# Preparing for Disaster: Protecting the Most Vulnerable in Emergencies

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*Many federal, state, local, and private entities are investing significant resources in disaster readiness initiatives. Often disregarded in these initiatives, however, are the special needs of vulnerable populations during disasters. In the context of emergencies, vulnerable groups may include individuals with disabilities, pregnant women, children, elderly persons, prisoners, certain members of ethnic minorities, people with language barriers, and the impoverished. The fate of the disadvantaged during disasters has received little attention in the legal literature, and this Article begins to fill that gap. Through an examination of normative distributive justice arguments, existing federal and state civil rights provisions, and emergency response laws, it argues that existing legal and ethical frameworks entitle vulnerable populations to significant protection. It also, however, highlights the shortcomings of the current statutory scheme as it relates to the needs of the disadvantaged during disasters and urges legislators to supplement these laws with additional requirements. Moreover, the Article argues that for vulnerable populations, successful disaster response is dependent upon careful planning. With this in mind, the Article develops a proposal for statutory provisions that will mandate adequate preparation to safeguard the welfare of the vulnerable in emergencies.*

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TABLE OF CONTENTS

## INTRODUCTION

Preparing for disasters has been high on the agendas of many federal, state, local, and private entities for several years.[1] For example, the Centers for Disease Control and Prevention ("CDC") and state public health departments are undertaking major emergency planning initiatives, including extensive training and educational programs.[2] Several recent governmental reports and statements also address emergency readiness in the United States.[3] The federal government has spent over $10 billion on emergency preparedness activities since 2001.[4]

These efforts, however, often disregard the special needs of vulnerable populations. During and after a catastrophic event, vulnerable populations may include individuals with disabilities, pregnant women, children, the elderly, prisoners, ethnic minorities, people with language barriers, and the impoverished.[5] A review of

[1] Dennis P. Andrulis et al., *Preparing Racially and Ethnically Diverse Communities for Public Health Emergencies*, 26 HEALTH AFF. 1269, 1269 (2007) ("The White House, Congress, and State and local governments have made emergency preparedness one of their highest priorities."); Aaron Katz et al., *Preparing for the Unknown, Responding to the Known: Communities and Public Health Preparedness*, 25 HEALTH AFF. 946, 946 (2006) (finding that "bioterrorism preparedness remains a high priority for federal, state, and local governments" and that "the capabilities of local public health and emergency response agencies" had improved significantly since 2004).

[2] *See* Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. § 247d-4(a)(3) (2006) (providing that "Secretary shall expand, enhance, and improve the capabilities of the Centers for Disease Control and Prevention relating to [public health emergency] preparedness"); *see also* Pandemic and All-Hazards Preparedness Act of 2006, 42 U.S.C. § 247d-3a (2006) (establishing grants for state and local governments to undertake activities designed to enhance public health emergency preparedness); Centers for Disease Control & Prevention, Public Health Law Program, http://www2a.cdc.gov/phlp/about.asp (last visited Feb. 19, 2009) (describing emergency preparedness activities of CDC's Public Health Law Program); Washington State Department of Health, Public Health Emergency Preparedness and Response Preparedness: Information for Local Health Agencies and Health Care Providers, http://www.doh.wa.gov/phepr/pheprlho.htm (last visited Feb. 19, 2009).

[3] *See generally* DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., FEMA'S PREPAREDNESS FOR THE NEXT CATASTROPHIC DISASTER (2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-34_Mar08.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, EMERGENCY MANAGEMENT: OBSERVATIONS ON DHS'S PREPAREDNESS FOR CATASTROPHIC DISASTERS (2008) (statement of William O. Jenkins, Jr., Dir. Homeland Sec. & Justice), *available at* http://www.gao.gov/new.items/d08868t.pdf.

[4] Rebecca Katz & Jeffrey Levi, *Should a Reformed System Be Prepared for Public Health Emergencies, and What Does That Mean Anyway?*, 36 J.L. MED. & ETHICS 716, 717 (2008).

[5] ASS'N OF STATE & TERRITORIAL HEALTH OFFICIALS, DEP'T OF HEALTH & HUMAN

thirty-seven national pandemic preparedness plans from Europe, Asia and the Pacific Rim, the Middle East, Africa, and the Americas revealed that "none of the plans suggested any systematic attempt to identify" disadvantaged groups.[6] Furthermore, fewer than twenty-five plans considered the needs of "one or more economically or socially disadvantaged group[s]."[7]

Inadequate preparation for the needs of vulnerable populations can lead to catastrophic consequences. The disadvantaged could suffer large death tolls, as illustrated by Hurricane Katrina, in which over 1,800 individuals died because they were unable to evacuate the city.[8] The infirm elderly, poor, and disabled were the most likely to die in that notorious disaster.[9] Members of vulnerable populations who survive could suffer permanent, debilitating injuries and become unable to work, live independently, and care for themselves. American taxpayers who pay for public safety-net programs would thus absorb the cost of increased use of such programs and loss of economic productivity. As demonstrated in the aftermath of Hurricane Katrina, a failed emergency response could also cause the government to suffer humiliation and the public to lose faith in those responsible for its welfare.[10] These prospects are alarming given the variety of potential emergencies that experts predict we will face in the

SERVS., AT-RISK POPULATIONS AND PANDEMIC INFLUENZA: PLANNING GUIDANCE FOR STATE, TERRITORIAL, TRIBAL, AND LOCAL HEALTH DEPARTMENTS 3-4 (2008), *available at* http://www.astho.org/pubs/ASTHO_ARPP_Guidance_June3008.pdf [hereinafter ASTHO]; HEALTH SYS. RESEARCH, INC., ALTERED STANDARDS OF CARE IN MASS CASUALTY EVENTS 30-31 (2005), *available at* http://www.ahrq.gov/research/altstand/altstand.pdf; Kathleen Tierney, *Social Inequality, Hazards, and Disasters*, *in* ON RISK AND DISASTER: LESSONS FROM HURRICANE KATRINA 109, 112-20 (Ronald J. Daniels et al. eds., 2006); Public Health – Seattle & King County, Vulnerable Populations Action Team (VPAT), http://www.kingcounty.gov/healthservices/health/preparedness/VPAT.aspx (last visited Feb. 20, 2009).

[6] Lori Uscher-Pines et al., *Planning for an Influenza Pandemic: Social Justice and Disadvantaged Groups*, 37 HASTINGS CENTER REP. 32, 38 (2007).

[7] *Id.*

[8] David Hall, *Katrina: Spiritual Medicine for Political Complacency and for Social Activists Who Are Sleepwalking*, 23 HARV. BLACKLETTER L.J. 1, 2 n.4 (2007).

[9] Katherine Pratt, *Deficits and the Dividend Tax Cut: Tax Policy as the Handmaiden of Budget Policy*, 41 GA. L. REV. 503, 558-59 (2007) (asserting that over 75 percent of those who died in Katrina were over 60 years old).

[10] L. Darnell Weeden, *Hurricane Katrina and the Toxic Torts Implications of Environmental Injustice in New Orleans*, 40 J. MARSHALL L. REV. 1, 35 (2006) ("As a result of governmental conduct since Katrina, almost all Louisianans now seem to share a distrust of the government.").

coming decades, ranging from bioterrorism attacks to natural disasters to pandemic influenza outbreaks.[11]

The vulnerable groups that are the subject of this Article consist of tens of millions of people.[12] According to the United States Census Bureau, in 2006, 41.3 million noninstitutionalized Americans over the age of five had disabilities.[13] Many more may have physical or mental impairments that may impact their welfare during an emergency but are not deemed to be serious enough to constitute reportable disabilities. In 2006, approximately 35.5 million individuals were sixty-five years of age or older[14] and 38.8 million Americans were living in poverty.[15] Children constitute approximately twenty-five percent of the United States population.[16] Meanwhile, at the end of 2007, approximately 2.3 million individuals were incarcerated in United States prisons and jails.[17] Some subset of each of these groups will almost certainly have special needs during disasters.

Unless the needs of vulnerable populations are addressed during all three phases of emergency response operations — pre-event planning and preparation, the event, and recovery[18] — members of these

[11] *See* Taiwo A. Oriola, *Against the Plague: Exemption of Pharmaceutical Patent Rights as a Biosecurity Strategy*, 2007 U. ILL. J.L. TECH. & POL'Y 287, 289 ("Experts have frequently warned of the high likelihood of a bioterrorism attack."); Payal K. Shah, *Assisting and Empowering Women Facing Natural Disasters: Drawing from Security Council Resolution 1325*, 15 COLUM. J. GENDER & L. 711, 721 (2006) ("Over the past decades, experts have documented the increasing impact of natural disasters on the world's population, with economic losses from natural disasters increasing more than ten times each decade."); Jeffrey K. Taubenberger et al., *The Next Influenza Pandemic: Can It Be Predicted?*, 297 JAMA 2025, 2025 (2007) ("[M]ost experts believe another influenza pandemic will occur . . . .").

[12] *See* discussion *infra* Part I.

[13] MATTHEW BRAULT, DISABILITY STATUS AND THE CHARACTERISTICS OF PEOPLE IN GROUP QUARTERS: A BRIEF ANALYSIS OF THE CIVILIAN NONINSTITUTIONALIZED AND TOTAL POPULATIONS IN THE AMERICAN COMMUNITY SURVEY 2 (2008), *available at* http://www.census.gov/hhes/www/disability/GQdisability.pdf.

[14] U.S. Census Bureau, Population by Age, Sex, Race and Hispanic Origin (Internet release date: July 27, 2007), http://www.census.gov/population/socdemo/age/2006older_table1.1.xls. According to a different report, in 2005 one-and-a-half million Americans resided in nursing homes. NAT'L COUNCIL ON DISABILITY, THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT: HAS IT FULFILLED ITS PROMISE? 7 (2005), *available at* http://www.ncd.gov/newsroom/publications/2005/pdf/personsect.pdf.

[15] BRUCE H. WEBSTER, JR. & ALEMAYEHU BISHAW, INCOME, EARNING, AND POVERTY DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY 20 (2007), *available at* http://www.census.gov/prod/2007pubs/acs-08.pdf.

[16] INST. OF MED., EMERGENCY CARE FOR CHILDREN: GROWING PAINS 234 (2007).

[17] HEATHER C. WEST & WILLIAM J. SABOL, PH.D., U.S. DEP'T OF JUSTICE, PRISONERS IN 2007, at 6 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf.

[18] U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 27 (2008),

communities are likely to suffer disproportionate harm in disasters. Their poor outcomes may be linked to lack of physical and emotional strength or a dearth of the social and economic resources upon which others rely during disasters. Response and recovery efforts will be optimized only if decision makers have carefully prepared for emergencies at a time when they have the leisure to contemplate options and establish responsible policies. However, planning and production of planning documents alone are not sufficient to achieve comprehensive and effective disaster readiness. Rather, at a minimum, planners must identify at-risk individuals through registries, delegate authority and responsibility to appropriate governmental officials, collect supplies, and allocate resources, among other steps.[19] Consequently, the terms "planning" and "preparation" in this Article are meant to include not only the contemplation of response approaches, but also the implementation of readiness initiatives.

Without appropriate preparation, vulnerable individuals may not be able to evacuate as instructed, reach points of distribution for medical countermeasures, understand written or verbal communications during an emergency, or find suitable housing if their residences are destroyed during a disaster. For example, while all residents of affected areas were failed by the response to Hurricane Katrina, the vulnerable often suffered to a much greater extent than others. The hearing impaired found that eighty percent of shelters did not have text telephones ("TTYs"); sixty percent of shelters had no television with open caption capability; only fifty-six percent of shelters posted announcements that were otherwise made verbally; and American Sign Language interpreters were available in fewer than thirty percent of shelters.[20] Meanwhile, low-income African Americans often could not evacuate because they had no personal transportation.[21] Furthermore, those with mobility impairments found that only five percent of the temporary housing provided by the Federal Emergency Management

*available at* http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf (identifying "three phases of effective response" as "prepare, respond, and recover").

[19] *See infra* Part IV.B for recommendations.

[20] NAT'L COUNCIL ON DISABILITY, THE IMPACT OF HURRICANES KATRINA AND RITA ON PEOPLE WITH DISABILITIES: A LOOK BACK AND REMAINING CHALLENGES 14 (2006), *available at* http://www.ncd.gov/newsroom/publications/2006/pdf/hurricanes_impact.pdf; PAUL CAMPBELL ET AL., HARVARD SCH. OF PUB. HEALTH, REACHING VULNERABLE POPULATIONS IN PUBLIC HEALTH EMERGENCIES: CONFERENCE PROCEEDINGS 9 (2007), *available at* http://www.mcph.org/Major_Activities/Emergency_Preparedness/2007/2007_Final_Conference_Report_pdf.

[21] Andrulis et al., *supra* note 1, at 1269.

Agency ("FEMA") was accessible to them even though twenty-five percent of the displaced population needed accessible housing.[22]

The fate of the disadvantaged during disasters has received little if any attention in the legal literature. This Article introduces legal analysis into the discussion of preparedness for vulnerable populations.[23] Numerous civil rights laws establish that vulnerable populations have a right to be free of discrimination and to enjoy certain benefits and governmental protections.[24] These rights and obligations are binding not only during ordinary times, but also during emergencies. Nevertheless, the existing legal framework must be supplemented by specific provisions in emergency response laws that mandate disaster planning to address the needs of vulnerable populations.

Preparation for the needs of vulnerable groups is most likely to occur if it is statutorily mandated. These groups often have weak political voices[25] and may not become a focus for governmental planners without laws requiring agencies to expressly account for the vulnerable. This Article develops recommendations for federal and state law provisions that require specific planning activities designed to safeguard the welfare of the disadvantaged.[26] It also explores ethical theories of distributive justice that address how the government should allocate scarce resources.[27] While the government may not be able to anticipate and address every need of all vulnerable groups, experts agree that certain initiatives can improve outcomes for the vulnerable.[28] For example, much can be accomplished by working with advocacy and community groups and by requiring private vendors who supply services during disasters to accommodate the needs of vulnerable groups. In addition, officials must communicate effectively with all segments of society to educate the public about what individuals must do for themselves during emergencies.[29] State

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[22] CAMPBELL ET AL., *supra* note 20, at 9.

[23] *See infra* Part III.

[24] *See infra* Part III.A.

[25] Sylvia A. Law & Barry Ensminger, *Negotiating Physicians' Fees: Individual Patients or Society? (A Case Study in Federalism)*, 61 N.Y.U. L. REV. 1, 81 (1986) ("The political voices of . . . those who are medically and economically vulnerable . . . are . . . diffuse and weak.").

[26] *See infra* Part IV.B.

[27] *See infra* Part II.

[28] *See infra* Part IV.B.2 (describing experts' recommendations).

[29] *See infra* Part IV.B.2. *See generally* ASTHO, *supra* note 5 (discussing ways to identify, communicate with, collaborate with, educate, and provide services to at-risk populations).

and federal emergency response statutes should provide planning authorities with detailed instructions to ensure that such initiatives are undertaken.

The Article proceeds as follows. Part I addresses the question of who "vulnerable populations" are in the context of disasters. It identifies and assesses the needs of numerous at-risk groups. Part II turns to ethical questions concerning how resources should be allocated in the process of planning for and responding to disasters. This Part explores whether there are moral justifications for investing disproportionate resources in accommodating the needs of the disadvantaged. In so doing, it presents several theories of distributive justice[30] and analyzes how they illuminate the question of resource allocation for vulnerable populations. Part III examines a variety of federal and state laws that establish nondiscrimination mandates and other obligations that public and private entities have towards vulnerable populations. These include federal and state disability laws, the Equal Protection Clause of the Fourteenth Amendment, the Eighth Amendment, Title VI of the Civil Rights Act of 1964 and similar state laws, and the tort of negligence. These laws reflect a long-standing commitment to protecting the rights of the vulnerable. This Part then presents a comprehensive survey of existing federal and state emergency response laws that include provisions addressing special needs communities. Part IV, the recommendations section, first argues that the existing statutory scheme constitutes a patchwork characterized by many gaps and shortcomings. To address these shortcomings, I then develop a proposal for statutory revisions that will more effectively safeguard the interests of the disadvantaged during disasters. Only with appropriate planning and resources will the vulnerable be able to survive and thrive after disasters. Such preparation is of critical importance based on ethical, legal, and practical considerations.

## I. VULNERABLE POPULATIONS

Vulnerable populations, also called "special needs" populations[31] or "at-risk" populations,[32] are those that are particularly "at risk of poor

[30] Distributive justice is concerned with the proper allocation of resources, benefits, and rewards. *See* NORMAN J. FINKEL, NOT FAIR!: THE TYPOLOGY OF COMMONSENSE UNFAIRNESS 23 (2001).

[31] FEMA, NRF Resource Center Glossary/Acronyms, http://www.fema.gov/emergency/nrf/glossary.htm#Top (last visited Feb. 21, 2009) (using term "special needs populations").

[32] Pandemic and All-Hazards Preparedness Act of 2006, 42 U.S.C. § 300hh-

physical, psychological, or social health" after a disaster.[33] They have "additional needs before, during, and after an incident in functional areas, including but not limited to: maintaining independence, communication, transportation, supervision, and medical care."[34] The term "vulnerable" in this Article is thus used to indicate the dependencies of particular populations.[35] Different groups are traditionally recognized as vulnerable in different contexts.[36] During disasters, several population segments are potentially vulnerable. These include (1) individuals with physical and mental disabilities, (2) elderly persons, (3) pregnant women, (4) children, (5) prisoners, (6) economically disadvantaged minorities, (7) undocumented workers, and (8) those with language barriers.[37] This Part analyzes the vulnerabilities of each group.

### *A. Individuals with Disabilities*

Large-scale disasters may leave individuals with physical and mental disabilities particularly challenged and helpless. Governmental assistance may be inadequate and may end too quickly after a disaster to meet the needs of the disabled.[38] Individuals with physical disabilities may be underserved in a variety of ways during a disaster. For example, those with hearing impairments may not be able to understand evacuation orders or instructions provided in shelters.[39]

1(b)(4) (2006) (using term "at-risk individuals").

[33] LU ANN ADAY, AT RISK IN AMERICA: THE HEALTH AND HEALTH CARE NEEDS OF VULNERABLE POPULATIONS IN THE UNITED STATES 4 (2d ed. 2001). Another source defines "vulnerability" as "the characteristics of a person or group and their situation that influence their capacity to anticipate, cope with, resist and recover" from a disaster. BEN WISNER ET AL., AT RISK: NATURAL HAZARDS, PEOPLE'S VULNERABILITY AND DISASTERS 11 (2d ed. 2005).

[34] FEMA, *supra* note 31.

[35] *See* Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 523-25 (2008) (discussing concept of universal vulnerability and how it differs from common understanding of vulnerability).

[36] *See, e.g.*, 45 C.F.R. §§ 46.111(b), .201-.409 (2008) (establishing additional protections for research involving fetuses, pregnant women, in vitro fertilization, prisoners, and children).

[37] *See* 42 U.S.C. § 300hh-1(b)(4)(B) (2006); HEALTH SYS. RESEARCH, INC., *supra* note 5, at 30-31; Tierney, *supra* note 5, at 112-20; FEMA, *supra* note 31; Public Health — Seattle & King County, *supra* note 5.

[38] NAT'L COUNCIL ON DISABILITY, THE NEEDS OF PEOPLE WITH PSYCHIATRIC DISABILITIES DURING AND AFTER HURRICANES KATRINA AND RITA: POSITION PAPER AND RECOMMENDATIONS 6 (2006), *available at* http://www.ncd.gov/newsroom/publications/2006/pdf/peopleneeds.pdf.

[39] NAT'L COUNCIL ON DISABILITY, *supra* note 20, at 4.

To the extent that official communication is transmitted through visual displays on television broadcasts, television monitors, or on paper, people with visual impairments might be unable to obtain critical information.[40] Accessible transportation may be unavailable to evacuate the wheelchair-bound, and shelters may not have accessible entrances, restrooms, and dining areas or adequate medical care.[41] It is also possible that during triaging processes, some health care providers may determine that individuals with disabilities are of a lower priority than others because treating them is more difficult or complicated. These are not theoretical difficulties. A report by the National Council on Disability concerning Hurricanes Katrina and Rita highlights these concerns. It provides accounts of individuals turned away from shelters, forced to sleep in their wheelchairs, and housed in inappropriate conditions, where they developed debilitating bedsores and other medical problems.[42] After emergencies, individuals with disabilities may also find it more difficult to secure accessible apartments or trailers, health care, appropriate schooling, and employment in areas that have been devastated by a disaster.[43]

Those with mental disabilities may also face acute difficulties in emergencies. Their evacuation may be mismanaged by emergency responders who misunderstand their behavior or are uncomfortable with them, and shelters may refuse to accept them or be ill equipped to meet their needs.[44] Individuals with mental disabilities may receive rough treatment if they are unable to follow instructions[45] and be inappropriately institutionalized as a convenient solution.[46] After Hurricane Katrina, FEMA reportedly refused to provide trailers to some individuals with known mental health histories even though they were capable of living independently.[47] Some mentally ill survivors were not able to fill out complicated housing applications and were not provided adequate assistance.[48] In addition, untrained FEMA officials assessed others as too disabled to live on their own.[49] Without appropriate planning that anticipates and accommodates the

[40] *Id.* at 5.
[41] *Id.* at 11.
[42] *Id.* at 13-14.
[43] *Id.* at 15-21.
[44] *See id.* at 3-4.
[45] *See id.* at 12.
[46] NAT'L COUNCIL ON DISABILITY, *supra* note 38, at 18-20.
[47] *Id.* at 7.
[48] *Id.*
[49] *Id.*

needs of the physically and mentally disabled, these populations are likely to be underserved in disasters and consequently suffer poor outcomes.

### *B. Elderly Persons*

Individuals who are sixty-five or older are more likely than others to suffer from chronic diseases, including arthritis, hypertension, heart disease, diabetes, and respiratory ailments.[50] Eighty percent of adults in this age group have at least one chronic illness, and fifty percent have two or more chronic conditions.[51] Older adults may also suffer from mobility, cognitive, sensory, social, and economic limitations that can impede their adaptability and ability to function in disasters.[52] As a result, they may become agitated, overwhelmed, and traumatized.[53] Additionally, during emergencies and in their aftermaths, the health of older adults can deteriorate because of poor nutrition, extreme temperatures, exposure to infection, interruptions in medical treatment, and emotional distress.[54] Among individuals with disabilities, those who are elderly may require particular attention and support because of their frailties.

### *C. Pregnant Women*

Pregnant women will also have special needs and face increased risks during disasters. These include premature deliveries, underweight infants, and infant mortality.[55] Some women may have to deliver babies without the benefit of hospital care.[56] Pregnant women also run the risk of being evacuated without access to medical records containing information critical to their welfare or that of their

[50] Nancy Aldrich & William F. Benson, *Disaster Preparedness and the Chronic Disease Needs of Vulnerable Older Adults*, 5 PREVENTING CHRONIC DISEASE 1, 1 (2008), *available at* http://www.cdc.gov/pcd/issues/2008/jan/07_0135.htm.

[51] *Id.* at 2 ("Nearly 50% of adults aged 65 or older have hypertension, 36% have arthritis, 20% have coronary heart disease, 20% have cancer, 15% have diabetes, and 9% have had a stroke.").

[52] *Id.*

[53] *Id.*

[54] *Id.* (discussing survey of 680 Hurricane Katrina evacuees living in Houston shelters).

[55] Rama Lakshmi, *Group Urges Disaster Planning for Pregnant Women, Babies*, WASH. POST, Aug. 17, 2006, at A09.

[56] KAREN OLNESS ET AL., HOW TO HELP THE CHILDREN IN HUMANITARIAN DISASTERS 123-28 (2d ed. 2006) (describing planning and preparation for women's obstetrical needs in disasters).

fetuses.[57] They may lose access to prenatal vitamins or other essential medication.[58] Pandemic outbreaks may be particularly life threatening for pregnant women or their unborn children, and exposure to other illnesses, such as viruses, in crowded shelters could constitute a further hazard. Furthermore, if relief workers are unaware of women's pregnancies, they might include them in mass vaccination or other prophylactic programs contraindicated for pregnant individuals.[59]

### *D. Children*

Children are a vulnerable population because of their susceptibility to injury and their dependence on others for livelihood, decision making, and emotional support.[60] Studies have shown that children who are injured by explosions are at greater risk of significant trauma than are adults.[61] Children may also suffer greater harm from exposure to bioterrorism agents because of their size, metabolisms, respiratory rates, and other factors.[62] Moreover, the physiological differences between children and adults are numerous, relating to head and tongue size in proportion to other body parts, nerve conduction, ventilation, oxygen demand, circulating blood flow, vulnerability of the liver and spleen, and skin thickness.[63] Children are likely to develop dehydration, malnutrition, and exhaustion more quickly than adults, and they are more susceptible to infectious

[57] Centers for Disease Control and Prevention, Critical Needs in Caring for Pregnant Women During Times of Disaster for Non-Obstetric Health Care Providers, http://www.bt.cdc.gov/disasters/pregnantdisasterhcp.asp (last visited Feb. 21, 2009).

[58] *Id.*

[59] William M. Callaghan et al., *Health Concerns of Women and Infants in Times of Natural Disasters: Lessons Learned from Hurricane Katrina*, 11 MATERNAL CHILD HEALTH J. 307, 307, 310 (2007) (discussing adverse impact on pregnancy of exposure to toxins, stress, and limited access to health care and risks of certain vaccinations); Bonnie Ewing et al., *Assisting Pregnant Women to Prepare for Disaster*, 33 AM. J. MATERNAL CHILD NURSING 98, 99 (2008) ("Pregnant women are a vulnerable population at high risk for injury, illness, and death before, during, and after disasters."); Centers for Disease Control and Prevention, *supra* note 57.

[60] *See* INST. OF MED., *supra* note 16, at 223 ("Children react differently than adults to medical emergencies because of anatomical, physiological, developmental, and emotional differences. Because of these differences, children are among the most vulnerable individuals in the event of a disaster.").

[61] Diana G. Fendya, *When Disaster Strikes — Care Considerations for Pediatric Patients*, 13 J. TRAUMA NURSING 161, 161 (2006).

[62] Shelly D. Martin et al., *A National Survey of Terrorism Preparedness Training Among Pediatric, Family Practice, and Emergency Medicine Programs*, 118 PEDIATRICS e620, e625 (2006), *available at* http://www.pediatrics.org/cgi/content/full/118/3/e620.

[63] Fendya, *supra* note 61, at 163-64.

diseases and severe forms of illnesses than are older individuals.[64] All of these factors affect children's treatment needs and medical outcomes. In addition, caring for children in an emergency involves psychological and social challenges stemming from their level of cognitive ability, emotional vulnerability, and dependence upon the support of family members.[65]

Thus, treatment that would be adequate for adults might be negligent or even grossly negligent[66] if administered to children. For example, children need different medication dosages and medical equipment sizes than adults, and the water pressure used to decontaminate[67] older people who are exposed to chemical releases is inappropriate for young children.[68] According to one study, fewer than fifty percent of emergency medicine programs that responded to a terrorism preparedness survey reported having adequate training relating to child victims.[69] In addition, there are comparatively few pediatric hospital beds, pediatric specialists, or providers with expertise in caring for children.[70]

Children require special attention and procedures during disasters, and they are often identified as a population that should be prioritized during relief efforts. For example, a government guidance document concerning the allocation of pandemic influenza vaccines reported that an essential priority of vaccine programs should be to protect children.[71] Yet, despite these initiatives, many agree that those

[64] OLNESS ET AL., *supra* note 56, at 35.

[65] Fendya, *supra* note 61, at 164-65.

[66] Gross negligence is "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." Marriott Corp. v. Chesapeake & Potomac Tel. Co., 723 A.2d 454, 462 (Md. 1988); Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 53 (2007) (discussing high standard for proving gross negligence).

[67] To decontaminate is to free of harmful substances, such as hazardous chemicals. WEBSTER'S II NEW COLLEGE DICTIONARY 293 (3d ed. 2004).

[68] Fendya, *supra* note 61, at 162.

[69] Martin et al., *supra* note 62, at e620.

[70] INST. OF MED., *supra* note 16, at 235 ("In the event of a disaster, the capacity of the health care system to care for a large number of children is likely to be inadequate.").

[71] U.S. DEP'T OF HEALTH AND HUMAN SERVS. & U.S. DEP'T OF HOMELAND SEC., GUIDANCE ON ALLOCATING AND TARGETING PANDEMIC INFLUENZA VACCINE 2-3, 13 (2008), *available at* http://www.pandemicflu.gov/vaccine/allocationguidance.pdf. Others who were identified as deserving priority were key pandemic responders and health care providers, those maintaining "essential community services," and individuals at greatest risk of infection because of their work. *Id.* at 3.

involved in the process of public health emergency planning have too often overlooked the needs of pediatric patients.[72]

### *E. Prisoners*

Because they are in custody, prisoners are entirely dependent upon governmental authorities for their welfare during a disaster, and, therefore, they too are a vulnerable population. Prisoners cannot evacuate on their own, seek medical care, or obtain food, shelter, and supplies unless authorities provide these to them.[73] Furthermore, in the chaos of an emergency, inmates could be subject to attacks by fellow prisoners or poorly trained, panicked guards.[74]

Events in the aftermath of Hurricane Katrina illustrate just how vulnerable prisoners are during disasters. The American Civil Liberties Union ("ACLU") issued a 2006 report entitled *Abandoned and Abused*, which describes the shocking conditions prisoners in the Orleans Parish Prison ("OPP") faced during and after Hurricane Katrina.[75] The following excerpt from the ACLU report vividly illustrates the dangers prisoners can face during a disaster:

> As floodwaters rose in the OPP Buildings, power was lost, and entire buildings were plunged into darkness. Deputies left their posts wholesale, leaving behind prisoners in locked cells, some standing in sewage-tainted water up to their chests. Over the next few days, without food, water, or ventilation, prisoners broke windows in order to get air, and carved holes in the jail's walls in an effort to get to safety. . . . Once freed from the buildings, prisoners were bused to receiving facilities around the state, . . . [though at one correctional center] thousands of OPP evacuees spent several days on a large outdoor field, where prisoner-on-prisoner violence was rampant and went unchecked by correctional officers.[76]

This episode demonstrates the manifest need for a systematic approach to disaster relief for prisoners. While many if not most state departments of corrections have emergency preparation systems or

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[72] INST. OF MED., *supra* note 16, at 226, 229; Fendya, *supra* note 61, at 161.

[73] *See* Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 U. MICH. J.L. REFORM 1, 3-4 (2008).

[74] *Id.*

[75] *See generally* AM. CIVIL LIBERTIES UNION, ABANDONED AND ABUSED (2006), *available at* http://www.aclu.org/pdfs/prison/oppreport20060809.pdf.

[76] *Id.* at 9.

plans,[77] commentators have criticized these as inadequate.[78] In particular, the plans have been found to be lacking in the areas of emergency training, drills and exercises, and preparation for possible terrorist attacks.[79]

### *F. Economically Disadvantaged Minorities, Undocumented Workers, and Individuals with Language Barriers*

Economically and socially disadvantaged individuals are likely to suffer disproportionate harm from disasters because they lack resources and adequate support systems.[80] Two disasters within the past two decades illustrate the problems facing those with socioeconomic disadvantages. In 1995, over 700 people died during a weeklong heat wave in Chicago.[81] African Americans were one-and-a-half times more likely to die than whites because they were impoverished, segregated, and lacked "social capital."[82] Ten years later, during Hurricane Katrina, the majority of those who remained in New Orleans were African Americans, and 21,787 black households reportedly had no car with which to evacuate the city.[83] Communication barriers compounded their problems, as residents who followed television broadcasts received untimely and contradictory evacuation instructions from authorities.[84] In addition, African-American refugees were not always welcomed by other communities.[85] At one point, a large group of mostly black refugees

[77] JEFFREY A. SCHWARTZ & CYNTHIA BARRY, U.S. DEP'T OF JUSTICE, A GUIDE TO PREPARING FOR AND RESPONDING TO PRISON EMERGENCIES 185-98 (2005), *available at* http://www.nicic.org/pubs/2005/020293.pdf (reporting on survey to which 33 state departments of correction responded and estimating that 70 to 85 percent of departments have emergency preparedness systems in place).

[78] Robbins, *supra* note 73, at 14.

[79] *Id.* at 13-20.

[80] Daniel Farber, *Disaster Law and Inequality*, 25 LAW & INEQ. 297, 302 (2007); Sherrie Armstrong Tomlinson, Note, *No New Orleanians Left Behind: An Examination of the Disparate Impact of Hurricane Katrina on Minorities*, 38 CONN. L. REV. 1153, 1161 (2006).

[81] Farber, *supra* note 80, at 304-05.

[82] *Id.*

[83] *Id.* at 297-98, 302.

[84] Andrulis et al., *supra* note 1, at 1269; Keith Elder et al., *African Americans' Decisions Not To Evacuate New Orleans Before Hurricane Katrina: A Qualitative Study*, 97 AM. J. PUB. HEALTH S124, S126 (2007).

[85] Tomlinson, *supra* note 80, at 1168-72 (discussing role of racism in Katrina response, including "false reports of violence and the subsequent strong-armed reaction").

attempted to walk across a bridge to Gretna, Louisiana, but were stopped by armed police because the City of Gretna did not wish to allow their entry or help them.[86] In addition, economically disadvantaged individuals are less likely than wealthier people to own residences and to benefit from insurance proceeds and other assistance available to homeowners after a disaster.[87] Lack of medical insurance may also impede the recovery of those who have suffered health consequences because of an emergency.[88]

Another group of vulnerable individuals, migrant workers, might be lured to areas that have been devastated by a catastrophe, hoping to find long-term, lucrative work assignments during the rebuilding process.[89] In the aftermath of Hurricane Katrina, thousands of workers, many of whom were undocumented, moved to New Orleans.[90] However, employers often housed individuals in deplorable conditions, required them to do extremely hazardous work, and denied them the pay they were promised.[91] In addition, post-Katrina workers, like 9/11 responders, faced significant health risks and were not provided appropriate training or protective gear.[92]

Undocumented individuals who are themselves victims of a disaster are eligible for short-term assistance after an emergency but, because of their illegal status, they are not qualified for long-term shelter or

[86] Farber, *supra* note 80, at 303; Tomlinson, *supra* note 80, at 1171. Sixty-two percent of those who died in New Orleans were African American. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR & 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 115 (2006), *available at* http://katrina.house.gov. However, African Americans appear not to have suffered a disproportionate number of deaths, as 68 percent of New Orleans' population was black in 2005. *See Census Says New Orleans Is Still a "Chocolate" Metropolis*, THE LA. WEEKLY, Aug. 29, 2008, *available at* http://www.louisianaweekly.com/news.php?viewStory=257.

[87] Farber, *supra* note 80, at 305.

[88] In 2007, 45.7 million Americans were uninsured. *See* Press Release, U.S. Census Bureau, Household Income Rises, Poverty Rates Unchanged, Number of Uninsured Down (Aug. 26, 2008) (http://www.census.gov/Press-Release/www/releases/archives/income_wealth/012528.html).

[89] Haley E. Olam & Erin S. Stamper, Note, *The Suspension of the Davis-Bacon Act and the Exploitation of Migrant Workers in the Wake of Hurricane Katrina*, 24 HOFSTRA LAB. & EMP. L.J. 145, 145 (2006).

[90] *Id.*

[91] *Id.* at 163-65.

[92] *Id.* at 167-68.

food programs.[93] Many may hesitate to turn to authorities for any aid at all because they fear prosecution for immigration violations.[94]

Finally, people with limited or nonexistent English language skills, who may or may not be otherwise disadvantaged, could face difficulties because they do not understand government-issued communications. Even efforts to translate communications might fail if translators do not pay careful attention to the nuances of language and to words, phrases, and concepts that cannot faithfully be translated from English to other languages.[95] Furthermore, efforts to distribute information to minorities through the Internet will be ineffective for those without computer access or sophisticated computer skills.[96]

As this Part has made clear, there are many populations whose dependencies make them vulnerable to disproportionate harm during disasters. But should society devote resources to protect these vulnerable groups during emergencies? The next Part explores normative responses to this question.

## II. NORMATIVE ARGUMENTS

Emergency preparedness for vulnerable populations raises challenging ethical questions. In the midst of a disaster, how should limited resources be allocated? To what extent should the needs of vulnerable populations be prioritized? For example, if health care providers are overwhelmed by a demand for medical care, should patients be treated simply on a first-come, first-served basis? Should patients be selected for treatment based on their anticipated prognosis? Should patients' social worth be considered in resource allocation decisions? Even the most prominent ethicists acknowledge that these problems are unresolved and have no easy solutions.[97]

The intractability of these questions has not prevented scholars and philosophers from proffering answers. This Part briefly explores several approaches to distributive justice, including utilitarianism,

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[93] INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL., BERKELEY SCH. OF LAW, WHEN DISASTER STRIKES: A HUMAN RIGHTS ANALYSIS OF THE 2005 GULF COAST HURRICANES 25-26 (2006), *available at* http://humanrights.vcop.edu/berkeley/disaster_strikes_version2.pdf.

[94] *Id.* at 26.

[95] Andrulis et al., *supra* note 1, at 1272.

[96] *Id.* (finding that "most resources and materials targeting minorities are disseminated primarily through the Internet").

[97] Norman Daniels, *Four Unsolved Rationing Problems: A Challenge*, 24 HASTINGS CENTER REP. 27, 27 (1994).

equal chances, and the best outcome for the least well off.[98] The purpose of this Part is not to develop a definitive answer to the complex ethical question of whether the disadvantaged should receive priority or disproportionate resources in the midst of a disaster and extreme scarcity. Rather, this Part shows that the difficulty in determining how to allocate scarce resources during disasters necessitates advanced planning. Planning before catastrophic events have struck will diminish the need for government agencies to make difficult moral choices in the midst of emergencies.

### *A. Utilitarianism*

According to utilitarian principles, actions are appropriate if they produce the greatest amount of good for the greatest number of people.[99] Actions need not have similar or identical consequences for all impacted individuals; rather, they must achieve the maximum overall benefit.[100] In the context of triage, the principle of utility might translate into a policy of attempting to save the greatest number of lives and thus to direct treatment to those who are most likely to benefit from it.[101] For example, health care providers may withhold medical resources from individuals considered unlikely to benefit

[98] *See supra* note 30.

[99] J.J. C. SMART & BERNARD WILLIAMS, UTILITARIANISM FOR AND AGAINST 30, 47 (1973) (explaining that under utilitarianism action A is to be chosen over action B if doing A will make mankind happier than doing B and if probable benefit will be maximized); John C. Moskop & Kenneth V. Iserson, *Triage in Medicine, Part II: Underlying Values and Principles*, 49 ANNALS EMERGENCY MED. 282, 284 (2007).

[100] *See* sources cited *supra* note 99.

[101] *See* GERALD R. WINSLOW, TRIAGE AND JUSTICE 63-70 (1982). The author outlines five "ranking principles for triage":

> U-1. The principle of medical success. Priority given to those for whom treatment has the highest probability of medical success.
>
> U-2. The principle of immediate usefulness. Priority given to the most useful under the immediate circumstances.
>
> U-3. The principle of conservation. Priority given to those who require proportionately smaller amounts of the resources.
>
> U-4. The principle of parental role. Priority given to those who have the largest responsibilities to dependents.
>
> U-5. The principle of general social value. Priority given to those believed to have the greatest general social worth.

*Id.* at 105-06; Moskop & Iserson, *supra* note 99, at 283; Nicki Pesik et al., *Terrorism and the Ethics of Emergency Medical Care*, 37 ANNALS EMERGENCY MED. 642, 644 (2001).

significantly from care. Such individuals include those with complicating factors or circumstances that prevent people from thriving, complying with medical protocols, or caring for themselves after treatment, such as multiple illnesses, drug or alcohol abuse, homelessness, or social or behavioral problems.[102] Furthermore, providers might deny care to injured patients who require considerable resources because of underlying infirmities or disabilities in order to save multiple patients who are healthier and require less treatment.[103] Utilitarian principles might militate against prioritizing care for the disadvantaged in an emergency if such individuals would require a disproportionate amount of resources.

Not all philosophers embrace utilitarianism principles. Some commentators criticize utilitarianism on at least three grounds.[104] First, utilitarianism may lead to results that defy moral and ethical values. For example, at its extremes, utilitarianism might lead one to justify killing a single individual in order to transplant her organs in others, saving multiple lives.[105] Second, it can be difficult to predict who will actually benefit most from treatment and who will live the most valuable lives posttreatment.[106] Third, even assuming the ability to predict these subsequent developments, utilitarianism requires unpalatable assumptions about the value of one life over another. For example, is the life of a quadriplegic patient less worth saving than the life of a nondisabled person? How can we assume that the quadriplegic individual does not derive as much pleasure from living, has a shorter life expectancy, or cannot contribute as much to society as others? What if the quadriplegic individual is Stephen Hawking? By contrast, what if the able-bodied person who is saved instead of the quadriplegic is a reckless driver prone to causing life-threatening accidents? Thus, utilitarianism can raise as many questions about distributive justice as it answers.

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[102] Asha V. Devereaux et al., *Definitive Care for the Critically Ill During a Disaster: A Framework for Allocation of Scarce Resources in Mass Critical Care: Tbl. 6*, 133 CHEST J. 51S, 60S (2008) (describing exclusion criteria for triage purposes); Moskop & Iserson, *supra* note 99, at 283; Pesik et al., *supra* note 101, at 644-45.

[103] Moskop & Iserson, *supra* note 99, at 285.

[104] *See* SMART & WILLIAMS, *supra* note 99, at 67-73, 77-150 (critiquing utilitarianism).

[105] Moskop & Iserson, *supra* note 99, at 285.

[106] *Id.* at 284 ("A standard criticism of utilitarianism is that it is often very difficult to predict the consequences of one's actions accurately.").

### *B. Equal Chances*

A second approach to distributive justice is the principle of equal chances. This principle requires health care providers to give each individual an equal chance to survive on the theory that each person's life is equally valuable to him or her.[107] This approach rejects the utilitarian argument that decision makers should calculate the sum of all anticipated benefits and burdens at issue in making treatment determinations.[108]

The philosopher John Taurek presented the following example to illustrate the theory of equal chances:

> I have a supply of some life-saving drug. Six people will all certainly die if they are not treated with the drug. But one of the six requires all of the drug if he is to survive. Each of the other five requires only one-fifth of the drug. What ought I to do?[109]

Taurek concludes that he should give each person an equal chance to survive and flip a coin to decide whether to give the drug to the one person who needs all of it or to the five who need only a fraction of the available amount.[110] The individual requiring all of the medication, like the other five, would have a fifty-fifty likelihood of being saved.[111] For purposes of establishing a disaster triaging policy, Taurek's philosophy would require a first-come, first-served process by which all treatable patients who arrive while resources are available would be given identical priority regardless of whether they need very intensive care or much more limited treatment.[112] In the alternative, a lottery system could be established.[113]

Critics of Taurek's philosophy argue that allowing many to perish in order to save the few is irrational. For example, in an essay entitled *Why the Numbers Should Sometimes Count*, John Saunders presents a hypothetical in which there is a choice between saving a single life and saving ten billion lives.[114] Saunders asks whether even in these

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[107] *Id.* at 286.

[108] *Id.*

[109] John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293, 294 (1977).

[110] *Id.* at 303.

[111] *Id.*

[112] WINSLOW, *supra* note 101, at 98-101 (discussing principle of prioritizing those who arrive first); Moskop & Iserson, *supra* note 99, at 286.

[113] WINSLOW, *supra* note 101, at 101-05 (discussing random selection for triaging purposes).

[114] John T. Saunders, *Why the Numbers Should Sometimes Count*, 17 PHIL. & PUB.

circumstances, Taurek would give the same priority to the single individual as to the ten billion. He argues that if human beings are valuable as human beings, it is only right to attempt to save as many of them as possible and to "count the numbers."[115]

Still, the equal chances principle raises thought-provoking questions as to whether, in the face of scarce resources, the default rule should be to try to save the many and sacrifice the few who need the most care. Do decision makers have a right to establish priorities based on value judgments concerning the worth of human lives? Those who are denied care likely have a fierce will to live and see their lives as immeasurably valuable. Thus, they will suffer intensely from the knowledge that they have been doomed to die while others are saved.

The equal chances theory does not support prioritizing the vulnerable over other disaster victims. Rather, it establishes an ethical nondiscrimination mandate that forbids deeming the disadvantaged to be less eligible for rescue based on the medical, social, or economic resources that they may require during and after disasters.

### *C. The Best Outcome for the Least Well Off*

A third normative argument, the theory of "the best outcome for the least well off," supports prioritizing the needs of vulnerable populations over others. Disadvantaged members of society will likely suffer disproportionate harm in disasters because of poverty, disabilities, isolation, and lack of resources with which to survive and recover.[116] According to this theory, authorities should distribute limited resources unequally in order to maximize benefits for the least well off.[117] Consequently, the least advantaged members of society would receive maximum benefits so that death — the worst outcome and the one most likely to be suffered by the disadvantaged — is avoided if at all possible.[118]

John Rawls articulates the rationale behind this approach in *A Theory of Justice*.[119] Rawls outlines the principles of justice that

AFF. 3, 3-4 (1988).

[115] *Id.* at 13.

[116] Farber, *supra* note 80, at 321 ("[T]he social disadvantages our society treats as ordinary and unremarkable become deadly in dramatic ways during the course of a disaster.").

[117] WINSLOW, *supra* note 101, at 92-98 (discussing approaches of prioritizing medically neediest and those who are generally neediest and most helpless); Moskop & Iserson, *supra* note 99, at 285.

[118] Moskop & Iserson, *supra* note 99, at 285.

[119] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1999).

hypothetical decision makers would choose were they operating behind a "veil of ignorance."[120] These decision makers would not know their own specific circumstances in life, such as their social status, personal strengths, and weaknesses. Consequently, the decision makers would not be prejudiced by their own agendas and expectations in life.[121] Rawls argues that the veil of ignorance would promote procedural justice and would prevent decision makers from exploiting people's diverse social and personal circumstances for their own advantage.[122] Rawls further hypothesizes that these decision makers would wish to maximize benefits for the worst off in the hope of ensuring their own good outcomes if they themselves were to fare poorly one day.[123] Thus, Rawls posits a "difference principle,"[124] according to which unequal distribution of wealth and income is permissible only if it is to the advantage of those who are least fortunate.[125]

Emergencies involving illness and injuries, however, may complicate this approach. The worst off will presumably be the sickest, and their risk of death will be highest. Thus, it is arguably irrational to plan to expend sizeable medical resources on what may well be futile attempts to save them.[126] Nevertheless, the argument that the government should redistribute resources to maximize benefits for the least advantaged is useful in that it emphasizes that some members of society may have greater resources and support networks with which to help themselves during emergencies than others. Thus, in the face of scarcity, officials may be justified in prioritizing the needs of those who are socially, economically, or medically vulnerable because these individuals could suffer particularly acute and long-lasting harm. As one commentator asserts, "Social justice. . . requires action to preserve human dignity for all, particularly those who suffer from systematic disadvantage."[127]

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[120] *Id.* at 118-23.

[121] *Id.* at 118.

[122] *Id.*

[123] *Id.* at 132-33; WINSLOW, *supra* note 101, at 51-52.

[124] RAWLS, *supra* note 119, at 65-70.

[125] *Id.* at 68-70, 175.

[126] Moskop & Iserson, *supra* note 99, at 285.

[127] Lawrence O. Gostin, *Why Should We Care About Social Justice?*, 37 HASTINGS CENTER REP. 3, 3 (2007).

### *D. What Ethics Teaches Us*

Utilitarianism, equal chances, and the best outcome for the least well off constitute three distinct approaches to distributive justice. These ethical theories provide no clear, single answer to the question of how emergency planners and responders should prioritize the needs of various populations and to whom resources should be allocated in the face of scarcity. Because there are no clear answers to these complex moral questions, the optimal approach is to minimize the need for difficult ethical choices, as I argue below.

The utilitarian goal of maximizing the net benefit to society may be intuitively appealing, especially in the context of disasters.[128] However, alternative conceptions of distributive justice also exist. These promote egalitarianism[129] or emphasize the needs of the disadvantaged.[130] Many commentators argue vigorously that considerable resources should be invested in assisting vulnerable individuals such as the poor, institutionalized, and disabled, because they are the least able to withstand the hardships caused by catastrophic events.[131]

Even some proponents of a utilitarian approach find it unethical to consider certain vulnerabilities as factors that influence resource allocation, and thus they offer a hybrid form of utilitarianism. For example, one article categorizes the following considerations as permissible for purposes of making emergency treatment decisions when faced with scarce resources: likelihood, duration, and extent of benefit as well as urgency of need and amount of required resources.[132]

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[128] *See* RAWLS, *supra* note 119, at 20 (describing classical utilitarianism as teaching that "society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it"); Robert Baker & Martin Strosberg, *Triage and Equality: An Historical Reassessment of Utilitarian Analyses of Triage*, 2 KENNEDY INST. ETHICS J. 103, 106 (1992).

[129] *See* Baker & Strosberg, *supra* note 128, at 105 (discussing egalitarianism); *supra* Part II.B. (discussing equal chances theory). Egalitarianism means treating all members of society equally. *See* Baker & Strosberg, *supra* note 128, at 105.

[130] *See supra* Part II.C.

[131] *See* JONATHAN WOLFF & AVNER DE-SHALIT, DISADVANTAGE 3 (2007) (reporting on convergence of views that ideal policy is to "identify the worst off and take appropriate steps so that their position can be improved"); Gostin, *supra* note 127, at 3 (asserting that "[s]ocial justice demands more than fair distribution of benefits and burdens in extreme health emergencies" and that failure to adequately support disadvantaged will "undermine[] social cohesion"); Uscher-Pines et al., *supra* note 6, at 33 (emphasizing that pandemic is likely to "exacerbate existing social and economic inequalities" and is thus "an urgent matter of social justice"); *supra* Part II.C.

[132] Pesik et al., *supra* note 101, at 644.

However, the authors warn that the following factors should not be deemed relevant: "[a]ge, ethnicity, or sex"; "[t]alents, abilities, disabilities, or deformities"; "[s]ocioeconomic status, social worth, or political position"; "[c]oexistent conditions that do not affect short-term prognosis"; "[d]rug or alcohol abuse"; and "[a]ntisocial or aggressive behaviors."[133] Accordingly, decision makers pursuing the goal of maximizing the net benefit to society would focus on short-term outcomes, prioritizing based on resources, need, and benefit considerations but not based on value judgments concerning who is deserving of care or who will live the most valuable lives in the future.

A careful study of American law reveals many instances in which we reject the utilitarian approach. American society has already elected to expend disproportionate resources on assisting the disadvantaged, and thus it is evident that doing so is politically feasible. For example, a large percentage of health care spending occurs at the end of life, often out of the publicly funded Medicare program, when there is little hope of longevity or a long-term high quality of life.[134] Likewise, Medicaid[135] and the State Children's Health Insurance Program ("SCHIP")[136] provide health benefits for the impoverished at public expense, while other Americans must pay out of pocket for insurance policies or remain uninsured.[137] The Americans with Disabilities Act[138] requires reasonable accommodations for individuals with disabilities, even when these impose expenditures upon private

[133] *Id.*

[134] *See* Micah Hartman et al., *U.S. Health Spending by Age, Selected Years Through 2004*, 27 HEALTH AFF. w1, w2 (2007) (stating that per capita spending for those age 85 and older was 5.7 percent higher than spending by working-age individuals in 2004); Christopher Hogan et al., *Medicare Beneficiaries' Costs of Care in the Last Year of Life*, 20 HEALTH AFF. 188, 190 (2001) (reporting that "spending in the last year of life accounted for 27.4% of all Medicare outlays for the elderly"); Donald R. Hoover et al., *Medical Expenditures During the Last Year of Life: Findings From the 1992-1996 Medicare Current Beneficiary Survey*, 37 HEALTH SERVS. RES. 1625, 1631, 1634 (2002) (finding that average annual medical expenditures for Medicare patients' last year of life was $37,581 in 1996 dollars, compared to $7,365 for nonterminal years).

[135] Centers for Medicare & Medicaid Services, Medicaid Program — General Information, http://www.cms.hhs.gov/MedicaidGenInfo (last visited Feb. 21, 2009).

[136] Centers for Medicare & Medicaid Services, Low Cost Health Insurance for Families and Children Overview, http://www.cms.hhs.gov/LowCostHealthInsFam Child/05OriginalSCHIPStatePlan.asp (last visited Mar. 23, 2009).

[137] Wideman v. Shallowford Cmty. Hosp., 826 F.2d 1030, 1032 (11th Cir. 1987) (explaining that there is "no general right, based upon either the Constitution or federal statutes, to the provision of medical treatment and services by a state or municipality").

[138] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (2000).

businesses.[139] Similarly, the Individuals with Disabilities Education Act ("IDEA")[140] requires public schools to provide special education services to children with certain mental and physical disabilities, even though special services are not legally mandated for others, such as gifted students.[141] These examples illustrate a profound commitment to the vulnerable.

Nevertheless, this Article does not attempt to resolve the challenging normative question of whether, in the face of extreme scarcity during an emergency, resources should be allocated disproportionately to the vulnerable while others are allowed to suffer greater deprivation as a result. Rather, I argue that society should focus significant attention on vulnerable populations during emergency planning processes, when planners have the leisure of acting without the pressures of time, chaotic conditions, and an extreme dearth of resources.[142]

Many complicated ethical decisions could in fact be avoided with appropriate emergency response preparation. Response and recovery plans must include provisions to meet the needs of a wide spectrum of vulnerable groups. An essential goal of emergency planning efforts should be to minimize unanticipated and complicated resource allocation problems involving the disadvantaged and vulnerable.[143]

Moreover, disaster readiness for the general population and disaster readiness for the vulnerable are mutually beneficial goals. The best outcomes for the vulnerable are most likely to be achieved with optimal preparation for those without special needs. The more prepared and well equipped the general population is to react appropriately during emergencies and the more the healthy and strong can care for themselves, the more likely it is that resources will be available for the acute needs of the disadvantaged. Advance planning and preparedness initiatives for all populations should aim to curtail the need for difficult moral choices and for sacrificing some victims for the sake of others.

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[139] *See id.* § 12182(b)(2)(A)(iv); *infra* text accompanying note 197.

[140] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-82 (2006) (originally enacted as Education of the Handicapped Act of 1970, Pub. L. No. 91-230, tit. VI, 84 Stat. 175 (1971)).

[141] *Id.*§ 1400 (setting forth findings and purposes section); *id.* § 1411 (authorizing appropriation for purposes of providing special education to children with disabilities); 34 C.F.R. § 300.101 (2008) (establishing requirement for free appropriate public education for children with disabilities).

[142] *See supra* note 4 and accompanying text (explaining that federal government has invested over $10 billion in emergency preparedness initiatives since 2001).

[143] *See infra* Part IV (detailing recommendations designed to promote achievement of this goal).

## III. THE LAW AND VULNERABLE POPULATIONS

The U.S. Constitution, federal law, and state statutes establish numerous obligations to protect vulnerable groups. Several of these are emergency response laws that specifically address disaster response and preparedness for the disadvantaged. Emergency relief planners and responders must recognize and be guided by these mandates. This Part focuses on a variety of general and disaster-specific federal and state provisions that establish nondiscrimination directives and affirmative duties to accommodate the needs of particular at-risk groups.

### *A. General Legal Protections for the Vulnerable*

Many legal provisions establish general protections for a variety of vulnerable groups. These protections apply both in ordinary times and in disasters. Below I analyze federal constitutional and statutory provisions, including the Equal Protection Clause of the Fourteenth Amendment, the Eighth Amendment, the Americans with Disabilities Act, the Rehabilitation Act, and Title VI of the Civil Rights Act of 1964. I also analyze state constitutional and statutory laws and tort theory, all of which generally protect the vulnerable.

#### 1. Federal Protections

Federal protections for the disadvantaged flow from both constitutional provisions and federal statutes. I analyze the content and efficacy of these safeguards below, turning first to constitutional law and then to statutory law.

##### *a. Constitutional Provisions*

The Equal Protection Clause and the Eighth Amendment are the principal sources of constitutional protection for the vulnerable. While plaintiffs have asserted many claims based on these Amendments, constitutional jurisprudence establishes significant obstacles to successful litigation. Despite these obstacles, constitutional mandates serve as an important guide for emergency planners and responders.

###### (1) The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall "deny to any person

within its jurisdiction the equal protection of the laws."[144] The Supreme Court has ruled that the equal protection mandate applies to both state and federal governmental entities.[145] This mandate in principle prohibits group-based discrimination by the government.[146]

The Equal Protection Clause most clearly prohibits race-based discrimination by the government. During the 1970s and 1980s, minority communities brought several successful federal equal protection challenges against municipalities based upon inequitable distribution of public services. In *Hawkins v. Town of Shaw*,[147] the plaintiffs alleged that African Americans occupied nearly ninety-eight percent of homes adjacent to unpaved streets in the town; that ninety-seven percent of homes without sanitary sewer service were in African-American neighborhoods; and that all new mercury vapor street lighting fixtures were installed in white neighborhoods.[148] Based on these facts, the Fifth Circuit found that the town had violated the Equal Protection Clause by providing plaintiffs with inferior governmental services.[149] Similarly, in *Ammons v. Dade City, Florida*,[150] the Eleventh Circuit held that the City's intentional discrimination in the provision of street paving, resurfacing, maintenance, and storm water drainage facilities to black and white communities constituted an equal protection violation.[151] These precedents demonstrate that plaintiffs can assert successful equal protection claims in cases of serious, intentional governmental discrimination. Thus, if authorities deliberately underserve or mistreat a minority community, such as African Americans, during an emergency because of race, that group could have a valid equal protection claim.

Liability for violations of the Equal Protection Clause is not limited to governmental agencies. State officials can be sued in their individual capacities for violating constitutional and civil rights under 42 U.S.C. § 1983.[152] That section provides that "[e]very person who,

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[144] U.S. CONST. amend. XIV, § 1; *see also* U.S. CONST. amend. V (stating that no person shall "be deprived of life, liberty, or property, without due process of law").

[145] *See* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954).

[146] Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2422 (2003) ("Race discrimination is the archetype of the group-based discriminations that the Equal Protection Clause was enacted to forbid.").

[147] 437 F.2d 1286 (5th Cir. 1971).

[148] *Id.* at 1288.

[149] *Id.*

[150] 783 F.2d 982 (11th Cir. 1986).

[151] *Id.* at 983-84.

[152] 42 U.S.C. § 1983 (2000).

under color of any statute, ordinance, [or] regulation . . . of any State . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."[153] The Supreme Court has held that § 1983 applies to federal officials as well.[154]

However, litigants asserting constitutional violations face significant challenges. First, state and federal entities and their employees often enjoy immunity protection. The Eleventh Amendment provides that private citizens cannot sue states for damages in federal court.[155] This principle extends to constitutional claims in state court[156] and to agencies and other arms of the state.[157] All suits for damages or retroactive relief against state governments are barred by the Amendment unless they are brought by a state or the federal government,[158] though Eleventh Amendment immunity does not extend to local government entities.[159] Likewise, the doctrine of federal sovereign immunity protects the United States from being sued without its consent.[160] Furthermore, the defense of qualified immunity shields federal and state government officials who are performing discretionary functions in their official capacities from liability for civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[161] Immunity and qualified immunity thus constitute significant barriers to recovery for constitutional claims.

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[153] *Id.*

[154] *See* Bivens v. Six Unnamed Agents, 403 U.S. 388, 395 (1970) (allowing for damages to redress Fourth Amendment violations by federal officials).

[155] U.S. CONST. amend. XI. The text reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[156] Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts").

[157] Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 463 (1945); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 985 (5th ed. 2003).

[158] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 49 (6th ed. 2000); *see Alden*, 527 U.S. 754; Carlos Manuel Vazquesz, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1685-86 (1997).

[159] Monell v. N.Y. Dep't. of Soc. Servs., 436 U.S. 658, 690 (1978).

[160] FALLON ET AL., *supra* note 157, at 1001.

[161] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Davis v. Scherer, 468 U.S. 183, 191 (1984) (stating that "[w]hether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of [his]

In addition, plaintiffs must assert intentional discrimination rather than disparate impact. Policies or actions that have only a disparate impact on a particular group do not violate the Equal Protection Clause.[162]

Finally, courts do not analyze all unequal treatment cases in the same manner under constitutional standards. Governmental classifications based on race, national origin, or alienage are subject to strict scrutiny by the courts.[163] All other types of classifications receive lower levels of review. For example, courts review sex-based differential treatment under intermediate scrutiny.[164] And classifications based on age and disability are subject to "rational basis" review — the government must show only that such classifications constitute "rational means to serve a legitimate end."[165] Plaintiffs asserting claims that will be assessed under the rational basis standard thus face particularly significant obstacles to successful litigation.

Still, while litigants may have difficulty prevailing in damages suits against governmental entities and employees, the *Hawkins* and *Ammons* cases[166] demonstrate that plaintiff victories are possible. Furthermore, regardless of potential litigation outcomes, the Equal Protection Clause articulates a clear antidiscrimination principle that should guide governmental authorities, including those charged with emergency preparedness and response.

(2) The Eighth Amendment

The Eighth Amendment prohibits the infliction of "cruel and unusual punishment[]"[167] and governs the treatment of incarcerated individuals.[168] While the general population has no right to health care or to have other services provided by the government,[169] prisoners

conduct as measured by reference to clearly established law").

[162] Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

[163] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

[164] *Id.* at 441.

[165] *Id.* at 441-42 (applying rational basis review to invalidate requirement of special-use permit for group home for mentally retarded individuals).

[166] *See supra* notes 147-51 and accompanying text.

[167] U.S. CONST. amend. VIII.

[168] Helling v. McKinney, 509 U.S. 25, 31 (1993); Estelle v. Gamble, 429 U.S. 97, 106 (1976).

[169] Wideman v. Shallowford Cmty. Hosp., 826 F.2d 1030, 1032 (11th Cir. 1987) (explaining that there is "no general right, based upon either the Constitution or

are entitled to food, clothing, shelter, and medical treatment because they are not free to obtain these necessities for themselves.[170] These entitlements are not suspended during disasters. As the Supreme Court has explained:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment . . . .[171]

The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[172]

Like those subject to equal protection violations, prisoners who feel they are the victims of cruel and unusual punishment may bring constitutional claims. Under the Eighth Amendment, prisoners may challenge their treatment in two ways. First, they may challenge specific conduct by prison officials, and second, they may challenge prison policies or regulations. Neither is easy to accomplish. Prisoners aggrieved by specific conduct must show that the conditions of incarceration posed substantial risks of serious harm and that prison officials demonstrated "deliberate indifference" to their health or safety.[173] Inmates must establish that prison officials were aware of and understood the risk at issue and disregarded it.[174] A showing of "deliberate indifference" requires more than evidence of negligence but less than proof of acts or omissions intended to cause harm or perpetrated with knowledge that harm would result.[175]

Likewise, claims based on allegedly unconstitutional prison policies face significant hurdles. Even if policies infringe upon prisoners' constitutional rights, courts will uphold them so long as they are reasonably related to the government's legitimate penological interests.[176] Despite this obstacle, inmates have prevailed in several

federal statutes, to the provision of medical treatment and services by a state or municipality").

[170] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

[171] *Id.*

[172] Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

[173] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[174] *Id.* at 837.

[175] *Id.* at 835.

[176] Turner v. Safley, 482 U.S. 78, 89 (1987) (involving challenges to regulation concerning inmate-to-inmate correspondence, which was upheld, and inmate marriage regulation, which was not). In order to analyze a regulation's

cases challenging prison policies. For example, in *Tillery v. Owen*,[177] the Third Circuit found that prison conditions violated the Eighth Amendment when prisoners were double-celled in "an overcrowded, dilapidated and unsanitary" facility.[178] Similarly, in *French v. Owens*,[179] the plaintiffs alleged that they were subjected to overcrowding and mechanical restraints; that they received inadequate health care, food, and recreation; and that the prison had an insufficient number of safety personnel and failed to comply with fire and occupational safety regulations.[180] The Seventh Circuit found that many of these conditions constituted cruel and unusual punishment that was unacceptable under the Eighth Amendment.[181]

In the context of emergency preparedness, the failure to develop and execute emergency plans may constitute an Eighth Amendment violation. Concededly, ordinary negligence by prison authorities is not a constitutional violation, and most prison regulations are upheld as sufficiently linked to valid penological goals.[182] But if prison authorities do not have or do not follow established emergency plans and abandon prisons en masse, leaving inmates to fend for themselves, as happened after Hurricane Katrina, an Eighth Amendment violation

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reasonableness, a court must consider the following four factors:

> (1) there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) the court should determine whether there are alternative means of exercising the constitutional right that remain open to the inmates; (3) the court is to consider the impact that accommodation of the asserted constitutional right will have on guards, other inmates, and on the allocation of prison resources; and (4) the court should assess whether there are ready alternatives to the prison regulation; the absence of such ready alternatives suggests that the regulation is reasonable while their existence may be evidence of the opposite.

Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990) (quoting *Safley*, 482 U.S. at 89-91) (internal quotations and citations omitted).

[177] 907 F.2d 418 (3d Cir. 1990).

[178] *Id.* at 420.

[179] 777 F.2d 1250 (7th Cir. 1985).

[180] *Id.* at 1251.

[181] *See id.* at 1258 (affirming district court's judgment for plaintiffs based on overcrowding, double-celling, mechanical restraints, and inadequate medical care, kitchen services, and correction officers, and vacating and remanding lower-court judgment insofar as it addressed exercise, recreation, protective custody, and fire and occupational safety); *see also* McCord v. Maggio, 927 F.2d 844, 847 (5th Cir. 1991) (finding that inmate's Eight Amendment rights were violated when he was forced to live in sewage and filthy water).

[182] *See supra* notes 173-76 and accompanying text.

may exist. Similarly, if prison authorities implement irrational policies that have no penological goals and endanger prisoners' lives during an emergency, courts may find them liable for constitutional violations.[183]

*b. Statutory Protections*

Several federal statutes establish antidiscrimination mandates that apply to emergency planning and response activities. These laws, which prohibit discrimination based on disability, race, color, and national origin, include the Americans with Disabilities Act, the Rehabilitation Act, and Title VI of the Civil Rights Act of 1964, all of which are analyzed below.

(1) The Americans with Disabilities Act and the Rehabilitation Act

The Americans with Disabilities Act ("ADA") prohibits disability-based discrimination.[184] The ADA Amendments Act of 2008[185] clarified the definition of "disability" and instructed that the term be interpreted in a broad and inclusive manner.[186] The Rehabilitation Act of 1973[187] provides further protections to the disabled. Together, these acts forbid public and private entities from discriminating against those with disabilities. Moreover, these acts reflect a legislative determination that society should not only eschew discrimination but also furnish accommodations for the needs of the disabled.

The ADA features separate titles that address discrimination by governmental entities and private businesses. Title II of the ADA governs the conduct of public services.[188] Qualified individuals with disabilities[189] may not be denied the benefits of programs, activities, and services, such as public transportation, provided by public

[183] *See* Robbins, *supra* note 73, at 20-40 (arguing that Eighth Amendment provides prisoners with plausible mechanism by which to challenge mistreatment such as that suffered during and after Hurricane Katrina).

[184] 42 U.S.C. §§ 12101-213 (2000).

[185] Pub. L. No.110-325, 122 Stat. 3553 (2008) (codified at 29 U.S.C.A. § 705, 42 U.S.C.A. §§ 12101-103, 12111-114, 12201, 12205a-213).

[186] 42 U.S.C.A. § 12102(4) (2008) ("The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.").

[187] 29 U.S.C. § 794 (2006).

[188] 42 U.S.C. §§ 12131-165 (2000).

[189] In the Title II context, qualified individuals are those "who, with or without reasonable modifications . . . meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131.

entities, nor can they be subjected to discrimination by these entities because of their disabilities.[190] Title II requires public entities to make their services readily accessible to individuals with disabilities unless the actions required to achieve this goal would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."[191] Finally, Title II provides aggrieved individuals with a private cause of action.[192]

Title III of the ADA extends similar mandates to many private entities. This Title addresses the treatment of individuals with disabilities by "public accommodations" and prohibits disability-based discrimination in the provision of goods, services, and other benefits.[193] As defined in the ADA, "public accommodation" is a term of art referring to any private entity whose operations affect commerce.[194] This broad definition includes within its sweep much of the health care industry – pharmacies, insurance companies, health care providers, hospitals, and other service providers.[195] This Title also covers public transportation services provided by private entities.[196] Title III requires covered entities to modify their policies, procedures, architecture, and communication mechanisms to accommodate individuals with disabilities, unless doing so is not readily achievable.[197] These modifications, for example, entail installing ramps for wheelchairs, furnishing TTY phone service for the hearing impaired, or changing attendance or break policies. Like Title II, Title III provides a private cause of action for those whose rights are violated.[198]

The Rehabilitation Act of 1973 preceded the ADA by many years, and it set an important, albeit somewhat narrow, precedent for protection of individuals with disabilities. Section 504 of the Act[199]

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[190] *Id.* § 12132. A "public entity" is defined as (1) a state or local government; (2) an instrumentality of a state or local government; or (3) the National Railroad Passenger Corporation and any other commuter authority. *Id.* § 12131. Damages have been allowed against states in Title II cases. In *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004), the Supreme Court held that private citizens may sue a state under Title II of the ADA to enforce their right of access to a courthouse and that Eleventh Amendment immunity does not bar such an action.

[191] 28 C.F.R. § 35.150(a) (2008).

[192] 42 U.S.C. § 12133.

[193] *Id.* § 12182 (2000).

[194] *See id.* § 12181(7) (2000).

[195] *Id.* § 12181(7)(F).

[196] *Id.* § 12184 (2000).

[197] *See id.* § 12182(b)(2)(A)(iv).

[198] *Id.* § 12188 (2000).

[199] 29 U.S.C. § 794 (2006).

protects individuals with disabilities, though it covers different parties from those to which the ADA applies. The law establishes that qualified individuals with disabilities[200] may not, because of their disabilities, be excluded from, denied the benefits of, or subjected to discrimination by programs and activities that receive federal financial support and those conducted by an executive agency of the United States or the United States Postal Service.[201]

These laws establish strong antidiscrimination and accommodation mandates for those with disabilities. However, Congress has qualified these protections in two significant ways. First, under the ADA and the Rehabilitation Act, covered entities need not accommodate individuals with disabilities if doing so would constitute an undue hardship.[202] Second, Title III of the ADA and section 504 of the Rehabilitation Act establish that covered entities need not allow individuals who pose a direct threat to the health or safety of others to benefit from their goods or services.[203] These qualifications constitute litigation barriers for some plaintiffs.

Establishing violations of these laws by emergency responders will be particularly challenging. Plaintiffs will need to prove that the alleged wrong was due specifically to their disabilities rather than to the chaos of a disaster and that the defendant could have accommodated their needs without undue hardship.[204] Proving undue hardship during a disaster will likely be much easier for defendants than establishing this defense during ordinary times because a disaster will severely strain human and financial resources. In addition, if treating a patient with HIV or tuberculosis under suboptimal emergency conditions would expose the provider or other patients to a significant risk of infection, doctors may be able to prove that a direct

[200] Federal regulations define a qualified person under section 504 as "a handicapped person who meets the essential eligibility requirements for the receipt of . . . services." 45 C.F.R. § 84.3(1)(4) (2008).

[201] 29 U.S.C. § 794(a); *see also* Modderno v. King, 82 F.3d 1059, 1060 (D.C. Cir. 1996) (stating that Office of Personnel Management was subject to section 504 because it was executive agency of United States).

[202] 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 35.150(a) (2008); *id.* § 39.150(a)(2) (2008).

[203] 42 U.S.C. § 12182(b)(3) (defining "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services"); *see* 29 U.S.C. § 794(a) (adopting definition of individual with disability provided in 29 U.S.C. § 705(20) (2006), which includes discussion of direct threat); 28 C.F.R. § 36.208 (2008).

[204] 42 U.S.C. § 12182(b)(2)(A) (establishing undue burden defense).

threat existed.[205] Furthermore, precedent establishes that patients will not be successful in suing health care providers for ADA or Rehabilitation Act violations relating to good-faith medical treatment decisions.[206]

In addition, policies concerning the allocation of medical resources that have a disparate impact on individuals with disabilities may not be actionable. The Supreme Court rejected a disparate-impact challenge in *Alexander v. Choate*,[207] which involved Tennessee's reduction of the number of inpatient hospital days for which Medicaid would pay.[208] Evaluating the restriction under the Rehabilitation Act, the Court upheld the State's fourteen-day limitation even though individuals with disabilities often have more extensive medical needs than others.[209] Since then, few disparate impact claims brought under the ADA or Rehabilitation Act have succeeded.[210]

In spite of these obstacles, plaintiffs might be able to assert successful disability discrimination claims in some circumstances. First, they may succeed in cases of egregious misconduct or conduct based on stereotypes and groundless assumptions about the disabled.[211] For example, if responders deem individuals with disabilities to be of low priority for triaging purposes simply because they have disabilities, they may violate disability rights statutes.[212] Second, aggrieved individuals might be successful in suits that allege deficient emergency response preparation. If emergency readiness

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[205] *See* sources cited *supra* note 203.

[206] Burger v. Bloomberg, 418 F.3d 882, 883 (8th Cir. 2005) ("[A] lawsuit under the Rehab Act or the Americans with Disabilities Act (ADA) cannot be based on medical treatment decisions . . . ."); Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) ("[P]urely medical decisions . . . do not ordinarily fall within the scope of the ADA or the Rehabilitation Act.").

[207] 469 U.S. 287 (1985).

[208] *Id.* at 289.

[209] *Id.* at 303-04.

[210] Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1240 n.101 (2003) ("[E]ven though the ADA explicitly recognizes disparate impact as a cognizable model of discrimination under the Act, almost no ADA disability disparate impact cases exist."). *But see* Sunrise Dev., Inc. v. Town of Huntington, 62 F. Supp. 2d 762, 776-77 (E.D.N.Y. 1999) (concluding that plaintiffs were likely to prevail on claim that zoning restrictions on assisted living facilities had disparate impact on disabled individuals).

[211] *See* NANCY LEE JONES, AMERICAN LAW DIV., CONG. RESEARCH SERV., THE AMERICANS WITH DISABILITIES ACT (ADA): ALLOCATION OF SCARCE MEDICAL RESOURCES DURING A PANDEMIC 14 (2006), *available at* https://www.policyarchive.org/bitstream/handle/10207/2809/RL33381_200060421.pdf?sequence=1.

[212] *Id.*

planners ignore the needs of individuals with disabilities, plaintiffs who find themselves without means of evacuation, communication, or access to other services during an emergency might prevail. Planners operating in the absence of the chaotic circumstances of an actual emergency could find it difficult to establish undue burden as a rationale for their failure to prepare for the needs of individuals with disabilities. However, because of Eleventh Amendment immunity, federal sovereign immunity, and qualified immunity,[213] plaintiffs may not be able to obtain monetary relief from governmental actors involved in emergency preparedness.[214]

It is important to emphasize that the ADA and Rehabilitation Act establish a dual mandate of nondiscrimination and accommodation.[215] These laws require covered entities not only to eschew discrimination, but also to take affirmative steps to accommodate the needs of individuals with disabilities. This dual commitment is particularly important in the context of emergencies, when individuals with physical and mental impairments have many special needs.[216]

(2) Title VI of the Civil Rights Act of 1964

Whereas the ADA and Rehabilitation Acts protect individuals with disabilities from discrimination, Title VI of the Civil Rights Act of 1964 prohibits racial discrimination, broadly defined. The law prohibits programs or activities receiving federal funds from engaging

[213] *See supra* notes 155-61 and accompanying text.

[214] *See* United States v. Georgia, 546 U.S. 151, 159 (2006) ("[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."); Tennessee v. Lane, 541 U.S. 509, 530-31 (2004) (holding that private citizens may sue state under Title II of ADA to enforce their rights of access to courthouse and that Eleventh Amendment immunity does not bar such action). However, it is unclear whether damages could be obtained in Title II cases that do not allege a violation of fundamental rights. *See* Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 465 (2007).

[215] *See supra* notes 184-201 and accompanying text.

[216] Several scholars have argued that the ADA's current reasonable accommodation mandate is insufficient to meet the needs of individuals with disabilities and that further assistance or alternative models must be used to serve the needs of this population. *See generally* Samuel Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004) (arguing for move to social welfare model to address needs of individuals with disabilities, including government assistance such as public funding and public health insurance); Satz, *supra* note 35 (arguing for blending of civil rights and social welfare approaches to disability rights); Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007) (developing "disability human rights paradigm").

in discrimination on the basis of race, color, or national origin.[217] Federal regulations promulgated by a variety of agencies pursuant to Title VI prohibit not only intentional discrimination but also actions that have a disparate impact on covered groups.[218] The statute features administrative enforcement provisions that allow federal agencies, such as the Department of Health and Human Services Office of Civil Rights,[219] to enforce violations of the statute.[220] In *Alexander v. Sandoval*,[221] the Supreme Court held that plaintiffs do not have a private cause of action to litigate disparate-impact cases under Title VI.[222] However, aggrieved individuals retain a private cause of action to challenge intentional violations of the statute.[223]

Because it is very difficult to prove discriminatory intent, plaintiffs have rarely prevailed in disparate treatment cases under the statute.[224] Nevertheless, aggrieved individuals who believe that federally and state-funded programs deliberately denied disaster-related services to them because of their race, color, or national origin may seek relief under Title VI. More importantly, regardless of litigation prospects, these programs should comply with the statutory directives and

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[217] 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[218] *See, e.g.*, 45 C.F.R. § 80.3(b)(2) (2008) (providing that recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination"); *see also* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 n.13 (1983) (noting that "every Cabinet department and about [40] federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination").

[219] *See* Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of* Alexander v. Sandoval, 3 YALE J. HEALTH POL'Y L. & ETHICS 215, 224 (2003).

[220] Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 23, 2000), *reprinted in* 42 U.S.C. § 2000d app. At 4-401 to -403 (2000); Dayna Bowen Matthew, *Disastrous Disasters: Restoring Civil Rights Protections for Victims of the State in Natural Disasters*, 2 J. HEALTH & BIOMEDICAL L. 213, 230 (2006) (stating that "private plaintiffs may prosecute intentional discrimination by bringing disparate treatment claims under Title VI, or plaintiffs may rely upon administrative enforcement through the Office for Civil Rights (OCR)," but noting that, "[o]ver the past decade . . . the OCR's enforcement record has been lackluster, its staff has been reduced, and its budgets have been cut").

[221] 532 U.S. 275 (2001).

[222] *Id.* at 285.

[223] *See id.* at 284; *see also* Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 360-61 (2008).

[224] *See* Rosenbaum & Teitelbaum, *supra* note 219, at 227-29.

ensure that they are not excluding protected groups from enjoying available benefits.

2. State Protections

Like the federal government, the states have enacted legal safeguards to protect the rights of the disadvantaged. Many provisions, including state equal protection clauses, disability laws, and other antidiscrimination mandates, parallel federal laws. In addition, under state common law, aggrieved individuals can sue for recovery based on tort theory. This subpart examines the protections to which vulnerable populations are entitled under state law.

*a. Constitutional and Statutory Provisions*

Many state constitutions establish equality mandates.[225] Fifteen states have equal protection provisions that are similar to the Fourteenth Amendment's Equal Protection Clause.[226] Other states have more specific constitutional provisions, such as ones that prohibit discrimination based on sex or against individuals exercising their civil rights.[227]

All fifty states have statutes that address disability rights, though they vary in scope and content. In general, these state laws prohibit discrimination based on disability and require that individuals with disabilities enjoy access to goods and services and receive needed accommodations.[228]

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[225] *See* Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1055 (2003); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196-97 (1985) .

[226] Shaman, *supra* note 225, at 1055 (listing fifteen constitutional provisions).

[227] Williams, *supra* note 225, at 1196 (stating that majority of state constitutions do not include equal protection clauses, but rather various equality or nondiscrimination provisions that vary in scope and content).

[228] ALA. CODE §§ 21-7-2, -3 (LexisNexis 2006); ALASKA STAT. §§ 18.80.200, .230, .255, 35.10.015 (2006); ARIZ. REV. STAT. ANN. §§ 41-1492.01-.05 (2004); ARK. CODE ANN. §§ 16-123-314(c), 20-14-301 to -303 (2005 & 2006); CAL. CIV. CODE §§ 51(f), 54, 54.1 (West 2007); CAL. GOV'T CODE § 4450 (West Supp. 2008); COLO. REV. STAT. §§ 9-5-103, 24-34-601, 24-34-801 (2007); CONN. GEN. STAT. ANN. §§ 29-269, 46a-64, 46a-71 (West 2004 & Supp. 2008); DEL. CODE. ANN. tit. 6, §§ 4501, 4504 (1999), tit. 16, §§ 9501, 9502 (1995), tit. 29, § 7306 (1997); D.C. CODE ANN. §§ 2-1402.01, .31, .73, 7-1001, 7-1002 (LexisNexis 2008 & Supp. 2008); FLA. STAT. ANN. §§ 413.08(3), 553.501-.513, 760.08 (West Supp. 2008); GA. CODE ANN. §§ 30-3-1 to -9 (2007); HAW. REV. STAT. ANN. §§ 103-50, 347-13, 368-1.5, 489-3 (LexisNexis 1993 & Supp. 2007); IDAHO CODE ANN. §§ 56-702, -703, 67-5909 (2002 & 2006); 775 ILL. COMP. STAT. ANN. §§ 5/5-102, 30/2, 30/3 (West 2001 & Supp. 2008); IND. CODE ANN. §§ 16-

In addition, some states have laws that parallel Title VI and prohibit facilities, programs, and activities receiving state funding from discriminating based on particular classifications. Under these statutes, state funding recipients generally may not discriminate based on disability, sex, age, race, color, religion, national origin, or ancestry.[229]

32-3-1-2, 22-9-1-2, 22-13-4-1, 22-13-4-1.5 (West 2005 & Supp. 2007); IOWA CODE ANN. §§ 216.7, 216C.3, 216C.4 (West 2000 & Supp. 2008); KAN. STAT. ANN. §§ 39-1101, 44-1009(c), 58-1303, 58-1304 (2000, 2005 & Supp. 2007); KY. REV. STAT. ANN. §§ 198B.260, 258.500, 344.120 (West 2006); LA. REV. STAT. ANN. §§ 40:1733, 40:1748, 46:1953, 46:2254, 49:146 (West 1999, 2001 & 2003); ME. REV. STAT. ANN. tit. 5, §§ 4591-92, tit. 17, § 1312, tit. 25, §§ 2701-02 (West 1964 & Supp. 2007); MD. CODE ANN., STATE FIN. & PROC. §§ 2-501 to -511 (West 2006); MD. CODE ANN., PUB. SAFETY § 12-202 (West 2003); MD. CODE ANN., HUMAN SERVICES §§ 7-702, 7-704 (West 2007); MD. ANN. CODE art. 49B, § 5(b) (2007); MASS. CONST. amend. CXIV; MASS. GEN. LAWS ANN. ch. 22, § 13A, ch. 272, § 98 (West 2000 & Supp. 2008); MICH. COMP. LAWS ANN. §§ 37.1102, .1302, .2302, 125.1351, .1361 (West 2001 & 2006); MINN. STAT. ANN. §§ 256C.02, 363A.02, .11, .12, 471.464 -.467 (West 2004, 2007 & 2008); MISS. CODE ANN. §§ 43-6-3 to -5, -101 to -125 (West 2008); MO. ANN. STAT. §§ 8.610-.657, 209.150, 213.065 (West 2000 & 2004); MONT. CODE ANN. §§ 49-1-102, 49-2-304, -308, 49-4-202, -211, 50-60-201(4) (2007); NEB. REV. STAT. §§ 20-126, -127, 81-5, 147 (1997 & 2003); NEV. REV. STAT. ANN. §§ 338.180, 651.070 (LexisNexis 2004 & Supp. 2007); N.H. REV. STAT. ANN. §§ 155:39-b to -d, 167-C:1 to -D:1, 275-C:14, 354-A:16 to -A:17 (LexisNexis 2002, 2008 & Supp. 2007); N.J. STAT. ANN. §§ 10:5-4, -4.1, -12(f) (West Supp. 2008); N.M. STAT. ANN. §§ 28-1-7(F), -7-3 (West 2000); N.Y. PUB. BLDGS. LAW §§ 50-51 (McKinney 1996); N.Y. EXEC. LAW § 296(2) (McKinney Supp. 2008); N.C. GEN. STAT. §§ 168-2, -3, 168A-6, -7, -9 (2007); N.D. CENT. CODE §§ 14-02.4-14, -15, 48-01.2-24 (Supp. 2007); OHIO REV. CODE ANN. §§ 3781.111, 4112.02(G) (West 2006 & Supp. 2007); OKLA. STAT. ANN. tit. 25, § 1402, tit. 61, § 11 (West 2008 & Supp. 2008); OR. REV. STAT. §§ 659A.142(3), .142(4), 447.210-.310 (2007); 43 PA. CONS. STAT. ANN. § 953 (West Supp. 2008); R.I. GEN. LAWS §§ 37-8-15, -15.1, 40-9.1-1, 42-87-2, -3 (1997 & 2006); S.C. CODE ANN. §§ 10-5-250, 43-33-10, -520, -530 (1976 & Supp. 2007); S.D. CODIFIED LAWS §§ 5-14-12, -13, 20-13-23, -23.1, -24 (1994 & 1995); TENN. CODE ANN. §§ 68-120-202, -204 (2006); TEX. REV. HUM. RES. CODE ANN. §§ 121.001, .003 (Vernon 2001 & Supp. 2007); TEX. REV. GOV'T CODE ANN. §§ 469.003, .052 (Vernon 2004); UTAH CODE ANN. §§ 26-29-1 to -3, 62A-5b-103 (2007 & Supp. 2007); VT. STAT. ANN. tit. 9, § 4502(c), tit. 20, § 2902 (Supp. 2007); VA. CODE ANN. §§ 51.5-40, -44 (2005); WASH. REV. CODE ANN. §§ 19.27.031, 49.60.215, 70.84.010,.92.110 - .150 (West 2002, 2005 & 2008); W. VA. CODE ANN. §§ 5-11-9(6), 5-15-4 (LexisNexis 2008); WIS. STAT. ANN. §§ 101.13, 106.52(3) (West 2004 & Supp. 2007); WYO. STAT. ANN. §§ 16-6-501, 35-13-201 (2007).

[229] HAW. REV. STAT. ANN. § 368-1.5 (1993) (noting that no otherwise qualified person with disabilities shall be subjected to discrimination by any program or activity receiving state financial assistance); KY. REV. STAT. ANN. §§ 344.120, .130, .145 (West 2006) (stating facilities supported directly or indirectly by government funds may not discriminate on basis of disability, religion, race, national origin, and sex); LA. REV. STAT. ANN. § 46:2254 (West 2003) (stating no disabled person shall be subjected to discrimination by any program or activity that receives state financial assistance); MO. ANN. STAT. §§ 213.010(15)(e), .065 (West 2004) (establishing that all persons within

These equality, disability discrimination, and civil rights constitutional and statutory provisions, like their federal counterparts, establish important guiding principles for policy makers, including emergency planners and responders. In some cases, they may also create opportunities for aggrieved individuals to pursue remedial action through litigation.[230] However, plaintiffs bringing cases under state law are likely to face immunity and proof problems similar to those that often hinder litigation under the parallel federal provisions.[231]

*b. Common Law Remedies Through Tort*

Another avenue for litigation is tort theory. Plaintiffs who are dissatisfied with the treatment they received in the wake of a disaster may bring negligence suits against emergency planners. The standard of care in any negligence case is fact specific and depends on the particular circumstances at issue. The court must assess whether the defendant "proceed[ed] with such reasonable caution as a prudent man would have exercised under such circumstances."[232]

state are entitled to full and equal use of any place of public accommodation without discrimination based on race, color, religion, national origin, sex, ancestry, or disability and defining "public accommodation" as including any public facility receiving state funds); NEB. REV. STAT. §§ 20-132, -133 (1997) (establishing that all persons within state are entitled to full and equal enjoyment of places of public accommodation, without discrimination based on age, sex, national origin, or religion and defining "public accommodation" as including any public facility supported in whole or in part by public funds); OKLA. STAT. ANN. tit. 25, §§ 1401-02 (West 2008) (providing that it is discriminatory practice "to deny the full and equal enjoyment of the goods, services, accommodations, facilities, privileges and advantages of a place of public accommodation because of race, religion, sex, origin, age or handicap" and that places of public accommodation are establishments supported by government funds); UTAH CODE ANN. §§ 13-7-2, -3 (2005) (establishing that businesses and places of public accommodation may not discriminate against individuals based on "race, color, sex, religion, ancestry or national origin" and defining "public accommodation" as including any facility that receives substantial government support).

230 *See* sources cited *supra* note 229.

231 *See supra* notes 162-61, 204-05, 222, and accompanying text.

232 Vaughan v. Menlove, (1837) 132 Eng. Rep. 490, 492 (C.P.) (affirming jury verdict for plaintiff who was injured when fire that began in defendant's haystack burnt down his house); *see also* Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (Or Is It Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165, 182 (2005) ("[S]tandard of care is defined by reference to a physician using the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing, good medical practice within the area of specialty practice, and reasonable, customary, accepted care under the circumstances.").

Because the standard of care varies based on the particular circumstances at issue, treatment that is adequate for healthy adults may be negligent when provided to vulnerable people with special needs, such as children, elderly persons, or disabled individuals.[233] Thus, emergency response personnel and planners should be aware that the treatment expected under the standard of care for vulnerable populations may be different from what is appropriate for others. Consequently, plaintiffs with special needs may find it easier to prove negligence or gross negligence[234] because response protocols that are acceptable for the general population could be egregiously inadequate for vulnerable individuals.[235]

As is the case under statutory law, however, many parties, such as governmental actors and volunteers, will enjoy various degrees of immunity for tort actions associated with discretionary good faith emergency response activities.[236] Immunity, however, generally is not granted for gross negligence and willful misconduct.[237] Furthermore, officials may be exposed to liability if they are not performing discretionary functions, for example, when they fail to follow clear instructions in detailed emergency plans that do not require significant judgment calls on the part of implementers.[238] The issue of liability and immunity in public health emergencies is discussed at length in my prior work and will not be repeated here.[239]

### *B. Emergency Statutes Addressing the Needs of Vulnerable Populations*

The constitutional, statutory, and common law protections discussed above[240] are general mandates that should not be suspended during emergencies. However, because a number of legislatures have recognized that the disadvantaged will have acute needs during and after disasters, some emergency laws include provisions specifically addressing the treatment of vulnerable populations. This subpart

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[233] *See supra* Part I (discussing needs of various vulnerable populations).

[234] *See supra* note 66 (defining gross negligence).

[235] *See supra* Part I.D (discussing special needs of children).

[236] Sharona Hoffman, *Responders' Responsibility: Liability and Immunity in Public Health Emergencies*, 96 GEO. L.J. 1913, 1937-49 (2008).

[237] *Id.*

[238] *See* Gordon v. City of Henderson, 766 S.W.2d 784, 786-87 (Tenn. 1989) (preserving negligence claims alleging that firemen were intoxicated and absent from their duty station because these failures did not fall within "discretionary function" exception of Tennessee Governmental Tort Liability Act).

[239] Hoffman, *supra* note 236, at 1913-69.

[240] *See supra* Part III.A.

surveys federal and state emergency statutes that establish relevant mandates for the planning, response, and recovery phases of disasters.

1. Federal Law and Executive Action

The Pandemic and All-Hazards Preparedness Act was passed by Congress in December of 2006 in reaction to the failures of the Hurricane Katrina response efforts.[241] The law added a provision entitled "At-risk individuals" to the Public Health Service Act.[242] It considers the "public health and medical needs of at-risk individuals"[243] to be a national goal. The Act defines "at-risk individuals" as "children, pregnant women, senior citizens and other individuals who have special needs in the event of a public health emergency, as determined by the Secretary of Health."[244] The Act also allows for, but does not require, the appointment of a Department of Health and Human Services ("HHS") "Director of At-Risk Individuals" for emergency preparedness purposes.[245] Beyond these general directives, the statute provides little guidance as to how to achieve its preparedness goal.[246]

[241] Pandemic and All-Hazards Preparedness Act of 2006, Pub. L. No. 109-417, 120 Stat. 2831 (codified in scattered sections of 42 U.S.C.); James G. Hodge et al., *The Pandemic and All-Hazards Preparedness Act: Improving Public Health Emergency Response*, 297 JAMA 1708, 1708 (2007).

[242] 42 U.S.C. § 300hh-16 (2006).

[243] *Id.* § 300hh-16(1).

[244] *Id.* § 300hh-1(b)(4)(B) (2006).

[245] *Id.* § 300hh-16.

[246] The provision instructs that the Secretary and a possible appointee, the Director of At-Risk Individuals, shall:

> (2) assist other Federal agencies responsible for planning for, responding to, and recovering from public health emergencies in addressing the needs of at-risk individuals;
>
> (3) provide guidance to and ensure that recipients of State and local public health grants include preparedness and response strategies and capabilities that take into account the medical and public health needs of at-risk individuals in the event of a public health emergency, as described in section 247d-3a(b)(2)(A)(iii) of this title;
>
> (4) ensure that the contents of the strategic national stockpile take into account at-risk populations as described in section 300hh-10(b)(3)(B) of this title;
>
> (5) oversee the progress of the Advisory Committee on At-Risk Individuals and Public Health Emergencies established under section 247d-6(b)(2) of this title and make recommendations with a focus on opportunities for action based on the work of the Committee;

An older law, the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), enacted in 1988, establishes a broad nondiscrimination mandate to protect vulnerable populations.[247] It enables the President to declare an emergency or major disaster.[248] A federal emergency may be declared at the request of a governor[249] or, in some circumstances, at the President's own initiative.[250] Section 308 of the Stafford Act[251] empowers the President to issue regulations to govern the provision of federal assistance at the location of major disasters and emergencies. These regulations, however, must ensure that authorities accomplish relief activities "without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status."[252] Federal governmental entities and other organizations supplying or receiving disaster assistance must comply with the regulations that the President promulgates.[253] Section 308, however, does not establish a private cause of action for violations, and no court thus far has found that an implied cause of action exists.[254] Nevertheless, its nondiscrimination mandate is expansive, extending to English proficiency and economic status, classifications that are not covered by other federal laws and not traditionally deemed to be protected within the American legal system.

In the aftermath of Hurricane Katrina, Congress passed the Post-Katrina Emergency Management Reform Act of 2006, which created the position of Disability Coordinator in FEMA to aid in disaster

> (6) oversee curriculum development for the public health and medical response training program on medical management of casualties, as it concerns at-risk individuals as described in subparagraphs (A) through (C) of section 247d-16(a)(2) of this title; [and]
>
> (7) disseminate novel and best practices of outreach to and care of at-risk individuals before, during, and following public health emergencies.

*Id.*

[247] 42 U.S.C. §§ 5121-5207 (2000).

[248] *Id.* §§ 5170, 5191.

[249] *Id.* § 5191(a).

[250] *Id.* § 5191(b). Such an emergency was declared by President Clinton after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995. *See* Letter from Bill Clinton, President, to James Lee Witt, FEMA Dir. on Disaster Assistance to Okla. City (Apr. 19, 1995) (http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=1995_public_papers_vol1_misc&page=553&position=all).

[251] 42 U.S.C. § 5151.

[252] *Id.* § 5151(a).

[253] *Id.* § 5151(b).

[254] Farber, *supra* note 80, at 310-11.

planning for individuals with disabilities.[255] More specifically, the Coordinator is tasked with the following duties: (1) interact with relevant government agencies regarding the needs of the disabled; (2) consult with organizations representing the interests of the disabled; (3) disseminate best practices and model evacuation plans; (4) develop training material concerning the needs of individuals with disabilities in a disaster; (5) promote accessibility of communication mechanisms, such as telephone hotlines, television and other programming, and websites with information about disaster relief; (6) ensure that accessible transportation is available for the disabled; and (7) work to ensure that appropriate post-event residence and relocation options are available for those with disabilities.[256] The law is detailed and provides considerable guidance for the responsible official as to first steps that should be taken to protect the disabled community in case of disaster. It does not, however, cover any at-risk groups other than the disabled. The Act does not mandate any similar planning efforts for minorities, children, the impoverished, and others.

Individuals with disabilities are also the subject of an executive order designed to provide them with additional protection. On July 22, 2004, President Bush issued Executive Order 13,347, entitled "Individuals with Disabilities in Emergency Preparedness," which promotes consideration of the safety and security of the disabled during emergencies[257] and establishes the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities in the Department of Homeland Security.[258] The Department of Homeland Security also expressed concern about individuals with disabilities in 2006 and issued a report finding that they were inadequately integrated into emergency readiness plans.[259]

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[255] 6 U.S.C. § 321b(a) (2006); Press Release, FEMA, Cindy Daniel Named FEMA's Disability Coordinator (June 21, 2007) (http://www.fema.gov/news/newsrelease.fema?id=37220).

[256] 6 U.S.C. § 321b(a).

[257] Exec. Order No. 13,347, 69 Fed. Reg. 44,573 (July 22, 2004), *available at* http://edocket.access.gpo.gov/cfr_2005/janqtr/pdf/3CFR13347.pdf.

[258] *Id.*; *see* INTERAGENCY COORDINATING COUNCIL ON EMERGENCY PREPAREDNESS AND INDIVIDUALS WITH DISABILITIES, U.S. DEP'T OF HOMELAND SEC., INDIVIDUALS WITH DISABILITIES IN EMERGENCY PREPAREDNESS EXECUTIVE ORDER 13347: PROGRESS REPORT JULY 2005 – SEPTEMBER 2006, at 6, *available at* http://www.disabilitypreparedness.gov/pdf/icc_0506_progress.pdf (last visited Apr. 10, 2009) (reporting on preparedness progress achieved through Council's efforts).

[259] U.S. DEP'T OF HOMELAND SEC., NATIONWIDE PLAN REVIEW PHASE 2 REPORT 41, 46-47 (2006), *available at* http://www.dhs.gov/xlibrary/assets/Prep_NationwidePlanReview.pdf.

The Department of Justice ("DOJ") has similarly stepped in to provide government agencies with guidance as to emergency preparedness for the disabled. In the same year that President Bush signed his executive order, the DOJ issued guidance for local governments entitled "Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities."[260] That document urged governmental entities to include individuals with disabilities in planning efforts.[261] It also suggested the establishment of a voluntary and adequately confidential registry of people with disabilities so that local officials can provide individual assistance to those in need.[262] In particular, it emphasized planning requirements in the following areas that impact people with disabilities: (1) methods of communication must include both visual messages and audio announcements so that they are usable by people with visual and hearing impairments; (2) evacuation plans should be designed to accommodate individuals with mobility, vision, hearing, cognitive, and mental health impairments; (3) planners should identify all accessible modes of transportation, such as lift-equipped buses, that could be available during an emergency; (4) shelters must be fully accessible, staffed with individuals who are educated about the special needs of individuals with disabilities (e.g., mobility assistance, help dressing, and communication), equipped with refrigeration, back-up power, and other necessities for people who need medication or assistive devices (e.g., wheel chairs), and willing to house service animals even if pets are generally disallowed; and (5) facilities and trailers that will temporarily house individuals with disabilities must be accessible and appropriately equipped.[263]

2. State Law

All states have their own emergency laws, which enable governors or other state authorities to declare state emergencies.[264] A

[260] U.S. Department of Justice, An ADA Guide for Local Governments: Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities, http://www.usdoj.gov/crt/ada/emergencyprepguide.htm (last visited Mar. 31, 2009).

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] HEALTH RESOURCES & SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS., EMERGENCY SYSTEM FOR ADVANCE REGISTRATION OF VOLUNTEER HEALTH PROFESSIONALS (ESAR-VHP) — LEGAL AND REGULATORY ISSUES 24 (2006), *available at* ftp://ftp.hrsa.gov/bioterror/May_06_Legal_Report.pdf [hereinafter ESAR-VHP]. For a

comprehensive review of state emergency statutes reveals that some contain provisions focusing on vulnerable populations, though these statutes vary widely in scope and content. However, emergency statutes in over half the states contain no reference to vulnerable populations.[265]

A few states have adopted antidiscrimination provisions that apply specifically to disaster relief activities.[266] These protect vulnerable populations by prohibiting discrimination based on race, color, religion, sex, age, national origin, ancestry, and economic status, and they prohibit discrimination by individuals or entities furnishing disaster relief services.[267]

Some states have taken steps to ensure that the disabled are specifically considered in the course of emergency planning efforts. A number of state provisions instruct in relatively general terms that planning initiatives should be undertaken.[268] Several states provide for the appointment of state officials with responsibility for individuals with disabilities.[269] Three states have established registries of disabled people.[270] Individuals are encouraged to register prior to disasters so that they can more easily receive assistance.[271] Other states specifically address the need for accessible shelters,[272] telecommunication,[273]

list of state laws and their definitions of "emergency" or "disaster," see *id.* at 79-89 app. B.

[265] *See infra* notes 266-79 and accompanying text (describing existing statutory provisions).

[266] CONN. GEN. STAT. ANN. § 28-15 (West 2003); N.C. GEN. STAT. ANN. § 166A-12 (West 2007); UTAH CODE ANN. § 26-8a-501(1) (West 2007) (prohibiting discrimination only in provision of emergency medical services).

[267] *See* sources cited *supra* note 266.

[268] ALA. CODE § 31-9B-3 (LexisNexis 2006); CAL. GOV'T CODE § 8589.6 (West 2005); FLA. STAT. ANN. § 252.356 (West Supp. 2008); MD. CODE ANN. STATE GOV'T § 9-2403 (West 2004) (focusing only on deaf and hard of hearing); N.Y. EXEC. LAW § 22(2)(b)(12) (West Supp. 2008).

[269] CAL. GOV'T CODE § 8588.15 (West Supp. 2008); R.I. GEN. LAWS § 30-15-6 (Supp. 2007); Press Release, Agency for Persons with Disabilities, Florida Officials Announce Chip Wilson as Statewide Disability Coordinator (Nov. 5, 2007) (http://www.apd.myflorida.com/news/2007/statewide-disability-coordinator-announced.htm).

[270] CAL. GOV'T CODE § 8589.6(b)(2); FLA. STAT. ANN. § 252.355 (West Supp. 2008); N.Y. EXEC. LAW § 23-a (West 2002); *see also* New Jersey Office of Emergency Management, Now's the Time to Get "Hurricane Ready" and Sign Up for NJ's Special Needs Registry for Disasters, http://www.capemaycountygov.net/Cit-e-Access/webpage.cfm?TID=5&TPID=9194 (indicating that six New Jersey counties have created voluntary, special needs registries for people with disabilities that will be used during disasters).

[271] *See* sources cited *supra* note 270.

[272] FLA. STAT. ANN. § 252.385(2)(b) (West Supp. 2008).

informational materials and educational outreach,[274] or for evacuation plans designed to accommodate individuals with disabilities.[275]

Finally, some states also address disaster relief planning for other vulnerable populations. Connecticut focuses on inmates of state institutions and children in schools.[276] Other states focus on welfare recipients or low-income residents,[277] elderly people,[278] and individuals with limited English language proficiency.[279]

## IV. RECOMMENDATIONS FOR AMENDING EXISTING LAW TO IMPROVE ASSISTANCE FOR VULNERABLE POPULATIONS IN DISASTERS

Successful response efforts are dependent upon effective planning and preparedness initiatives. The question of how best to plan for the needs of various vulnerable groups during disasters is not new. Many experts have given the matter considerable thought and delineated

[273] CONN. GEN. STAT. ANN. §§ 28-24(a)(1), -25b(b) (West Supp. 2008); OR. REV. STAT. ANN. § 401.773 (West 2007).

[274] FLA. STAT. ANN. § 252.35(2)(a),(i)-(j) (West Supp. 2008); ME. REV. STAT. ANN. tit. 37-B, § 704 (Supp. 2007); OKLA. STAT. ANN. tit. 63, § 6701 (West 2004).

[275] 430 ILL. COMP. STAT. ANN. 130/1 to /125 (West 2004) (requiring owners of high rise buildings to plan for evacuation of disabled occupants during disaster and make their plans available to police); OR. REV. STAT. ANN. § 401.272 (West 2007) (providing that Office of Emergency Management shall develop plan for safely evacuating service animals and people who use them, with emphasis on protecting human life).

[276] CONN. GEN. STAT. ANN. § 28-9(e) (West Supp. 2008) ("The governor shall take appropriate measures for protecting the health and safety of inmates of state institutions and children in schools.").

[277] DEL. CODE ANN. tit. 31, § 521 (1997) (directing state to provide funding for welfare-receiving households in disasters, including emergency shelter, mortgage or rent assistance, and other costs relating to self-sufficiency of household); D.C. CODE ANN. § 7-2231.08 (LexisNexis 2008) ("The Agency shall also pay particular attention to the needs of senior citizens and low-income residents in establishing an effective homeland security public warning and information capability."); ME. REV. STAT. ANN. tit. 22, § 3761 (2004) (allowing state to provide assistance to needy families with children who are deprived of basic necessities because of emergency); N.Y. EXEC. LAW § 22(2)(b)(12) (West Supp. 2008) (stating state disaster plan should pay particular attention to needs of poor).

[278] D.C. CODE ANN. § 7-2231.08 (LexisNexis 2008) (requiring special attention to needs of senior citizens); ME. REV. STAT. ANN. tit. 37-B, § 704 (addressing provision of educational material to elderly); N.Y. EXEC. LAW § 22(2)(b)(12) (West Supp. 2008) (recommending state disaster plan to pay particular attention to needs of elderly).

[279] CAL. GOV'T CODE § 8589.6(b)(2) (West 2005) (establishing registries for those with English language deficiencies and elderly persons); FLA. STAT. ANN. § 252.35(2)(j) (requiring establishment of educational outreach program); ME. REV. STAT. ANN. tit. 37-B, § 704 (addressing provision of educational material to this population).

careful suggestions.[280] However, thus far, specific planning guidelines have generally not been adopted as legal requirements that are bolstered by political accountability and enforcement mechanisms. This Part analyzes the shortcoming of American law insofar as it addresses the needs of vulnerable populations in disasters. It then develops recommendations to address the current gaps and shortcomings of the law. It is only with educated, sensitive, and responsible planning that we can avoid repeating the many failures that the disadvantaged have suffered in past disasters.

### *A. Where Existing Law Falls Short*

While numerous legal provisions establish equality and nondiscrimination mandates as well as affirmative duties towards vulnerable populations, these laws are insufficient to protect the needs of the vulnerable during disasters. In principle, these mandates and duties apply both in ordinary times and during emergencies.[281] As discussed in Part III, these include the Equal Protection Clause, the Eighth Amendment, the ADA, the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, and state constitutional equal protection provisions, disability laws, and civil rights statutes.[282] With all these laws in place, it might be tempting to argue that vulnerable populations already have adequate legal protections. Unfortunately, the difficulty litigants have in vindicating their rights under current law[283] necessitates more rigorous protection.

Relying on litigation as the primary safeguard for the rights of the disadvantaged raises at least four significant concerns. First, those who die or are permanently disabled as a result of emergency responders' acts or omissions can never be made whole, even if they are able to prove liability. Second, various sources of immunity protect governmental actors, volunteers, and others from liability related to disaster response activities.[284] Third, juries might believe that under chaotic, exigent circumstances, responders performed as well as possible, that response shortcomings must be forgiven, and that inequities were inevitable. Fourth, the disadvantaged might not be able to afford to litigate claims to vindicate their rights.

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[280] *See infra* Part IV.B (discussing recommendations offered by preparedness experts).

[281] *See supra* Part III.A.

[282] *See supra* Part III.A.

[283] *See supra* Part III.

[284] *See* Hoffman, *supra* note 236, at 1937-54; *supra* notes 155-61 and accompanying text.

Consequently, litigation is unlikely to provide adequate relief to aggrieved parties in the aftermath of a disaster.

In light of these limitations, some legislatures have recognized that appropriate planning is of critical importance to the disadvantaged. These legislatures realize that prospectively preventing harm to the vulnerable is vastly superior to relying on a retroactive remedial system. As a result, a limited number of relevant federal and state preparedness provisions have been enacted.[285] Unfortunately, they fall far short of providing a comprehensive protection scheme.

The federal and state laws constitute a patchwork of legislation that leaves many gaps and unanswered questions. For example, the Pandemic and All-Hazards Preparedness Act ("PAHPA") allows for the optional appointment of a "Director of At-Risk Individuals" in the Department of Health and Human Services but does not require this appointment.[286] It also provides no guidance as to how this official is to achieve preparedness goals.[287] The Post-Katrina Emergency Management Reform Act of 2006 mandates that FEMA must have a Disability Coordinator but does not address preparedness for any other vulnerable population.[288] Moreover, state protections vary widely. While some states require a limited number of emergency planning initiatives for vulnerable populations,[289] other states ignore the topic of emergency preparedness for the disadvantaged altogether.[290] No state provides a comprehensive preparedness approach.

Existing laws do not consistently designate officials who will be responsible for emergency preparedness for the disadvantaged and who will be publicly accountable in case of failures. Nor do the statutes provide extensive, detailed guidance as to what steps should be taken to address the needs of vulnerable populations in disasters. Without mechanisms to ensure accountability and without specific requirements, appropriate preparedness is unlikely to be accomplished. In the absence of strong statutory mandates, vulnerable populations, who often have weak political voices,[291] may not represent a priority for emergency planners. Consequently, further legislative intervention is needed.

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[285] *See supra* Part III.B.

[286] 42 U.S.C. § 300hh-16 (2006).

[287] *Id.*

[288] 6 U.S.C. § 321b(a) (2006).

[289] *See supra* Part III.B.2.

[290] *See supra* Part III.B.2.

[291] Law & Ensminger, *supra* note 25, at 81.

### *B. Specific Recommendations*

A critically important mechanism for the promotion of the interests of disadvantaged communities is federal and state emergency response legislation. Both federal and state laws addressing emergency preparedness for vulnerable populations should be revised and strengthened to maximize disaster readiness. The suggested legal interventions are designed to bolster accountability and ensure that specific tasks are undertaken to promote the interests of the disadvantaged during disasters.

#### 1. Enhancing Accountability

Federal and state statutes should require the designation of officials with specific responsibility for vulnerable groups in emergencies. Government officials who are required by law to engage in various planning activities are likely to be motivated to achieve preparedness goals because they will be judged based on their performance. Administrations that fail in their planning and response efforts may suffer serious political consequences, and individual officials may lose their jobs, as was the case after Hurricane Katrina.[292]

Federal law should thus provide for greater accountability. Congress should amend PAHPA to require the appointment of a Director of At-Risk Individuals rather than leaving such an appointment to the discretion of the Health and Human Services Secretary.[293] Following the example of the Post-Katrina Emergency Management Reform Act of 2006, PAHPA or associated federal regulations should also develop more detailed requirements as to the tasks that the Director must accomplish.[294] Under PAHPA, the Secretary was obligated to submit a report to Congress concerning preparedness progress by December 19, 2007.[295] Such reports should be required on an annual basis and should be publicly available.

PAHPA, however, is not the only federal law that must be amended in order to provide comprehensive protection to vulnerable

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[292] Christine Hauser, *Three Days After Losing Katrina Duties, FEMA Chief Resigns Post*, N.Y. TIMES, Sept. 12, 2005, http://www.nytimes.com/2005/09/12/national/nationalspecial/12cnd-fema.html.

[293] 42 U.S.C. § 300hh-16 (2006).

[294] *See supra* notes 255-56 and accompanying text; *see also infra* Part IV.B.2 for suggestions as to specific requirements.

[295] 42 U.S.C. § 300hh-16(8); DEP'T OF HEALTH & HUMAN SERVS., PANDEMIC AND ALL HAZARDS PREPAREDNESS ACT PROGRESS REPORT 14-16 (2007), *available at* http://www.hhs.gov/aspr/conference/pahpa/2007/pahpa-progress-report-102907.pdf.

populations in disasters. The Act governs only one type of disaster — public health emergencies.[296] It is important that federal legislation require preparedness planning for a wide range of federally declared disasters.[297] Congress should therefore amend the more broadly applicable Post-Katrina Emergency Management Reform Act as well.[298] The statutorily established position of FEMA Disability Coordinator[299] should be expanded to encompass coordination of emergency preparedness for all vulnerable populations and not solely for individuals with disabilities.[300] The statute should include a detailed list of tasks that addresses not only the needs of individuals with disabilities,[301] but also those of other vulnerable populations,[302] and should require publicly available annual progress reports.

The state emergency statutes should also require the appointment of officials with specific responsibility for at-risk groups, because not all emergencies will be declared at the federal level.[303] Furthermore, the activities of state and local responders may reach more individuals than the assistance of federal authorities. Designated state officials with explicit responsibility for vulnerable populations will be accountable if they fail to perform their assigned duties and could suffer job loss or political backlash. However, in order to be effective, offices in charge of planning for at-risk populations would need to be well funded and staffed, and thus, legislation must provide for adequate financial appropriations.

2. Detailed Planning Guidance

The federal and state emergency laws that address disaster readiness for vulnerable populations should provide detailed requirements to guide the work of the designated governmental authorities, whom I will call vulnerable populations coordinators ("VPCs"). The Post-Katrina Emergency Management Reform Act's

[296] 42 U.S.C. § 247d(a) (2006).

[297] *See supra* notes 248-50 and accompanying text (discussing Stafford Act, which authorizes President to declare national emergencies that are not public health emergencies).

[298] 6 U.S.C. § 321b(a) (2006).

[299] *Id.*

[300] *Id.*

[301] *See id.*

[302] *See infra* Part IV.B.2 for suggested requirements.

[303] ESAR-VHP, *supra* note 264, at 24. For a list of state laws and their definitions of "emergency" or "disaster," see *id.* at 79-89 app. B.

list of duties[304] and DOJ guidance[305] can serve as a strong foundation for statutory requirements regarding individuals with disabilities. For recommendations concerning other vulnerable groups, legislators can turn to existing state emergency laws[306] and proposals formulated by experts in the field.

General guidance can be drawn from the report of a panel of twenty-four experts from eleven countries who met in Bellagio, Italy, in July 2006.[307] They were tasked with formulating recommendations to mitigate and prevent unjust outcomes for the world's disadvantaged in the event of a pandemic influenza outbreak.[308] The experts, who became known as the "Bellagio Group," created a "Checklist for Pandemic Influenza Preparedness and Response Plans" consisting of three action items for emergency planners: (1) identify traditionally disadvantaged populations and those likely to be disproportionately harmed by a pandemic; (2) involve these groups in planning initiatives; and (3) identify and address the needs of vulnerable populations likely to arise from a pandemic.[309]

Many advocates and scholars have applied similar criteria to formulate more detailed recommendations for vulnerable groups. For example, experts have stressed the importance of obtaining input directly from affected communities.[310] Federal and state officials should be statutorily required to consult with representatives of the various vulnerable populations because these individuals may be in the best position to assess and articulate their needs.[311] Representatives could be chosen from among the leadership of major advocacy organizations, such as the National Council on Disability and the AARP.

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[304] 6 U.S.C. § 321b(b) (2006).

[305] *See supra* notes 260-63 and accompanying text.

[306] *See supra* Part III.B.2.

[307] Uscher-Pines et al., *supra* note 6, at 33.

[308] *Id.*

[309] *Id.*

[310] Andrulis et al., *supra* note 1, at 1274 (reporting that some state and local government agencies have also involved minority groups in discussions concerning how best to communicate with and serve particular communities in emergencies); Uscher-Pines et al., *supra* note 6, at 33.

[311] *See* 6 U.S.C. § 321b(b)(3) (2006) (requiring Disability Coordinator to consult "with organizations that represent the interests and rights of individuals with disabilities about the needs of individuals with disabilities in emergency planning requirements and relief efforts"). In the case of children, undocumented persons, and prisoners, it will most likely be necessary to rely upon advocates who represent their interests rather than members of these populations themselves.

Statutes should also obligate VPCs to ensure that modes of communication, educational materials, shelters, transportation, medical supplies, and other resources are accessible to disabled, elderly, or impoverished individuals, children, those who are not proficient in English, and others who are disadvantaged.[312] More specifically, with respect to children, the statutes should list the following goals, recommended by the Institute of Medicine: (1) establish protocols to minimize separations between parents and children and expedite reunions in case of unavoidable separations; (2) improve pediatric expertise among health care providers involved in emergency response activities; (3) develop pediatric surge capacities; (4) supply social, medical, and mental health services that are appropriate for children; and (5) at least every two years conduct disaster drills that include a hypothetical pediatric mass casualty event.[313] In addition, to protect elderly and disabled individuals with limited mobility, the statutes should require support for homebound individuals and the provision of home health care services, to the extent possible.[314]

VPCs should also be required to safeguard the welfare of ethnic minorities and those with language barriers through specific measures. These include the following steps: (1) promoting culturally sensitive, accurate, and easily understood translation of written and verbal communication; (2) increasing use of technology, such as audio and video tools for those with poor reading comprehension; (3) conducting tabletop training exercises geared towards minority communities that address issues such as distrust of governmental authorities,[315] availability of translators, and other culturally relevant issues; and (4) creating centralized information resources that enable agencies and organizations serving minorities to access appropriate materials and experts.[316]

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[312] *Id.* § 321b(b) (requiring FEMA Disability Coordinator to promote accessibility of communication mechanisms, transportation, and temporary housing).

[313] INST. OF MED., *supra* note 16, at 239.

[314] Aldrich & Benson, *supra* note 50, at 3.

[315] Some individuals may distrust government authorities based on their personal experiences or their identification with a group that has been historically oppressed. African Americans, for example, may distrust government-provided medical services because of a long history of abuses, including the Tuskegee syphilis trial. *See* Sharona Hoffman, *"Racially-Tailored" Medicine Unraveled*, 55 AM. U. L. REV. 395, 426-27 (2005). Illegal aliens may distrust offers of government assistance in disasters because they fear being prosecuted for immigration violations. *See supra* notes 93-94 and accompanying text.

[316] Andrulis et al., *supra* note 1, at 1275-77.

The vulnerable populations for which VPCs are responsible should include prisoners. The VPCs should oversee efforts to develop plans for the efficient and safe evacuation of prisons and jails,[317] ensuring that prison authorities conduct disaster drills, coordinate across departmental lines, and have designated facilities that can receive evacuees who are inmates.[318]

Emergency statutes should also address the creation of voluntary registries to store information about those who are most likely to be isolated and to lack mobility and communication modes during an emergency. These include individuals with disabilities,[319] elderly persons, and those with English language barriers.[320] Registries would allow responders to locate those with special needs and would facilitate efforts to reach them for purposes of evacuation or delivery of information and supplies. Both local authorities and advocacy organizations should educate at-risk communities about the registries and encourage individuals to provide the necessary information. Although data would be accessible to authorized individuals during emergencies, registry operators would need to implement safeguards so that confidentiality is maintained. Vulnerable people are unlikely to register if they believe that their identities, medical conditions, and contact information might be sold to marketers or disclosed to other third parties.

Widespread use of electronic health record systems would significantly enhance the efficacy of registries, enabling optimal treatment of victims once they are located.[321] These systems would prevent medical records from being lost, allow responders to locate critical information through electronic searches, alert clinicians to patients' medical histories, allergies, or drug lists, and facilitate treatment in many other ways.[322]

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[317] *See* AM. CIVIL LIBERTIES UNION, *supra* note 75, at 10-11.

[318] *Id.* at 11; *see also* DEP'T OF HEALTH & HUMAN SERVS., CORRECTIONAL FACILITIES PANDEMIC INFLUENZA PLANNING CHECKLIST 1-8 (2007), *available at* http://www.pandemicflu.gov/plan/workplaceplanning/correctionchecklist.pdf.

[319] New Jersey Office of Emergency Management, *supra* note 270 (reporting that six New Jersey counties have created voluntary, special needs registry for people with disabilities that will be used during disasters).

[320] *See supra* notes 270 and 279 and accompanying text (discussing states that have already established registries).

[321] *See* Sharona Hoffman & Andy Podgurski, *Finding a Cure: The Case for Regulation and Oversight of Electronic Health Record Systems*, 22 HARV. J.L. & TECH. 103, 112-19 (2008) (discussing benefits of EHR systems).

[322] *Id.*; *see also* Robert Steinbrook, *Health Care and the American Recovery and Reinvestment Act*, 360 N. ENGL. J. MED. 1057, 1057 (2009) (explaining that President Obama's stimulus legislation, The American Recovery and Reinvestment Act of 2009, provides "$19.2 billion for health information technology.").

It should be noted that government agencies may contract with private parties for the delivery of some services, such as transportation or distribution of medical supplies, to the public. The relevant statutory provisions should require that in such cases, contracts between the state and private parties obligate the provider of services to plan for and be prepared to address the needs of vulnerable populations.[323] Failure to plan appropriately would constitute breach of contract that would be actionable by the state government.

Moreover, all state emergency response laws should contain explicit nondiscrimination mandates.[324] Following the Stafford Act's precedent,[325] all states should include provisions that prohibit discrimination based on race, color, religion, sex, age, national origin, ancestry, economic status, or disability[326] in the provision of state-sponsored disaster assistance. Responders and recipients of aid who are found to violate these provisions would be deemed to have breached their disaster relief contracts with the state or forfeit state funding.[327]

These recommendations do not demand the creation of new private causes of action for aggrieved individuals beyond those that already exist.[328] As argued in previous work, liability for response activities can have the adverse effect of discouraging participation in emergency operations[329] and therefore must be approached with great caution by legislators. Even without the threat of new causes of action, the proposed statutory provisions should galvanize politically accountable emergency planners and focus their attention on the fate of the disadvantaged.

The recommended requirements would follow a long-established tradition in American law and policy of both prohibiting discrimination against the vulnerable and devoting significant and often disproportionate resources to promoting the welfare of the

[323] *See* ALA. CODE § 31-9B-3 (LexisNexis Supp. 2007) (requiring that state agencies include emergency planning requirements in contracts for care of disabled).

[324] *See supra* notes 266-67 and accompanying text (discussing states that already have such provisions).

[325] 42 U.S.C. § 5151(a) (2000).

[326] These laws could incorporate by reference existing state laws that prohibit discrimination based on various classifications and emphasize that the mandates apply even during emergencies. For example, all states have laws that prohibit disability-based discrimination. *See supra* note 228.

[327] *See* 42 U.S.C. § 5151 (deeming compliance with Stafford Act's anti-discrimination mandate to be "a condition of participation in the distribution of assistance or supplies under this chapter or of receiving assistance").

[328] *See supra* Part III.

[329] Hoffman, *supra* note 236, at 1917, 1955-56.

disadvantaged. These commitments are manifested in constitutional provisions, including the Equal Protection Clause and the Eighth Amendment, disability laws such as the ADA and IDEA, public programs such as Medicaid and SCHIP,[330] and a limited number of existing federal and state emergency laws.[331] The suggested approach, consequently, is not unprecedented and should be embraced by the government and American public.

## CONCLUSION

It is clear that during emergencies vulnerable populations will have special needs and require particular attention.[332] However, despite significant investment of resources in emergency preparedness at the federal and state levels,[333] progress for special needs groups remains slow, and many have identified severe planning and readiness gaps in this area.[334] For these populations, emergency response failures can have catastrophic consequences, including loss of the ability to work or live independently, permanent injury, and death.[335] As the Hurricane Katrina experience made clear, preparedness fiascos will result in humiliation and a loss of public faith in the government as well.[336]

In the context of emergencies, vulnerable populations include a large spectrum of groups: individuals with physical and mental impairments, elderly persons, those with language barriers, children, pregnant women, the impoverished, certain ethnic minorities, undocumented persons, and prisoners.[337] Some segment of each of these populations is likely to require acute attention. While individuals with disabilities have drawn some attention in preparedness circles,[338] other vulnerable populations have been all but ignored.[339]

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[330] *See supra* notes 134-41; Part III.

[331] *See supra* Part III.B.

[332] *See supra* Part I.

[333] *See supra* notes 1-2 and accompanying text.

[334] CTRS. FOR DISEASE CONTROL & PREVENTION, KEY FINDINGS FROM PUBLIC HEALTH PREPAREDNESS: MOBILIZING STATE BY STATE 5 (2008), *available at* http://www.bt.cdc.gov/publications/feb08phprep/pdf/feb08phpkeyfindings.pdf (focusing on preparedness challenges); Gostin, *supra* note 127, at 3 (arguing that current influenza plans fail to address special needs of vulnerable groups).

[335] *See supra* notes 8-9 and accompanying text.

[336] *See supra* note 10 and accompanying text.

[337] *See supra* Part I.

[338] *See supra* notes 255-63 and accompanying text.

[339] *See* Uscher-Pines et al., *supra* note 6, at 38 (emphasizing that few pandemic

This Article has argued that vulnerable populations will enjoy meaningful protection only if emergency plans and preparedness initiatives anticipate and address their needs. Without appropriate planning, response efforts are unlikely to be adequate for at-risk communities. A robust legal framework already requires that the welfare of vulnerable groups be safeguarded. These are federal and state disability rights laws, the Equal Protection Clause, Title VI of the Civil Rights Act of 1964 and equivalent state laws, the Eighth Amendment, PAHPA, the Stafford Act, and various state laws.[340] Emergency planners and responders operating at the pre-event, event, and recovery phases should bear in mind the mandates and spirit of these legal provisions. These laws establish a commitment to eschew discrimination against vulnerable populations and require that affirmative steps be taken to safeguard the welfare of the disadvantaged. In addition, several distributive justice theories justify allocation of scarce resources to members of vulnerable populations even if they require more intensive care or disproportionately large resource investments when compared to others.[341] It is also important to emphasize that disaster readiness for vulnerable populations goes hand in hand with preparedness for the general population. If those without special needs are well equipped to react appropriately and care for themselves during emergencies, the vulnerable are more likely to enjoy good outcomes because more resources will be available to serve those who require extra assistance.

Nevertheless, a careful critique reveals that existing mandates are insufficient to protect the welfare of at-risk groups during disasters. Consequently, this Article has formulated detailed recommendations for revision and improvement of federal and state emergency laws so that they more effectively promote the interests of those in greatest need.

The recommendations and guidelines reviewed in this Article demonstrate that much can be done to anticipate and address the needs of the vulnerable during catastrophic events. Adequate planning will go far to minimize the extent to which these groups suffer disproportionately and experience devastating outcomes. Responsible emergency preparedness and response efforts are critical to preventing disasters from ending or ravaging the lives of society's disadvantaged members.

preparedness plans address needs of disadvantaged groups).

[340] *See supra* Part III.

[341] *See supra* Part II.