4) (2005) (providing for “financial or direct assistance to applicants for the purpose of constructing permanent housing *in insular areas outside the continental United States and in other remote locations* when alternative housing resources are not available and the types of financial or direct temporary housing assistance described at paragraph (b)(1) of this section are unavailable, infeasible, or not cost-effective”) (emphasis added); 44 C.F.R. § 206.117(b)(3) (“FEMA may provide financial assistance under this paragraph to replace the primary residence of an *owner-occupied dwelling . . .*”) (emphasis added). Though no such exception was made here, the rationale for this rule—to permit permanent construction in areas where trailers or rental subsidies are likely to be ineffective—seems well-suited to a catastrophic disaster such as Katrina. This exception has been broadened by recent reform of the Stafford Act, which now

c. Other Needs Assistance

FEMA also provides non-housing assistance to pay for other disaster-related expenses and serious needs, such as replacement of lost vehicles and damaged household items (appliances and furnishings) and disaster-related medical expenses.¹⁰⁴ However, FEMA's procedures in awarding such assistance can exclude low-income people. For example, benefits to replace vehicles lost in the storm were allocated only to those who could demonstrate they carried insurance on their vehicles (although such insurance almost never covers losses from events such as Katrina).¹⁰⁵ Since low-income families disproportionately cannot afford or do not have such insurance, such a policy, in effect, punishes them for being poor.

B. Barriers to Access: How FEMA procedures and policies limited assistance to those most in need

The federal emergency response to this unprecedented natural disaster suffered from abysmal planning and a lethargic response to the needs of hurricane survivors in the devastated Gulf Coast. Anecdotally, we knew the system had broken down when, ten days after the storm, the Emergency Coordinator for Mississippi Emergency Management Agency (MEMA) told us that he had not yet seen or spoken to a FEMA representative.¹⁰⁶ When we asked where we might be able to locate FEMA, he brusquely replied, "Your guess

permits funding of permanent and semi-permanent housing in many additional areas, provided certain criteria demonstrating housing need are met. *See infra* Part V for a full discussion of the changes.

104. *See* FEMA, HELP AFTER A DISASTER, *supra* note 33, at 5.

105. *See* Press Release, FEMA, Disaster Aid Scenarios (Oct. 21, 2005), available at <http://www.fema.gov/news/newsrelease.fema?id=19882> (applicant "will need to provide proof of ownership and insurance information on the damaged vehicle"). This car insurance requirement presents a typical instance in which FEMA imposes a requirement but does not identify the requirement clearly for applicants or advocates in its process. For example, this car insurance requirement is *not* identified in FEMA's regulations or the materials provided to applicants. *See, e.g.*, 44 C.F.R. § 206.119(c)(2) (2005); FEMA, HELP AFTER A DISASTER, *supra* note 33.

106. Interview with Emergency Response Coordinator for MEMA, in Jackson, Miss. (Sept. 8, 2005).

is as good as mine.” The only information we could locate at the MEMA headquarters in Jackson was a list of ice delivery locations. The next day, we drove from Jackson, Mississippi to Gulfport and found hundreds of families gathering outside of makeshift emergency shelters, isolated and unable to register with FEMA. Gulfport Mayor Brent Warr announced, “We were literally fending for ourselves,” with no federal assistance on the horizon.¹⁰⁷

As we witnessed while assisting families at community legal clinics in the days and months following the storm, applicants faced several threshold barriers to even applying for emergency relief:

(1) FEMA eliminated paper applications, instead requiring applicants to register with FEMA on-line or over the phone—in areas where phone lines were frequently jammed and internet service either down or non-existent for many low-income families;

(2) FEMA phone lines were overwhelmed with the sheer number of calls and electronic applications, resulting in busy signals and hours-long holds—even overnight;

(3) temporary workers hired to handle the deluge of calls were poorly-trained, with limited knowledge of FEMA’s unclear rules and limitations; and

(4) the local DRCs were inaccessible to many low-income families, particularly those without transportation.

The *McWaters II* court recognized the emotional impact of these bureaucratic roadblocks to recovery, stating “FEMA’s indecision and internal bureaucratic bumbling has strained even the most patient of citizens.”¹⁰⁸ These immediate problems were further exacerbated by procedural barriers to relief under FEMA’s IHP, as well as the SBA loan requirement. The interplay of registration problems and shifting procedural requirements, resulted in long delays and unwarranted denials of individual assistance for hurricane survivors—burdens borne particularly by those with little or no resources of their own to fall back on.

107. Sally Jenkins, *Hook or by Crook, Surviving Storm*, WASH. POST, Sept. 19, 2005, at A1.

108. *McWaters II*, 436 F. Supp. 2d 802, 820 (E.D. La. 2006).

1. *A Flawed Application Process*

Families in coastal Mississippi suffered the consequences of a political storm that arose from the lack of emergency preparedness. Red Cross shelters in Mississippi opened a day before the disaster, but the locations were at least 160 miles north of the Gulf Coast.¹⁰⁹ MEMA posted emergency evacuation routes, but offered no transportation assistance out of coastal Mississippi.¹¹⁰ Without adequate resources to evacuate—and no formal evacuation plan in place—poor families were often resigned to wait out the storm in their communities. The lower-income families who remained would have to wait in the burgeoning queue of those attempting to apply for emergency relief. This meant unregistered families would face even longer delays in receiving a FEMA travel trailer or mobile home.¹¹¹

Two weeks after the storm, we found that limiting registration to the toll-free line and the internet made it nearly impossible for many of our clients in coastal Mississippi to apply for FEMA emergency benefits. Families calling from southern Mississippi area codes grew tired of the operator's refrain, "All lines are temporarily busy due to the storm." Only those outside of the disaster area had a chance of reaching a live FEMA representative. Internet access was equally limited. Thus, those with the ability to leave the area after disaster—or, more specifically, families with the resources to temporarily relocate outside the coast—registered more effectively. Volunteer

109. Lesly C. Simmons, *Gulf Coast States Prepare for Hurricane Katrina*, AM. RED CROSS, Aug. 27, 2005, http://www.redcross.org/article/0,1072,0_272_4467,00.html ("All Red Cross chapters in Mississippi north of Interstate 20 are opening shelters tonight . . .").

110. See Press Release, MEMA, Evacuation Traffic Expected to Increase on Interstates (Aug. 27, 2005).

111. Charles Craig, a FEMA spokesperson who participated in the Lawyers' Committee legal clinic on October 27, 2005, noted that there was a backlog of hundreds of families waiting on FEMA trailers in Mississippi. According to Mr. Craig, the trailers were distributed according to the order of registration. When one client responded that she registered a week after the storm and was still waiting for a trailer, he told her that she should continue to wait and check in each week at the local DRC. There was no way to confirm where she fell in the waiting list or how long she would remain without a trailer. For the next several weeks, she continued to live out of her car with her grandchildren. Interview with client, at Lawyers' Committee Disaster Relief Legal Clinic, Gulfport, Miss. (Oct. 27, 2005).

efforts began to fill the gap in disaster response; companies offered free cell phones for registration,¹¹² while legal advocates helped individuals in isolated communities complete the FEMA registration process.

a. *Unclear Rules and Procedures*

Families who were able to register with FEMA in the early fall months following the storm often spoke with poorly-trained, temporary workers faced with unclear rules and limitations.¹¹³ The lack of training and/or poor implementation of FEMA guidelines gave FEMA operators broad discretion for unreviewed decisions. Mary Price, for example, a renter in Gulfport, Mississippi, was told that she was ineligible for IHP grant assistance until she filed her insurance claims.¹¹⁴ Perplexed, she told the operator that she had no insurance.¹¹⁵ It appeared that the name of her landlord had been mistakenly entered as her insurance carrier.¹¹⁶ Similarly, Lucy Bell was told she was not eligible to receive grant assistance until her home had been inspected by FEMA.¹¹⁷ Yet, her entire street was cordoned off by emergency workers, and she had no phone or postal address, making it impossible for her to meet a FEMA inspector at the place where her home once stood.¹¹⁸ Two months after the storm, she and her family remained on a “camping” vacation, awaiting emergency relief.

After hosting the first few legal clinics for hurricane survivors in coastal Mississippi¹¹⁹—which included speaking to hundreds of

112. For example, Verizon Wireless donated several hundred cell phones to the Lawyers’ Committee for use in the Disaster Relief Legal clinics.

113. We experienced this both through the disaster relief legal clinics and similar reports from *pro bono* attorneys who participated in client intake and FEMA appeals cases.

114. Interview with client, at Lawyers’ Committee Disaster Relief Legal Clinic, Gulfport, Miss. (Oct. 27, 2005).

115. *Id.*

116. *Id.*

117. Interview with client, at Lawyers’ Committee Disaster Relief Legal Clinic, in East Biloxi, Miss. (Nov. 16, 2005).

118. *Id.*

119. The Lawyers’ Committee hosted Disaster Relief Legal Clinics in Gulfport on October 27, 2005, and December 14, 2005, and in Biloxi on November 16, 2005.

FEMA representatives on the phone and in person—it became apparent that, with FEMA, inconsistency is the rule, not the exception. And discretion is likely to be used to the disadvantage of those least informed of their legal rights, particularly families with limited resources who lost personal records and had difficulty meeting documentary requirements, such as proof of occupancy, damage, personal property loss, and insurance coverage.

For example, in late April and early May 2006, FEMA sent about 500 notices summarily terminating trailer residents from the FEMA trailers in Mississippi alone.¹²⁰ The thirty-day eviction notices did not describe why families must leave, but rather cryptically attached a FEMA determination noting that they were “ineligible” for other FEMA benefits such as “rental assistance.”¹²¹ In the face of confusing and intimidating letters, many families simply gave up and moved out. One trailer park manager reported that over a third of her park moved out after receiving the notices.¹²²

Families who waited several months to receive a FEMA trailer were now threatened with the loss of that precious temporary housing. They did not understand their rights to challenge the eviction. When they received the trailer, they were told that they could remain in the unit up to eighteen months, subject to recertification.¹²³ In part, the confusion was due to the fact that notices were silent on the occupants’ rights, such as their ability to prove eligibility and recertify

120. Some 500 eviction notices were sent out, with a total of 3,000 notices planned. (For reference, at the time, there were less than 40,000 trailers in Mississippi.) See Dewan, *supra* note 12; Fausset, *supra* note 29. In May, *pro bono* attorneys at Lawyers’ Committee legal clinics helped six trailer residents respond to termination notices from FEMA. In June, 2006, FEMA reversed course and the hurricane survivors were not evicted. See Hammack, *supra* note 12; *infra* note 126 and accompanying text.

121. See, e.g., Letter from R. David Paulison, Acting Dir., Emergency Preparedness & Response, FEMA, to Ms. [Brown] (Apr. 21, 2006) (on file with authors).

122. Fausset, *supra* note 30. (“[T]he manager[] said that about a third of the park’s 90-plus households had moved away in recent weeks. Most, she said, had been scared off by the eviction notices.”).

123. Press Release, FEMA, Recertification, What Does it all Mean? (Apr. 26, 2006) [hereinafter FEMA, Recertification], available at <http://www.fema.gov/news/newsrelease.fema?id=25560>.

under the grant program.¹²⁴ Also, Mississippi landlord-tenant law tilts so strongly against tenants, and provides them such little opportunity for representation, that tenants rarely succeed in stopping evictions.¹²⁵ Then, in June 2006, in response to a barrage of publicity and advocacy from the Lawyers' Committee and others, FEMA suspended the eviction of 3,000 Mississippi families from government-issued trailers.¹²⁶

At the same time, even families who were not being threatened with eviction from their trailers faced a cumbersome and often contradictory administrative system. FEMA's "recertification" process¹²⁷—requiring applicants to establish their continuing eligibility to remain in the trailer—created a mood of fear and uncertainty. For example, one client signed a standard FEMA Individuals and Households Program Occupant Dwelling Lease on April 25, 2006, which expired just five days later.¹²⁸ The lease stated that, in order to remain in her trailer, she would have to renew the FEMA lease *every calendar month* "subject to recertification of continuing eligibility."¹²⁹ This meant that in order to avoid an eviction after May 1, she would have to enter into a new lease and recertify. She signed the five-day lease agreement "under duress" and came to our legal clinic fearing FEMA would evict her if she was not present in her trailer if and when an inspector arrived for recertification.¹³⁰ Making matters worse, FEMA issued conflicting

124. See Letter from R. David Paulison to Ms. [Brown], *supra* note 121. Notably, "[t]he letters gave the recipients 60 days to appeal the decision—but 30 days to get out of their trailers." Richard Fausset, *FEMA Calls Off Trailer Evictions*, L.A. TIMES, June 21, 2006, at A4. Without a policy of staying evictions pending an appeal, this provided little likelihood of relief, particularly since an appeal could take far longer than 30 days to decide.

125. Mississippi Center for Justice, Gulf Coast Survey Results, 2-3 (2006) (on file with author); see MCJ on the Post-Katrina Coast, *supra* note 64. According to this survey of local landlord-tenant eviction proceedings conducted in 2006, landlords received a judgment for eviction in 100% of cases where tenants were unrepresented. *Id.*

126. See Fausset, *supra* note 30; Dewan, *supra* note 12.

127. See generally FEMA, Recertification, *supra* note 123.

128. See FEMA, Individuals and Households Program Occupant Dwelling Lease (Apr. 25, 2006).

129. *Id.*

130. *Id.*

statements on “recertification,” sowing confusion as to how long families could reside in trailers, or what they must do to remain.¹³¹

Though there will always be practical problems with administering temporary housing and verifying eligibility, these problems were exacerbated in the FEMA context due to the overwhelming number of policy decisions and guidelines that *were not transparent and accessible* in a single, authoritative source so that applicants (or even their attorneys) could correct errant decisions by directing FEMA representatives to mistakes in their determinations. Without transparency, it is difficult to ensure that FEMA workers, applicants, and advocates are all playing by the same rules—heightening confusion and inconsistency.

b. *Limited Access to Disaster Recovery Centers*

Finally, hurricane survivors in disaster areas faced the problem of limited access to the very DRCs designed as the staging areas for FEMA’s first responders. In Gulfport, Mississippi, the first FEMA DRC did not permanently open until over a month after Katrina. The opening of the DRC was announced September 16, but when we drove a group of hurricane survivors to the location after September 22, we encountered a locked building with a posted sign that read:

131. In one notice, FEMA suggested recertification would occur every 60 to 90 days. *See* FEMA, Recertification, *supra* note 123 (“Depending on individual circumstances, occupants will receive one on-site visit every 60 to 90 days at their temporary home and many telephone follow-ups.”). At the same time, as described above, FEMA leases were issued indicating recertification would occur every month. FEMA, Individuals and Households Program Occupant Dwelling Lease, *supra* note 128. Finally, on July 26, in response to public outcry and efforts of advocates, FEMA changed its policy so that all eligible evacuees who began in the FEMA apartments or 403 housing program and transitioned to the 408 program only had to certify *one time* prior to October 31, 2006. Memorandum from John D’Araujo, Jr., Dir. of Recovery, FEMA, to Deputy Director for Gulf Coast Recovery, re: Recertification Extensions (July 26, 2006), *available at* http://www.femaanswers.org/images/9/90/Recertif_memo_Jul26_re_403-408.pdf. Compounding the conflicting information provided to individual applicants, FEMA also recognized that “multiple and varying 403/408 communications [were] made to State/local governments, landlords and individual evacuees” *Id.* In other words, different groups of evacuees were receiving different messages about continuing assistance depending upon which type of assistance—Short-Term Lodging (403) or Temporary Housing (408)—they were receiving. *See id.*

“Temporarily closed due to storm.”¹³² The neighboring DRC in Ocean Springs, Mississippi, opened quickly after the storm, but was located over fifteen miles from the low-income and minority neighborhoods in Gulfport.¹³³ Without public transportation, most families—who either did not have a car or lost their car in the storm—could not reach a DRC outside of their immediate neighborhood.¹³⁴

The obvious solution to the lack of access to DRCs in the hardest hit disaster areas would include implementing a mobile DRC unit that could travel extensively to neighborhoods and emergency shelters. As the *McWaters II* court noted, “It defies reason that a federal agency whose exclusive provision—and indeed, sole reason for existence—is to assist fellow Americans in a time of natural disaster in meeting their utmost needs would *fail* to notify people of the available services *and* the requirements for engaging those services, in some clear, consistent, and accessible way.”¹³⁵ The Red Cross, volunteer churches, and non-profit organizations stepped in to do the work of immediate disaster relief in the low-income and minority neighborhoods of Gulfport, Mississippi.¹³⁶ Yet, these grassroots

132. See Press Release, FEMA, Disaster Recovery Centers Open in Biloxi and Gulfport (Sept. 16, 2005), *available at* <http://www.fema.gov/news/newsrelease.fema?id=19681>; Press Release, FEMA, Threat of Hurricane Rita Forces Temporary Closure of Disaster Recovery Centers in Gulf Coast Counties (Sept. 22, 2005), *available at* <http://www.fema.gov/news/newsrelease.fema?id=19673>.

133. See Press Release, FEMA, Disaster Recovery Centers Open in Ocean Springs and Pascagoula (Sept. 5, 2005), *available at* <http://www.fema.gov/news/newsrelease.fema?id=18640>.

134. The Insurance Information Institute estimates that 305,000 private passenger auto claims arose from Katrina in Louisiana and Mississippi. See INSURANCE INFORMATION INSTITUTE, HURRICANE KATRINA: ONE YEAR LATER, <http://www.iii.org/media/hottopics/additional/katrina1year/> (last visited Nov. 25, 2006). In a major disaster, the problems of less-mobile populations are exacerbated. Obviously, the elderly and disabled may have particular problems, especially if their vehicles are damaged or destroyed. Lower-income families are less likely to have a vehicle, and they have fewer vehicles per family member. See Yihua Liao, Vehicle Ownership Patterns of American Households, UTC-UIC Information Brief IB-10B-02, at 1 fig.1, 3 tab.I (2002), <http://www.utc.uic.edu/%7Efta/Information%20Briefs/vehicles3.pdf>.

135. *McWaters II*, 436 F. Supp. 2d 802, 820 (E.D. La. 2006).

136. See, e.g., Tony Pipa, *Weathering the Storm: The Role of Local Nonprofits in the Hurricane Katrina Relief Effort*, in NONPROFIT SECTOR RESEARCH FUND WORKING PAPER SERIES 1 (Aspen Institute 2006) (“find[ing] that small and

efforts alone were insufficient without a parallel effort by FEMA to link hurricane survivors in core disaster areas with individual disaster assistance.

2. *Particular Procedural Roadblocks*

a. *Shared Household Rule*

Application (or *misapplication*) of FEMA's "shared household rule," which limits benefits on a per-"household" basis,¹³⁷ was among the most significant problems faced by families seeking assistance. At our legal clinics, this was the single most common reason families we assisted were determined ineligible or otherwise delayed in receiving benefits. While rational in the abstract, in practice the rule created significant harm to the families most in need of FEMA's assistance after the storm.

Defining the household can be difficult, especially for low-income families. In the abstract, the rule presumes that most households will be easily defined, perhaps imagining a single nuclear family sharing income, food, and household expenses. But in reality, living situations are regularly more complicated, the lines blurred. For brief or extended periods of time, relatives or friends may live at the same address, including a variety of scenarios where persons sublet or rent rooms and/or "double up" in units when rent costs weigh heavily. A variety of circumstances we encountered through our legal clinics thus belie easy application of the "shared household" rule:

- After initially providing her with a trailer, FEMA denied Ms. Smith's eligibility under the "shared household" rule. Prior to Katrina, Ms. Smith resided with her adult sister, a homeowner, and paid her sister \$300 per month rent for the use of her room.¹³⁸ Confirming their status as separate households,

medium-sized nonprofits and faith-based groups are vital to our nation's disaster response infrastructure."), *available at* http://www.nonprofitresearch.org/usr_doc/Nonprofits_and_Katrina.pdf.

137. 44 C.F.R. § 206.117(b)(1)(i)(A) (2005). "FEMA will include all members of a pre-disaster household in a single registration and will provide assistance for one temporary housing residence, unless the Regional Director or his/her designee determines that the size or nature of the household requires that we provide assistance for more than one residence." *Id.*

138. Telephone Interviews with Ms. [Jones] (May 2006). *See also* Letter from

however, Ms. Smith's sister refuses to allow her to relet a room in the house since she now intends to sell the home and move out of state.¹³⁹

- Before the storm, Ms. Jones, her fiancé, and their three-year-old son rented a bedroom in her fiancé's step-father's house.¹⁴⁰ Two other bedrooms were also rented by her prospective brother-in-law and sister-in-law and their spouses and children.¹⁴¹ In all, there were four "households" within the same house, each functionally separate.¹⁴² However, after initially providing Ms. Jones with a trailer for her family, FEMA subsequently declared her a "shared household" and sought to evict her,¹⁴³ which would have required her family of three to share a trailer with her fiancé's step-father.
- For several months prior to the storm, Ms. Brown resided as a live-in aide to provide care to her ailing ex-husband, who was recovering from an amputation.¹⁴⁴ They maintained separate

Jonathan P. Hooks, Staff Attorney, Hous. & Cmty. Dev. Project, Lawyers' Comm. for Civil Rights Under Law, to Mary Ellen Martinet, FEMA Trailer Div. (May 19, 2006) (on file with authors). We also heard of instances in which FEMA initially denied assistance even to renters in completely separate units, if they shared an address with their landlord.

139. Telephone Interviews with Ms. [Jones], *supra* note 138.

140. *Id.*; *see also* Letter from Jonathan P. Hooks to Mary Ellen Martinet, *supra* note 138. As news coverage of Ms. Jones's case summarized:

But a number of residents said they were being kicked out erroneously, or for technicalities that arise from gray areas in FEMA regulations. [Ms. Jones]'s problem is one of the most common: FEMA officials told her she was ineligible because someone from her previous residence had also requested a trailer. [Jones] said her fiancé's stepfather had indeed received a FEMA mobile home—it is crammed with six people. But that doesn't necessarily mean she can't have one. FEMA guidelines say the agency "may consider" more than one housing application from extended families who were living on one property before the storm.

Fausset, *supra* note 30.

141. Letter from Jonathan P. Hooks to Mary Ellen Martinet, *supra* note 138.

142. *Id.*

143. *Id.*

144. Telephone Interviews with Ms. [Brown] (May 2006); *see also* Letter from Jonathan P. Hooks, Staff Attorney, Hous. & Cmty. Dev. Project, Lawyers' Comm. For Civil Rights Under Law to Mary Ellen Martinet (May 15, 2006) (on file with authors).

households, living in different bedrooms and having their own bank accounts.¹⁴⁵ Following Katrina, Ms. Brown evacuated separately from her ex-husband, and subsequently relocated to a FEMA trailer in D'Iberville, Mississippi, while her ex-husband remained out of state.¹⁴⁶ In April 2006, however, FEMA determined that Ms. Brown was ineligible under FEMA's "shared household rule" and sought to evict her from the trailer.¹⁴⁷

Many of our clients presented situations similar to these, struggling either to get assistance in the first place or to continue to receive temporary housing assistance after an initial check was issued. While higher-income households might also have complicated living arrangements, such complexities can often occur when lack of income and savings push more low-income families into short- or long-term dependence on friends and relatives for housing.

Unfortunately, in addition to the misapplication of the shared household rule, FEMA's mishandling of the application process compounded the problem. These issues often arose in piecemeal fashion after the fact, with applicants often receiving confusing and contradictory information from FEMA staff and members of extended "shared households" being left to fend for themselves. Typically, we would hear from an applicant who had initially been told to apply for benefits separately from other residents at the same address—or where FEMA never raised the "shared household" issue during the application process. Then, later, the applicant would receive a notice that they had been denied benefits since a member of the "shared household" had earlier applied for and received benefits. Applicants were commonly told by FEMA staff at a Disaster Recovery Center or on the FEMA hotline to apply separately, only to have the decision later reversed after the application was submitted. In addition, FEMA's system flagged such applications as potential instances of fraud, which could delay benefits for *all* applicants at that address.¹⁴⁸

145. Letter from Jonathan P. Hooks to Mary Ellen Martinet, *supra* note 138.

146. Telephone Interviews with Ms. [Brown], *supra* note 144; *see also* Letter from Jonathan P. Hooks to Mary Ellen Martinet, *supra* note 144.

147. Letter from Jonathan P. Hooks to Mary Ellen Martinet, *supra* note 138; *see also* Letter from R. David Paulison to Ms. [Brown], *supra* note 121.

148. *See* Press Release, FEMA, Do Not File Duplicate Disaster Assistance Applications (Oct. 17, 2005) (stating that submitting more than one application

Regardless, by denying the second applicant as ineligible under the “shared household” rule, FEMA ultimately left it to the two applicants to sort out the situation—in effect giving the first applicant total discretion as to whether to share any benefits with the other persons within the extended “shared household.”

In the cases we saw, almost invariably the recipients of the household’s benefits were not in a position to “share” for a variety of reasons. Without sufficient savings and with FEMA benefits barely sufficient to cover ongoing needs, many low-income persons simply could not afford to share the FEMA money.

Moreover, the denial of the second application also certainly meant that the original application did not cover the full losses of the entire “shared household.” The first applicant, not considering the other individual members of the same household, would not seek sufficient housing assistance to provide shelter for the “shared household.” For example, the applicant would only seek a trailer sufficient to house his or her portion of the household (and/or rental assistance for a unit for those household members). In practice, this meant that, although the second applicant was entitled to temporary housing assistance as part of the “shared household,” they received nothing. Similarly, the first application would also not cover the full losses of the household, since it omitted the personal property losses, medical needs, or transportation losses of the other side of the extended “shared household.”

Defining a single household prior to the storm was difficult, but situations became even more complex when pre-disaster households were separated by the storm.¹⁴⁹ In addition to the physical separation of families due to evacuation, many others either had to, or chose to, live apart due to a variety of circumstances after the storm, such as finding new employment in other areas or being near relatives or

“could delay processing of your application and receipt of your assistance”), available at <http://www.fema.gov/news/newsrelease.fema?id=19786>.

149. See, e.g., Evelyn Nieves, *Families Still Split Since Katrina*, WASH. POST, Oct. 27, 2005, at A5 (estimating there are “more than 1,500 cases of ‘fractured families’ that have not been reunited, according to the National Center for Missing and Exploited Children”); see also Shaila Dewan et al., *Evacuees’ Lives Still Upended Seven Months After Hurricane*, N.Y. TIMES, Mar. 22, 2006, at A1 (finding that “blacks were more likely [than whites] to have been separated from family members” after the storm).

friends who were able to provide child or health care and financial or emotional assistance. Of course, this did not even address instances where familial, romantic, and other relationships were strained or terminated by the stresses of Katrina, making it impossible to continue to reside as a single household.¹⁵⁰

However, FEMA practices failed to account for these considerations. FEMA did not provide publicly-accessible rules or exceptions that established when a pre-storm “shared household” could legitimately be entitled to separate benefits.¹⁵¹ Instead, it took months for FEMA to even *purport* to modify its “shared household” rule to correct one of its most obvious injustices—that it prevented delivery of assistance to households that remained physically separated in different cities or states as a result of the evacuation.¹⁵² In practice, advocates encountered regular breaches of the purported policy and FEMA staff who were unfamiliar with the new rule.¹⁵³

150. FEMA’s failure to establish clear exceptions for these contexts could have a disparate impact on women, particularly women with children. First, it creates serious economic pressure to remain in a single household regardless of how unhealthy the relationship may be, particularly for children. In addition, it gives enormous economic power to the applicant receiving the FEMA benefits, particularly the power to withhold housing assistance and funds for replacement of personal property and the like from other adults in the household. For these reasons, this situation is open to abuse.

151. In testimony during the *McWaters* case, FEMA purported to provide exceptions for applicants who were renting separate units to house the families. *McWaters II*, 436 F. Supp. 2d 802, 822 (E.D. La. 2006). However, FEMA employed specious and circular logic to conclude that if families could not afford to rent separate units to house the split household, then they were in effect a single household. *Id.* Of course, this meant that only families with resources to advance rent costs could take advantage of this opportunity to “establish” themselves as separate households after the storm. *Id.* at 822 n.37.

152. *See id.* at 821 (“FEMA recognized that in many cases those displaced by Katrina were separated during evacuation and were unable, for a variety of reasons, to re-connect after the Storm, and as such, the agency claims it modified its assistance policies accordingly, in effect providing separate assistance to different members of a single pre-disaster household who were separated post-Katrina.”).

153. *See* discussion *supra* Part IV.B.2.a.

b. *The SBA Loan Application Requirement*

In addition to the denials addressed above, a major factor creating extensive delays for so many families was the federal requirement that, prior to being considered for FEMA grant assistance, virtually all families seeking benefits must apply for a loan from the Small Business Administration Disaster Home Loan Program. This procedure limited federal disaster-related expenditures by requiring those who could afford to repay disaster assistance to do so through a subsidized loan rather than a grant.¹⁵⁴

As discussed below, FEMA's loan application requirement was implemented poorly on a policy level, creating confusion and delay. Moreover, FEMA's imposition of the requirement itself was illegal. As the *McWaters I* court held in December 2005, the Stafford Act governing FEMA benefits expressly forbids conditioning housing assistance on SBA loan applications.¹⁵⁵ Unfortunately, notwithstanding the court's decision and order, FEMA continued to issue news releases confusing the public, applicants, and some

154. See 44 C.F.R. § 206.119(a)(1)-(3) (2005) ("To qualify for assistance under this section, an applicant must also: (1) Apply to the United States Small Business Administration's (SBA) Disaster Home Loan Program for all available assistance under that program; and (2) Be declined for SBA Disaster Home Loan Program assistance; or (3) Demonstrate that the SBA assistance received does not satisfy their total necessary expenses or serious needs arising out of the major disaster.").

155. *McWaters I*, 408 F. Supp. 2d 221, 232 (E.D. La. 2006) (citing 42 U.S.C. § 5174(a)(2)) ("[A]n individual or household shall not be denied assistance under paragraph (1) [Temporary Housing] . . . of subsection (c) [Types of Housing Assistance] solely on the basis that the individual or household has not applied for or received any loan or other financial assistance from the Small Business Administration or any other Federal agency.") (alteration in original). Technically, the statute "only" bars FEMA from imposing the loan requirement on applicants for housing assistance. FEMA does offer other related programs, such as home repair funding and "other needs assistance." *McWaters I*, 408 F. Supp. 2d at 232; see also 42 U.S.C.A. § 5174(c) (West 2003) (describing the types of housing assistance that is available to disaster victims). In practice, however, the distinction is irrelevant, since FEMA did not provide temporary housing assistance while the loan process was purportedly imposed for other benefits—and did not clarify for applicants that the application was not required in any event. See *McWaters I*, 408 F. Supp. 2d at 232 ("FEMA has also not made it clear that even if Other Needs Assistance is sought, one may still receive the Temporary Housing Assistance in the meantime or without applying for an SBA loan.").

advocates about the loan requirement.¹⁵⁶ In June 2006, the *McWaters II* court condemned such confusing tactics.¹⁵⁷

The SBA requirement caused numerous problems for many of the families most in need. First, complying with the requirement was confusing for many applicants. While in some cases FEMA operators or staff explained the basis for the requirement, not all applicants understood that they were *required* to submit a loan application, particularly to the SBA, to receive emergency help after a disaster. As a result, those that did not complete the application rendered themselves ineligible for assistance. The complexity of the application itself could pose problems for families with limited reading or literacy skills.

But mostly, for the vast majority of families in need—those for whom the SBA loan program was plainly unaffordable and thus inappropriate—the procedural requirement was perverse. Many did not understand that it was in their best interest to be denied for the very loans they were required to apply for, and be denied as quickly as possible, since this would return them to FEMA where they could begin to be considered for FEMA’s grant program.

In addition to confusion, the requirement introduced significant delay into the process of receiving benefits—delay which weighed more heavily on those without immediately available resources. Some seven months after the disaster, in February 2006, almost 20% of the applicants referred to FEMA for assistance remained

156. Press Release, FEMA, SBA Loan Application Necessary for Assistance (Feb. 13, 2006). As the title of FEMA’s press release indicates, it misleadingly gave the impression that an SBA loan application was necessary for housing assistance when in fact FEMA could not, by law, impose such a requirement.

157. *McWaters II*, 436 F. Supp. 2d 802, 823 (E.D. La. 2006). Though the issue was not squarely presented to the court since a motion for contempt was not filed, the court nonetheless noted:

[S]uch a release, with its confusing and incorrect headline, and technical emphasis on ‘other programmatic assistance’ appearing only in the text of the release, certainly seems to violate the *spirit* of the Court’s Order, if not its literal terms. . . . The Court finds it highly probable that most citizens affected by a disaster will not know the difference between ‘housing assistance,’ ‘other needs assistance,’ ‘other programmatic assistance’ and the like. It was this confusion that the Court’s original Order meant to address, but apparently it still remains.

Id.

unprocessed, totaling approximately 94,800 households out of 500,700 referred to SBA.¹⁵⁸ Naturally, several months of delay would test even the resources of households with relatively strong savings.

While some delay is understandable with any administrative process, FEMA and SBA's administrative policy here appears to have exacerbated the delay by failing to efficiently screen out obviously financially ineligible households. SBA uses an undisclosed income level to summarily decline applicants who could not afford to repay the SBA loan. In this disaster, 101,200 applicants out of 500,700 (just over 20%) were summarily declined in this manner.¹⁵⁹ But since less than one in five applicants, only 96,100,¹⁶⁰ were ultimately approved for loans, the income bar appears to be set far too low, creating an administrative burden for SBA to review and process too many ineligible families—while simultaneously delaying assistance to those most in need.

In addition, FEMA further complicated matters by failing to require the submission of income data by applicants to expedite the SBA loan application process. Because income was not a “required field” in the FEMA application process, and because many applicants were never told of the significance of failing to provide an income

158. According to a confidential source at the SBA, the following numbers (rounded) reflect the disposition of SBA loan applications as of February, 2006:

Loan Applications Received	399,500
<u>Applications Summary Declined</u>	<u>101,200</u>
TOTAL number of applications received	500,700

DISPOSITION of applications

Declined (Summary Declined + Applications Declined)	258,400	51.61%
Withdrawn	51,400	10.26%
Approved	96,100	19.19%
Applications Still in Process	94,800	18.93%

Memorandum from Jonathan P. Hooks submitted to Office of Senator Joseph Lieberman, Ranking Member of the Homeland Sec. & Governmental Affairs Comm. (Mar. 24, 2006) (on file with authors); *see also* Bill Walsh, *SBA Frustrated in Delivery of Disaster Relief, Loans Approved, but Conditions Must Be Met*, TIMES-PICAYUNE (New Orleans), Mar. 10, 2006, at 4 (“The SBA continues to be criticized for its high loan-rejection rate. Of 201,775 applications, 49,153 have been approved—meaning three out of four applicants are denied.”).

159. *See* Hooks, *supra* note 158.

160. *Id.*

level, applicants who did not complete it were automatically referred for full application review by the SBA.¹⁶¹ Leaving the income question blank was not uncommon. Many applicants were confused by the inquiry, since it was not clear whether they were to report their pre-disaster income, their momentary income as of the time of the application, or some projected income they anticipated receiving after the disaster had passed.

In short, the loan application requirement created serious confusion that postponed the delivery of relief and exacerbated the difficulties faced by those who had the fewest resources in reserve.

c. Insurance

Having homeowners' insurance could also result in significant confusion and delays of benefits, which were particularly troublesome for low-income homeowners. Under law and FEMA regulations prohibiting duplication of benefits, FEMA will not provide assistance to families who are eligible for other benefits, including homeowners' insurance.¹⁶² Typically, this meant that FEMA required applicants to exhaust insurance benefits before turning to FEMA for assistance.

Unfortunately, particularly after Katrina, families waiting to settle insurance disputes could remain without FEMA assistance for a significant period of time, for several reasons. First, some policy holders were stuck in a widespread dispute over whether the damage from Katrina was covered by typical homeowners' policies that do not cover flood damage,¹⁶³ specifically, whether the "storm surge" from

161. See Transcript, Nat'l Low-Income Housing Coal., Call to Discuss the SBA's Role in Recovery (Jan. 4, 2006), available at <http://www.nlihc.org/news/010406katrinacall.pdf> ("They decline to give that information so they're automatically sent to SBA.").

162. 42 U.S.C. § 5155(a) (2000); 44 C.F.R. §§ 206.110(h), 206.113(a)(2) (2005).

163. In Mississippi alone, several class actions were filed disputing the extent of loss covered by various homeowners' insurance policies. See, e.g., Class Action Complaint for Damages and Declaratory Relief, *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05CV436 LG-RHW, (S.D. Miss. 2006) (purported class of Mississippi homeowners with property in the path of Hurricane Katrina); Class Action Complaint on Contract of Insurance, *Guice v. State Farm Fire & Cas. Co.*, No. 1:06CV1LG-RHW, (S.D. Miss. 2006) (purported class of homeowners and residents of Hancock, Harrison, and Jackson Counties who owned State Farm home

Katrina was classified as flood or wind damage.¹⁶⁴ In addition, some policyholders had individualized disputes over whether their loss was caused by flood or wind.¹⁶⁵ Finally, the sheer volume of claims delayed the process.¹⁶⁶ For the lowest-income homeowners, the delays were more difficult, increasing the pressure on them to accept inadequate settlement offers from their insurers.¹⁶⁷

FEMA, however, could have eliminated the delays these families

insurance policies).

164. *Guice v. State Farm Fire & Cas. Co.*, No. 1:06CV1-LTS-RHW, 2006 U.S. Dist. LEXIS 57571, at *11 (S.D. Miss. Aug. 14, 2006).

165. News reports have also indicated that one of the largest insurers, State Farm, may have tried to fraudulently reduce its loss by hiding reports indicating that some losses were due to covered wind damage, not floodwaters. See Anita Lee, *Grand Juries Looking at State Farm*, SUN HERALD (Biloxi), Sept. 28, 2006, at A1.

166. See, e.g., Dean Starkman & Albert B. Crenshaw, *Homeowners Wait for Claims To Be Adjusted; Industry Chokes on Volume of Work*, WASH. POST, Sept. 29, 2005, at D1 (“Some 10,000 insurance adjusters are deploying in the Gulf Coast region to handle more than 1 million claims expected to result from Katrina and Rita. But their progress has been slowed by their inability to inspect houses in inaccessible sections of the disaster areas and by the sheer bulk of the claims. . . . [F]or now, claims-handling is the most pressing issue for policyholders. While some homeowners report prompt service under difficult circumstances, others complain of busy signals, unreturned calls and dangling claims waiting for an insurance adjuster’s visit. Irate homeowners have flooded insurance departments with complaints about claims denied on the basis of the flood exclusion.”); Dean Starkman, *The Legal Storm in Katrina’s Wake; Battles over Insurance Claims Begin to Clog Gulf Coast Dockets, Spill into State Legislatures*, WASH. POST, Aug. 30, 2006, at D1 (“[A]cross the Gulf Coast, . . . more than a million policyholders have turned to their insurers for payment on homeowner’s, commercial and other insurance claims. Battles over claims have clogged state and federal courts here and spilled into state legislatures.”); Joseph B. Treaster, *Tempers Flare as Agents Assess Storm’s Damage*, N.Y. TIMES, Oct. 4, 2005, at A16 (“[M]any homeowners are still waiting for a first contact from their company and others haggle with agents and adjusters over whether water or wind flattened their home and how much, if anything, their policies will pay.”).

167. Compared to whites, minorities were statistically more likely to accept low settlement offers, rather than dispute them. See Rukmini Callimachi & Frank Bass, *Study: Whites Pursued Katrina Insurance Claims More Aggressively*, PITTSBURG POST-GAZETTE, Oct. 25, 2006, at E1 (“Though poor and minority neighborhoods suffered the brunt of Katrina’s fury, residents living in white neighborhoods have been three times as likely as homeowners in black neighborhoods to seek state help in resolving insurance disputes, according to an Associated Press computer analysis.”).

faced by using its broad authority to extend benefits pending receipt of insurance proceeds.¹⁶⁸ Indeed, under its regulations and public information guides, in the event of delays exceeding thirty days, FEMA may provide assistance to insured applicants, though the payment must be repaid to the extent the loss is covered by insurance.¹⁶⁹ Unfortunately, in practice, FEMA frequently failed to use this discretion to assist low-income households. Numerous clients at our legal clinics found that their applications were being delayed or denied (i.e., awarded \$0) on the basis that insurance claims were pending—even through the later spring and summer of 2006. That so many applicants continued to be denied or delayed benefits, when FEMA had established authority and discretion to assist them, spoke volumes about the extent to which FEMA encouraged or supported its staff in meeting the needs of applicants.

Indeed, FEMA's form determination letters in this regard reflected its penchant for obfuscating available benefits and assistance, thus further discouraged applicants from pursuing available benefits.¹⁷⁰ Specifically, in describing why applicants with

168. See 42 U.S.C.A. § 5155(b)(1) (West, Westlaw through P.L. 109-279) (“This section shall not prohibit the provision of Federal assistance to a person who is or may be entitled to receive benefits for the same purposes from another source if such person has not received such other benefits by the time of application for Federal assistance and if such person agrees to repay all duplicative assistance to the agency providing the Federal assistance.”).

169. FEMA, HELP AFTER A DISASTER, *supra* note 33, at 10 (assistance may be provided “[i]f a decision on your insurance settlement has been delayed longer than 30 days from the time you filed the claim”); see also 44 C.F.R. § 206.110(h)(1) (2005) (FEMA will provide assistance if “[p]ayment of the applicable benefits are significantly delayed”); 44 C.F.R. § 206.113(a)(3) (2005) (FEMA will provide assistance “when the insured individual or households’ insurance proceeds have been significantly delayed through no fault of his, her or their own, and the applicant has agreed to repay the assistance to FEMA or the State from insurance proceeds that he, she or they receive later”); 44 C.F.R. § 206.116(a) (2005) (requiring repayment).

170. The full text of FEMA's form letter pertaining to insurance denials provides:

Applicants with Insurance: Your application for assistance may be placed on hold to allow you time to file your insurance claim. Federal law prohibits FEMA or the State from duplicating assistance that may be available from insurance. A \$0 amount listed above does not necessarily mean that you are ineligible for assistance. It means that FEMA needs to know the amount of your insurance settlement and your unmet needs

insurance were denied benefits, the letters did not notify them of the opportunity to seek benefits subject to repayment once insurance claims were settled.¹⁷¹ To the contrary, the letter suggested that an applicant must know the amount of their insurance settlement before FEMA would further process the application, implying that benefits were denied until that time.¹⁷² If anything, the letter could leave the confusing impression that the applicant was denied altogether.¹⁷³

d. *Insufficient Damage/Inspection Process*

Finally, a common factor for a delay or denial of FEMA assistance was a finding of insufficient damage by a FEMA inspector. In some instances, FEMA simply ignored satellite mapping images:

[Molly Devans] is a 74-year-old, disabled woman who lost everything when Katrina destroyed her apartment. Initially, FEMA denied that she had any damage, even though her home had been in an area that FEMA's observation satellites determined to be a "total loss." Eventually, after [Molly] got a *pro bono* lawyer [through the Lawyers' Committee's FEMA Appeals project], FEMA admitted that her home really was in the "geospatially-determined-total-loss"

before we can process your application further.

Letter from R. David Paulison, Acting FEMA Dir., Emergency Preparedness & Response (Oct. 31, 2005), *available at* <http://www.probono.net/ms/fema.cfm> (follow "Complete Sample Intake (prepared by the Lawyers' Committee for Civil Rights Under Law)" hyperlink).

171. *Id.*

172. *Id.*

173. FEMA's own press releases confirm that it knew its language was likely to sow confusion. Indeed, the titles of the releases themselves recognize that the letters would be construed as "denial letters." *See, e.g.*, Press Release, FEMA, FEMA Denial Letter May Not Mean Denial of Assistance, (Oct. 23, 2005) ("Any applicant who receives a letter from FEMA stating that a claim for federal assistance has been denied because of insurance coverage should contact his/her insurance agent and request a 'delay of settlement' letter."), *available at* <http://www.fema.gov/news/newsrelease.fema?id=19982>; Press Release, FEMA Denial Letters May Not Be Last Word, (Jan. 7, 2006) ("Those who receive *denial letters* from FEMA deeming them ineligible because of insurance may later receive assistance" by submitting appropriate paperwork) (emphasis added), *available at* <http://www.fema.gov/news/newsrelease.fema?id=22238>. Unfortunately, FEMA did not correct this confusing language in its form letter. Thus, the same language continued to be sent to applicants throughout the disaster.

zone, but declined to compensate her because they needed “some time” to figure out the value of her total loss.

Week in, week out, FEMA and [Molly]’s lawyer [debated] the “value of loss issue.” Every week, FEMA asked her lawyer to “be patient” and suggested that they call back “next week.” This continued for 8 weeks. [Then in July], without much patience, [Molly]’s lawyer insisted that FEMA send a good-faith payment while their valuation team worked things out. They said they’d look into it. Four days later, [Molly] received a \$10,019.63 check (without any explanatory letter).¹⁷⁴

Another problem was the delay and difficulty associated with coordinating a formal FEMA inspection. For example, several clients in our FEMA appeals project received a FEMA eviction notice, citing “withdrawn—no contact” as the reason for eviction.¹⁷⁵ We met one client, Fred Parks, at his trailer, where he showed us his letter.¹⁷⁶ Mr. Parks was particularly distraught because he was illiterate and had to rely on his sister for an explanation of his temporary housing status.¹⁷⁷ Mr. Parks clung to his front porch in Gautier during the storm, while the winds and rain destroyed his rental home.¹⁷⁸ After living out of his car for months, he received a FEMA trailer only to be subject to an imminent eviction.¹⁷⁹ He told us that a FEMA inspector called his sister (Mr. Parks remains without a phone line) to arrange a FEMA inspection, but the inspector cancelled the appointment.¹⁸⁰ Now, he was facing an eviction because FEMA had not completed a formal

174. Press Release, Lawyers’ Comm. For Civil Rights Under Law, Stories Ongoing, One Year Later (Aug. 16, 2006) (on file with authors).

175. *See, e.g.*, Letter from R. David Paulison, Acting Dir., Emergency Preparedness & Response, FEMA to Mr. [Parks] (Jan. 16, 2006) (on file with authors).

176. *Id.*

177. Interview with Mr. [Parks], in Gautier, Miss., (May 18, 2006). Mr. Parks had to have his sister write a letter to FEMA on his behalf. *See* Letter from Ms. [Parks] to FEMA (May 21, 2006) (on file with authors).

178. *Id.*

179. Interview with Mr. [Parks], *supra* note 177.

180. *Id.*; *see* Letter from R. David Paulison, Acting Dir., Emergency Preparedness & Response, FEMA to Mr. [Parks] (May 3, 2006) (on file with authors).

inspection.¹⁸¹ We called FEMA on his behalf several times and were ultimately assured that the eviction would be withdrawn and an inspector would be sent out to his former home. Fred Parks is only one of the many eligible disaster survivors who faced a denial based on a hasty or erroneous finding of insufficient damage.

V. ADVOCACY AND REFORM

A. *Recent Stafford Act Improvements*

Drawing upon the maddening experience of Mr. Parks and other low-income families denied benefits by FEMA or facing delays and confusion in the process, we and other advocates urged comprehensive reform of the law governing FEMA benefits. Overcoming FEMA's shortcomings, unfortunately, requires more than impact litigation to hold FEMA to its existing legal and constitutional duties or individual representation to address mishandling of particular applications. It requires substantial reform of FEMA's governing statute to eliminate barriers and improve FEMA's responsiveness to the needs of applicants, especially those with low incomes. Fortunately, some provisions revising the Stafford Act, which governs FEMA benefits, were included when, on October 4, 2006, the President signed the Department of Homeland Security Appropriations Act of 2007 into law.¹⁸² While advocates still have much to do, these Stafford Act reforms are a welcome change.

Beyond substantial organizational overhaul and revisions of FEMA's disaster response, particular provisions corrected some of the substantive problems identified above. First, on rental assistance, the Stafford Act was changed to *explicitly* allow families to use cash assistance to pay for security deposits and utility bills.¹⁸³ This

181. Interview with Mr. [Parks], *supra* note 177.

182. Department of Homeland Security Appropriations Act of 2007, PL 109-295, 120 Stat. 1355 (codified as amended in scattered sections of U.S.C.).

183. *See* Department of Homeland Security Appropriations Act of 2007, § 689d(1)-(2), 120 Stat. at 1452, (codified as amended at 42 U.S.C.A. § 5174(c)(1)(A)(i)-(ii) (West, Westlaw through P.L. 109-367, excluding P.L. 109-304, P.L. 109-351, P.L. 109-364 to P.L. 109-366)) (providing that housing assistance "may include the payment of the cost of utilities, excluding telephone service," as well as the cost of "security deposits"). Whether pre-existing law required FEMA to allow applicants to use assistance for utilities had been litigated in *Watson*. *See*

eliminates a significant barrier faced by low-income families who had difficulty making effective use of the assistance if they lacked the income to cover these ancillary costs.

In addition, the reform bill recognized that, where a substantial share of rental housing had been destroyed, FEMA funds should be made available to provide longer-term, more permanent housing solutions for renters. As noted above, this reform corrects a preference which formerly limited available funds for improving the permanent housing stock to owner-occupied dwellings only. Two changes address this need. First, the Stafford Act was amended to authorize FEMA to provide semi-permanent or permanent housing to displaced households when alternate housing resources were not available.¹⁸⁴ Previously, such funding for permanent rental housing resources had been limited to insular or remote areas.¹⁸⁵ This provision gives FEMA the flexibility to support efforts to replenish rental stock depleted by a disaster and related rent increases.

Second, the appropriations bill authorized a pilot program to make better use of existing rental housing located in disaster areas as a means of “provid[ing] timely and cost-effective temporary housing assistance.”¹⁸⁶ Under the pilot program, FEMA (or agencies it funds) may enter into lease agreements for displaced households with owners of multi-family rental property in disaster areas and make repairs to these properties.¹⁸⁷ This provides a mechanism to quickly repair

supra note 94.

184. See § 685(1)-(2), 120 Stat. at 1447, (codified as amended at 42 U.S.C.A. § 5174(c)(4) (West, Westlaw through P.L. 109-367, excluding P.L. 109-304, P.L. 109-351, P.L. 109-364 to P.L. 109-366)) (striking the restriction on funding “permanent housing construction” to only “remote” locations and permitting such construction in any location where “no alternative housing resources are available” and FEMA’s temporary housing assistance is “unavailable, infeasible, or not cost-effective”).

185. § 685, 120 Stat. at 1447.

186. § 689i(a)(1), 120 Stat. at 1454 (codified as amended at 6 U.S.C.A. § 776(a)(1) (West, Westlaw through P.L. 109-367, excluding P.L. 109-304, P.L. 109-351, P.L. 109-364 to P.L. 109-366)) (“The pilot program shall be designed to make better use of existing rental housing, located in areas covered by a major disaster declaration, in order to provide timely and cost-effective temporary housing assistance to individuals and households eligible for assistance under section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5174) where alternative housing options are less available or less cost-effective.”).

187. § 689i(a)(2)(A)(i)-(ii), 120 Stat. at 1454 (codified as amended at 6 U.S.C.A. § 776(a)(2)(A)(i)-(ii) (West, Westlaw through P.L. 109-367, excluding

salvageable rental units while at the same time allowing FEMA, through leases, to ensure that repaired units are available to lower-income households.

B. *Significant Reform Remains Necessary*

However, additional significant statutory and regulatory reforms can and should still be made to make FEMA's programs more effective for all households affected by a disaster. For example, several reforms were included in one of the versions of the bill that the Senate passed, Senate Bill 3721, but the reforms were not included in the final legislation.¹⁸⁸ Among other things, the Senate bill corrected the "shared household" rule problems in part, expressly authorizing assistance to be provided separately to different members of a pre-disaster household for reasons of divorce, family separation, domestic violence, or "other good cause."¹⁸⁹ The Senate version also proposed to expedite adjustment to the amount of rental assistance to facilitate its use in "extraordinary circumstances" where fair market rents dramatically increased after the storm.¹⁹⁰

At a minimum, we urge FEMA and Congress to explore ways to address the shortcomings identified in this article. Central reforms would include changes to better address "shared household" rule problems and to ease and clarify grounds for permitting persons who formerly shared an address to obtain appropriate benefits and temporary housing after a disaster.

Procedurally, reform should focus on introducing clarity and consistency into the process. As highlighted in the discussion above, one of the most critical failings of FEMA is the confusing and opaque nature of benefits provided and procedural rights available to each disaster survivor applying for assistance. Certainly, FEMA and/or Congress could seek to establish clearer rules to ensure that in each disaster, applicants are adequately apprised of their rights. However,

P.L. 109-304, P.L. 109-351, P.L. 109-364 to P.L. 109-366)) (permitting FEMA to "enter into lease agreements with owners of multi-family rental property" and to "make improvements to properties under such lease agreements").

188. See S. 3721, 109th Cong. (as reported with an amendment, Aug. 3, 2006).

189. S. 3721, § 218(a).

190. S. 3721, § 218(b).

FEMA's unresponsiveness to the needs of so many families may be related to something even more fundamental.

We firmly believe a significant reason FEMA has failed to provide such procedural clarity is because it so adamantly resists providing individual households with any enforceable procedural rights—refusing to even concede that Constitutional Due Process standards govern disaster relief as they do all other federal action.¹⁹¹ The adversarial process, while not perfect, is an effective way of bringing to the attention of agencies—and courts—ways in which programs fall short for those they are intended to serve. At minimum, the Stafford Act should be amended to permit federal court jurisdiction for evacuees to sue FEMA where rights guaranteed by the Stafford Act and the Declaration of an Emergency have been denied. Indeed, recognizing and incorporating such a process could lead to greater clarity and efficiency in disaster relief.

Imagine for a moment that FEMA provided a single, clear statement of the benefits available and the procedural rights accorded to victims after each disaster, including an open appeals process with clear statements informing applicants of the basis used for rejecting their claims. Rather than being a burden, such clear statements would provide applicants with the information needed to more expeditiously resolve or, where appropriate, abandon their requests for disaster assistance. Indeed, far too many of the cases described above involved significant time spent by FEMA operators reviewing unclear case files or by appeals branch staff reviewing appeals where the basis for denial was unclear—to say nothing of the time and effort spent by advocates trying to resolve simple mistakes. Further, a clear, public statement of available benefits and procedures would allow for significantly greater ease in correcting erroneous determinations by individual FEMA staff members who incorrectly applied its policies.

Finally, because it also requires justifying policies and procedures in an open forum, the adversarial process could quickly correct some of FEMA's most troubling procedures. For example, if FEMA was forced to consider its actions in light of due process standards, it would likely not have issued trailer eviction notices that required

191. See *McWaters II*, 436 F. Supp. 2d 802, 812 (E.D. La. 2006) (“Essentially defendants argue that under the aegis of sovereign immunity, FEMA may commit unconstitutional acts and not be subject to any judicial review.”).

needy families to vacate their trailers while their appeals were pending. While such change would not be easy, it would be vital to better ensure that FEMA assistance meets the needs of those with the fewest resources to support themselves after a disaster.

Hurricane Katrina reminded those who had forgotten that America still has far to go to fully include many of its citizens, especially the poorest, in its promise. After the hurricane, President Bush expressed the eagerness of many to overcome this unfortunate history: “There’s . . . deep, persistent poverty in this region . . . [with] roots in a history of racial discrimination, which cut off generations from the opportunity of America. We have a duty to confront this poverty with bold action.”¹⁹² It should not require the searing images from August 2005—or the barren landscape still present in much of the Gulf Coast—to take this call to action seriously. Ensuring that government assistance is effectively designed to serve all people, regardless of differences in income, race, sex, or disability, is one obvious way to begin.

192. Michael A. Fletcher, *Bush’s Poverty Talk Is Now All but Silent: Aiding Poor Was Brief Priority After Katrina*, WASH. POST July 20, 2006, at A4.

