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No Shelter from the Storm: Undocumented Populations and Federal Disaster Aid

Ashley Morey[1]

I. INTRODUCTION

In 2011, the United States experienced hurricanes, wildfires, flooding, tornadoes, earthquakes, and droughts throughout the country.[2] The economic cost of these disasters was $35 billion—three times greater than the average annual cost of disasters in the United States.[3] Many scientists theorize that disasters are becoming more common, or at least more severe, due to climate change and destruction of natural barriers such as coastal marshlands.[4] Hurricane Katrina, for example, was especially severe because the coastal marshland in Louisiana had been systematically destroyed by development and pollution, leaving very little intact to absorb the storm surge.[5]

Disasters are problematic not simply because they are becoming more frequent and more severe, but because they can destroy infrastructure and use up valuable resources.[6] Disasters can destroy roads, levees, buildings, and communications systems.[7] Government and nongovernment

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[1] The author would like to thank Professor Cliff Villa for his generous and invaluable guidance and feedback throughout the process of writing this article.

[2] *2011 Federal Disaster Declarations*, FEMA (Mar. 15, 2012, 2:55 PM), http://www.fema.gov/news/disasters.fema?year=2011.

[3] *Earthquakes Prompt Record Insurance Claims in 2011*, REUTERS, Jan. 4, 2012, http://www.reuters.com/article/2012/01/04/us-munichre-earthquakes-idUSTRE8030KM20120104.

[4] ROBERT R.M. VERCHICK, FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD 30 (2010); *Weather and Climate Extremes in a Changing Climate*, US CLIMATE CHANGE SCI. PROGRAM 1 (June 2008), http://downloads.climatescience.gov/sap/sap3-3/sap3-3-final-all.pdf.

[5] VERCHICK, *supra* note 4, at 30–31.

[6] DANIEL A. FARBER ET AL., DISASTER LAW AND POLICY 10 (2d ed. 2010).

[7] *Id.* at 3.

organizations can be prevented from distributing aid upon which populations rely.[8] Court systems can be caught off guard if courthouses and records are destroyed, and this can impede access to legal remedies.[9] Disasters also require coordination of emergency resources: evacuation assistance, emergency shelter, food, and medicine. If these resources are handled poorly or distributed slowly, people will die. The nation witnessed this after Hurricane Katrina.[10]

An often-repeated sentiment in disaster law scholarship is that although disasters are said to be "great equalizers," they actually reinforce disparities.[11] The poor feel the impacts of disasters most acutely because they are more likely to lack the resources (e.g., transportation and money) needed to evacuate. Non-English speakers often have limited notice that a dangerous situation is arising due to their lack of contact with mainstream means of communication or because warnings are not widely disseminated in other languages.[12] Finally, the poor and minorities tend to live in the areas most vulnerable to disaster.[13]

The impacts of disasters are amplified in undocumented populations. In addition to financial and social issues that uniquely affect them, undocumented populations are barred from receiving most kinds of federal

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[8] *See id*.

[9] *See* Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 128 (2006) (discussing how thousands of detainees were left without remedies after Hurricane Katrina).

[10] FARBER ET AL., *supra* note 6, at 149.

[11] *See id.* at 204; VERCHICK, *supra* note 4, at 106.

[12] INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL. BERKELEY, BOALT HALL SCH. OF LAW, WHEN DISASTER STRIKES: A HUMAN RIGHTS ANALYSIS OF THE 2005 GULF COAST HURRICANES 21 (Mar. 2006), *available at* http://www.law.berkeley.edu/files/IHRLC/Briefing_Paper_Report_When_Disaster_Strikes_2_Mar_06.pdf [hereinafter WHEN DISASTER STRIKES].

[13] Susan L. Cutter, *The Geography of Social Vulnerability: Race, Class, and Catastrophe*, SSRC.ORG (June 11, 2006), http://understandingkatrina.ssrc.org/Cutter/; VERCHICK, *supra* note 4, at 107.

aid.[14] Undocumented populations also have an acute, and understandable, fear of detention and deportation, which prevents them from utilizing available government resources after disasters.[15] The United States is home to nearly 12 million undocumented immigrants, and neglecting them in times of crisis is a violation of human rights.[16] As disasters become more common and more severe, the United States' disaster policies should not be shaped by the immigration policy debate, but rather by our commitment to providing safety and security for all people affected by disasters.

This article addresses the issue of undocumented immigrants and disaster aid by discussing current demographic trends, barriers to obtaining disaster aid, current federal policies and their consequences, and the manner in which other organizations manage these situations. It then proposes relatively minor modifications to the existing disaster response structure that will drastically increase the ability of undocumented immigrants to access aid.

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[14] ELLEN RUTH WASEM, CONG. RESEARCH SERV., RL 33091, HURRICANE KATRINA-RELATED IMMIGRATION ISSUES AND LEGISLATION 3 (2005), *available at* http://fpc.state.gov/documents/organization/53687.pdf.

[15] US DEP'T OF HEALTH AND HUMAN SERV., DEVELOPING CULTURAL COMPETENCE IN DISASTER MENTAL HEALTH PROGRAMS: GUIDING PRINCIPLES AND RECOMMENDATIONS 15, 28 (2003), *available at* http://store.samhsa.gov/shin/content//SMA11-DISASTER/SMA11-DISASTER-01.pdf [hereinafter HHS, CULTURAL COMPETENCE].

[16] *See id.*; Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISP. CENTER 1 (Apr. 14, 2009), http://www.pewhispanic.org/files/reports/107.pdf. Undocumented immigrants account for 4 percent of the overall population in the United States, as well as 30 percent of the total foreign-born population. *Id. See also* VERCHICK, *supra* note 4, at 186–87.

II. BACKGROUND INFORMATION

A. The Changing Number and Distribution of Undocumented Immigrants in the United States

Undocumented immigrants account for 4 percent of the overall United States population.[17] As this group becomes more diverse and settles in more states, any solution to the lack of disaster assistance for undocumented immigrants will need to be multifaceted and complex.

The Pew Hispanic Center estimates that there are nearly 12 million undocumented immigrants living in the United States.[18] Although Mexicans comprise 59 percent of the undocumented population, a significant number of undocumented immigrants come from Central America (11 percent) and South and East Asia (11 percent).[19] A lesser proportion comes from South America (7 percent), Europe and Canada (4.5 percent), the Caribbean (4 percent), and the Middle East (less than 2 percent).[20]

The undocumented population in the United States is also diverse in terms of its location. While it used to be true that most undocumented immigrants concentrated in border states, today, many immigrants move to other regions throughout the country.[21] For instance, in 1990, California was home to 42 percent of the nation's 3.5 million undocumented immigrants,[22] and now, California houses only 22 percent of the 11.9 million undocumented immigrants in the United States.[23] Meanwhile, states in the mid-Atlantic, Southeast, Midwest, and Mountain regions have doubled their proportions of undocumented immigrants since 1990.[24]

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[17] Passel & Cohn, *supra* note 16 at 2–3.
[18] *Id.* at 1.
[19] *Id.* at 21.
[20] *Id.*
[21] *Id.* at *i*.
[22] *Id.* at *i*.
[23] *Id.* at 1–2.
[24] *Id.* at 2.

B. Disparities Between Undocumented People and US-Born Residents

Undocumented immigrants face a host of issues that US-born residents are either unlikely to encounter or tend to experience less drastically. Undocumented immigrants often receive less education, make less money, and are less likely to be insured than US-born residents. Additionally, undocumented people are subject to racist and discriminatory attitudes. All of these factors contribute to a heightened need for disaster aid.

Undocumented immigrants are considerably less likely to be educated than US-born residents and authorized immigrants. For instance, while only 2 percent of US-born adults and 13 percent of authorized immigrants between the ages of twenty-five and sixty-four have less than a ninth-grade education, a staggering 29 percent of undocumented immigrants in the same age range have not completed any high school coursework.[25] The statistics are similar across the educational spectrum for this age group: US-born residents and authorized immigrants tend to be at least twice as likely to have achieved every educational level.[26] The trend for those between the ages of eighteen and twenty-four is similarly shocking. While 15 percent of authorized immigrants and 8 percent of US-born residents in this age group have not completed high school, the proportion of undocumented immigrants who have not completed high school is 40 percent.[27]

Undocumented workers are also more likely to have low-skilled jobs than US-born residents. Less than one-third of US-born residents hold jobs in the service, construction, production, and installation industries, whereas a full two-thirds of undocumented immigrants hold such jobs.[28] While undocumented workers represent only 4 percent of the US population, they

[25] *Id.* at 11.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 14.

make up 25 percent of all farm workers, 37 percent of all drywall installers, 28 percent of dishwashers, and 27 percent of housekeepers and maids.[29]

The combination of lack of education, low-skill jobs, and lack of status prevents undocumented immigrants from earning as much as US-born residents and authorized immigrants, even over time. The median income for US-born households is $50,000 per year.[30] The median income of authorized immigrants who have been in the United States fewer than ten years is around $41,000 per year, but after ten years in the United States, their median income increases to about $54,000 per year.[31] Alternatively, undocumented immigrants with fewer than ten years in the United States have a median annual household income of $33,000. Even after a decade in the United States, the annual salaries of undocumented households increases by only $3,000.[32] The fact that undocumented immigrants tend to have more workers per household than US-born residents makes this disparity even more notable.[33]

Finally, undocumented immigrants are less likely to be covered by health insurance than US-born residents. While 24 percent of authorized immigrants and 14 percent of US-born adults did not have health insurance at any time in 2007, 60 percent of undocumented adults were without health insurance during the same period.[34] Similarly, 8 percent of children of US-born parents did not have health insurance at any point in 2007, compared with 25 percent of US-born children of undocumented parents and 45 percent of undocumented children.

These education, vocation, wage, and insurance statistics demonstrate the challenges encountered by undocumented immigrants in the United States.

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[29] *Id.* at 15.
[30] *Id.* at 16.
[31] *Id.*
[32] *Id.*
[33] *Id.* US born households have 1.23 workers per household, whereas households headed by an undocumented immigrant have 1.75 workers per household. *Id.*
[34] *Id.* at 18.

These challenges are particularly important to note in a discussion of the effects of disasters on undocumented immigrants. For example, lack of money and health insurance can make recovery from, and even survival of, a disaster considerably more difficult.

C. Barriers to Obtaining Disaster Aid

There are two primary barriers between undocumented people and disaster aid: logistic barriers and fear-based barriers. Logistic barriers encompass lack of information about undocumented populations, lack of resources, poor communication, and loss of documentation or status. Fear-based barriers stem from a general distrust by undocumented people of government authorities. This section explores how undocumented people experience these barriers before and after a disaster.

1. Logistic Barriers

Logistic issues surrounding access to aid for undocumented people occur before and after disasters.[35] Many of the logistic barriers plague all immigrants, particularly those with limited means or lack of English-language proficiency.[36] Although these logistic barriers are not unique to undocumented immigrants, they arguably have a harsher impact on them.[37]

First, there is a lack of information about undocumented populations which affects the ability of the government to warn people about a disaster before it happens.[38] Governments, at every level, have inadequate information about undocumented populations (as well as homeless populations and even tourist populations) that inhabit potentially dangerous areas, such as regions likely to be affected by hurricanes or urban areas that

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[35] WHEN DISASTER STRIKES, *supra* note 12, at 21–22.
[36] *Id.*
[37] *See* WASEM, *supra* note 14, at 1.
[38] Susan L. Cutter, *GI Science, Disasters, and Emergency Management*, 7 TRANSACTIONS IN GIS 439, 443 (2003), *available at* http://webra.cas.sc.edu/hvri/pubs/2003_GIScienceDisastersAndEM.pdf.

might be affected by earthquakes or terrorist attacks.[39] For instance, if better information on both the sizes of undocumented populations and the best means of communicating with undocumented populations was available, mandatory evacuation orders would reach more people[40] and local governments would be better equipped to provide accurate information to assisting agencies, like FEMA, which can help mobilize emergency resources.[41] And, practically speaking, first-responders would have a better idea about where to look for people possibly trapped after a disaster.[42]

When governments have little information about the populations actually inhabiting an area, governments cannot adequately plan for evacuation before a disaster strikes. This problem affects people in two ways: first, undocumented immigrants are effectively excluded from government-provided transportation and, second, undocumented immigrants without their own transportation simply cannot evacuate.[43] After Hurricane Katrina, for instance, some estimate that around 100 thousand Latino residents (documented and undocumented) failed to evacuate the Gulf Coast before the storm solely because they did not have access to a vehicle.[44]

Second, lack of resources continues to create problems for undocumented immigrants after a disaster has already occurred. As the National Research Council has written about social vulnerability and disasters:

> Lower-income and minority populations, who tend to have larger families, may also be reluctant to impose on friends and relatives for shelter. Lack of financial resources may leave less-well-off segments of the population less able to take time off from work

[39] *Id.*; Cara Buckley, *Bill Would Aid Relatives of 9/11 Immigrant Dead*, N.Y. TIMES, Nov. 22, 2009, http://www.nytimes.com/2009/11/23/nyregion/23families.html.
[40] Cutter, *supra* note 38, at 443.
[41] *See id.*
[42] *Id.*
[43] *See* VERCHICK, *supra* note 4, at 121.
[44] WHEN DISASTER STRIKES, *supra* note 12, at 7.

> when disasters threaten, to travel long distances to avoid danger, or to pay for emergency lodging.[45]

The same issues that create problems in the face of disasters continue to affect people during the response and recovery stages as well.

Third, undocumented immigrants face barriers in the realm of communication, both in terms of language and contact. Although immigrants from Mexico and Latin America make up the biggest group of undocumented immigrants in the United States,[46] the lack of Spanish language resources is pervasive[47] (especially considering the sheer number of documented Spanish-speakers who also live in the United States[48]). As the government was preparing for Hurricane Katrina, it neglected to issue a warning in any language other than English in the Gulf Coast.[49] Even in Southern California, where there is a large Spanish-speaking population and the threat of earthquakes and wildfires is high,[50] there has been no serious effort to translate materials into Spanish; most efforts are aimed at using Spanish-language news outlets to direct pertinent information to Spanish-speaking populations.[51]

This problem affects documented and undocumented immigrants from other cultures as well. In the wake of Hurricane Katrina, callers seeking information from FEMA were given two choices: English and Spanish.[52] As

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[45] Comm. on Disaster Research in the Soc. Sci., *Facing Hazards and Disasters: Understanding Human Dimensions*, NAT'L RES. COUNCIL OF THE NAT'L ACAD. 130 (2006), http://www.nap.edu/openbook.php?record_id=11671&page=R1.

[46] Passel & Cohn, *supra* note 16, at 15.

[47] Ann Bessie Matthew & Kimiko Kelly, *Disaster Preparedness in Urban Immigrant Communities: Lessons Learned from Recent Catastrophic Events and Their Relevance to Latino and Asian Communities in Southern California*, TOMÁS RIVERA POL'Y INST. & ASIAN PAC. AM. LEGAL CENTER 6 (2008), http://www.trpi.org/PDFs/DISASTER_REPORT_Final.pdf.

[48] *Id.*

[49] WHEN DISASTER STRIKES, *supra* note 12, at 22.

[50] Matthew & Kelly, *supra* note 47, at 6.

[51] *Id.*

[52] Jonathan Blazer & Brett Murphy, *Addressing the Needs of Immigrants and Limited English Communities in Disaster Planning and Relief: Lessons for Government, Disaster*

a result, many Vietnamese immigrants were not aware of official FEMA shelters, and rather took shelter in "ethnic enclaves," like the Hong Kong City Mall in Houston, TX.[53]

The lack of language-specific resources causes problems beyond evacuation.[54] After disasters, non-English speakers are effectively denied access to public health information (e.g., water safety) and information about where to obtain disaster aid and shelter.[55] This lack of information is compounded by a lack of contact between government entities and undocumented (and documented) populations.[56]

Because no official, language-specific information was disseminated through any channels before Hurricane Katrina, immigrant communities had to establish ad hoc methods for distributing information.[57] Common methods of dissemination include using language-specific radio programming, religious institutions, and ethnic grocers.[58] One report makes the observation that Hurricane Katrina was one of the most devastating disasters in US history, but immigrant populations had to rely on word-of-mouth means of transmitting information.[59] Unfortunately, this pattern of lack of contact between immigrant populations and the government repeats itself from disaster to disaster.[60]

Finally, access to disaster aid is hampered by loss of documentation and loss of status. Loss of documentation refers to the literal, physical loss of immigration documentation.[61] After disasters, many people are displaced

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Relief Agencies, and Community-Based Organizations, 22 IMMIGRANTS' RIGHTS UPDATE 1, 7 (2008), *available at* http://www.ncg.org/s_ncg/assets/dpri/NILCAddressingImmigrantsNeeds.pdf.

[53] *Id.* at 6.

[54] *See* WHEN DISASTER STRIKES, *supra* note 12, at 22.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 21.

[59] *Id.* at 22.

[60] *See* Matthew & Kelly, *supra* note 47, at 7.

[61] WASEM, *supra* note 14, at 2.

from their homes because their homes are destroyed or because emergency resources are only available elsewhere. Many Hurricane Katrina survivors faced these issues, but for immigrants who physically lost their immigration documents along with their homes, the impacts were especially devastating.[62] Immigrants who were lawfully admitted into the United States and had work-authorization were denied the ability to obtain work legally [63] because employers are required to verify the work eligibility of all potential new hires, under penalty of sanction.[64] Further, long-term disaster aid requires the submission of immigration documentation.[65]

After disasters, not only do many authorized immigrants lack the documentation required to obtain the aid to which they are statutorily entitled, many face massive hurdles in terms of replacing their documentation.[66] If government buildings and other critical infrastructure are damaged, immigrants can face lengthy delays before their documentation is replaced.[67] For example, after Hurricane Katrina, the New Orleans court system and other basic governmental agencies were crippled due to the widespread destruction of their buildings.[68] Such bureaucratic delays are lengthened in jurisdictions that have not adopted comprehensive disaster mitigation strategies, which can include measures like adequately backing up records and enabling employees to work from home.[69]

"Loss of status" refers to immigrants who entered the United States under a visa requiring sponsorship.[70] The United States grants a limited number of visas each year to petitioners who have a US-citizen family member or

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[62] *Id.*
[63] *Id.*
[64] Immigration and Nationality Act, 8 U.S.C. § 1324a (2005).
[65] *Disaster Assistance Frequently Asked Questions*, FEMA (June 23, 2011), http://www.fema.gov/assistance/dafaq.shtm#citizen1.
[66] WASEM, *supra* note 14, at 2.
[67] *Id.*
[68] *See* Garrett & Tetlow, *supra* note 9, at 56.
[69] *Id.*
[70] WASEM, *supra*, note 14, at 7–8.

employer willing to sponsor the petitioner.[71] If that family member dies in the course of the disaster or if that business is destroyed as a result of the disaster, then the visa holder no longer has sponsorship, and legal status is revoked.[72] The timber industry was hard hit after Hurricane Katrina, and many workers lost their jobs and, therefore, their immigration status.[73] Because of the loss of immigration status, these workers were unable to obtain any other legal work, including work related to cleanup and rebuilding efforts that were desperately needed after the devastating hurricane.[74]

Barriers to immigrants' access to disaster aid include lack of government information about localized populations, lack of resources, poor communication, and loss of documentation and status. These issues are not always specific to undocumented immigrants; furthermore, the distinction between documented and undocumented is not always important or clear. The porousness of this distinction is best shown by the fact that immigrants who physically lose their documentation as a result of a disaster effectively become "undocumented" because they lose their ability to prove eligibility to work and to obtain long-term aid. Similarly, authorized immigrants whose statuses are revoked due to the effects of disasters actually become "undocumented."

2. Fear-Based Barriers

Many immigrants, particularly undocumented immigrants, are distrustful of the government.[75] This fear does not abate after a disaster, even when many people experience dire need.[76] There are three main fear-based

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[71] *Id.*
[72] *Id.* at 8–9.
[73] Elena Shore, *Katrina Victims Denied Aid and Face Deportation*, NEW AM. MEDIA, (Sept. 28, 2005), http://news.ncmonline.com/news/view_article.html?article_id=69b9752a0c82041c78788e4390506983.
[74] *Id.*
[75] *See* HHS, CULTURAL COMPETENCE, *supra* note 15, at 14–17.
[76] *Id.*

barriers to obtaining disaster aid: (1) an anti-immigrant social and political climate, (2) a general wariness of government interaction, and (3) a specific fear of encountering authorities during the evacuation process. Unfortunately, fear-based barriers often prevent undocumented immigrants from obtaining not only government aid, but also private, nongovernmental aid.[77]

The current social and political climate in the United States is hostile towards immigration.[78] Social scientists posit that the general American attitude toward immigration changed after September 11, 2001, because Americans became much more concerned about national security.[79] Americans perceived "the threat" as originating outside the country, and, at some point, the focus shifted to protecting the nation's borders.[80] Consequently, the attitude toward immigrants is now relatively hostile.[81]

The United States' current immigration policies reflect this hostile attitude and contribute to barriers that undocumented immigrants face in obtaining disaster aid. The US Department of Homeland Security's Immigration and Customs Enforcement Department (ICE) is detaining and deporting more undocumented immigrants each year,[82] and given the current detention rates, the fear of deportation is well founded; in 2011, 396,906 foreign nationals were deported by ICE.[83] After an undocumented immigrant is detained by ICE, a world of uncertainty unfolds: not only can

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[77] *Id.*
[78] Regina Branton et al., *All Along the Watchtower: Acculturation of Fear, Anti-Latino Effect, and Immigration*, 73 J. OF POL. 664, 677 (2011).
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *ICE Total Removals Through February 20th, 2012*, ICE.GOV 1, http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf (last visited May 30, 2012).
[83] *Id.*

detentions last for years, but detainees do not know if, or when, they will see their families or be able to access legal counsel.[84]

Distrust in the government may stem from cultural experience as well.[85] If an immigrant, documented or undocumented, came from a country where the government was unreliable or corrupt, it may be harder for that person to trust the US government.[86] After a devastating hurricane in Alabama, for example, immigrants from Communist countries in Asia reported that they were generally distrustful of any government.[87] Perhaps more surprisingly, many in the group surveyed were "not accustomed to receiving Government assistance," and simply did not seek disaster aid.[88]

Finally, undocumented immigrants have a particular fear of encountering government officials during the evacuation or aid-receipt processes.[89] These fears are, unfortunately, not unfounded. After Hurricane Katrina, undocumented immigrants were detained in both Texas and West Virginia while using government-provided means of evacuation.[90] These individuals are now facing deportation hearings.[91] As discussed below, the US government typically does not give undocumented immigrants assurances that they will be free from prosecution if they seek assistance after a disaster.[92] It is difficult to imagine voluntarily subjecting oneself to contact

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[84] *See FAQ on Federal Immigration Reform*, ESPERANZA IMMIGRANTS RTS. PROJECT, http://www.esperanza-la.org/faq-re-federal-immigration-detention.html (last visited Apr. 2, 2012).
[85] HHS, CULTURAL COMPETENCE, *supra* note 15, at 15.
[86] *Id.*
[87] *Id.*
[88] *See id.*
[89] *See id.*
[90] Shore, *supra* note 73. The detainees in Texas allegedly voluntarily turned themselves over to immigration authorities and the detainees in West Virginia were detained while on an evacuation bus after one of the men was accused of attempting to assault someone. *Id.* The person he allegedly tried to assault did not press charges. *Id.*
[91] *Id*.
[92] *Id.*

with government authorities if detention and deportation could possibly result.

All of these fear-based barriers contribute to low rates of undocumented immigrants obtaining disaster assistance.[93] After the 1994 Northridge earthquake in California, many immigrants avoided disaster services due to their distrust of the government and fears of detention.[94] In preparation for Hurricane Gustav in 2008, ICE said that although it would not be conducting any immigration enforcement activities in direct conjunction with disaster preparation or response, all people would need to register their information with authorities at various steps in the evacuation process.[95] Because such assurances are not taken seriously, given the choice between weathering the storm and evacuating, many undocumented immigrants (and their documented family members) do not evacuate, preferring to face injury—or even death—rather than risk separation from their families or deportation.[96]

III. EXISTING FEDERAL POLICIES AND THEIR CONSEQUENCES

Federal law on the subject of undocumented populations and disaster aid is currently comprised of a patchwork of laws that fail to adequately address the needs of some 12 million individuals living in the United States. Because there is no congruent set of statutes that applies to undocumented immigrants in the specific context of disasters, a rule will often be applied in a manner that is inconsistent with another governing statute. By exploring ambiguities in the laws that apply to immigrants and disasters, this section details the applicable statutes and how their enforcement, or

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[93] HHS, CULTURAL COMPETENCE, *supra* note 15, at 20.
[94] *Id.*
[95] Angela Kelly, *New Orleans Immigrants Weather the Storm*, HUFFINGTON POST (Sept. 4, 2008), http://www.huffingtonpost.com/angela-kelley/new-orleans-immigrants-we_b_124103.html.
[96] *Id.*; Editorial, *Hurricanes, Citizenship, and the Makings of an Unnatural Disaster*, N.Y. TIMES, May 28, 2008, http://theboard.blogs.nytimes.com/2008/05/20/hurricanes-citizenship-and-the-makings-of-an-unnatural-disaster/.

nonenforcement, creates consequences that are both unjust and unsafe. It then discusses several recent opportunities to specifically address the issue of undocumented immigrants and disaster aid. Finally, this section considers the use of agreements not to prosecute and the conference of Temporary Protected Status in the context of disasters.

A. The Law is Ambiguous and Inconsistent

There are federal laws that apply to government aid for undocumented immigrants in general and, likewise, there are federal laws that apply to the government's role before, during, and after disasters.[97] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) governs the types of government aid for which immigrants, documented and undocumented, are eligible.[98] The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Stafford Act)[99] governs FEMA and the types of aid available after a presidentially declared disaster.[100] This section looks at the laws that always apply, and that sometimes apply, to undocumented immigrants in relation to disasters, with a focus on the inconsistent results that sometimes arise.

1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996

Under PRWORA, undocumented immigrants[101] are denied most federal public benefits.[102] The public benefits denied to undocumented immigrants include "any grant, contract, loan, professional license, or commercial

[97] WASEM, *supra* note 14, at 2.
[98] *Id.*
[99] FARBER ET AL., *supra* note 6, at 90; 42 U.S.C. §§ 5121–5208 (2009).
[100] FARBER ET AL., *supra* note 6, at 90–91.
[101] 8 U.S.C. § 1611 (2012). The statute refers to undocumented immigrants as "unqualified aliens," which is an entire subset of statutorily defined immigrants that includes undocumented immigrants. *Id*. For consistency, I will continue to use the phrase "undocumented immigrants."
[102] *Id.* § 1611(a).

license provided by an agency of the United States or by appropriated funds of the United States,"[103] as well as,

> [a]ny retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.[104]

PRWORA not only defines "public benefit" very broadly, but it also purports to supersede all other provisions of law.[105]

Despite what seems like a sweeping prohibition of federal aid for undocumented immigrants, PRWORA does contain several important exceptions. It allows for an exception related to disaster aid which provides for "short-term, non-cash, in-kind disaster relief."[106] Complementing the exception for disaster aid, PRWORA also allows undocumented immigrants to receive most emergency medical treatment[107] and public health assistance relating to the immunization and treatment of communicable diseases.[108]

The US attorney general is also charged with using his or her discretion to provide "programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter)" to undocumented immigrants.[109] When implementing such services, the attorney general is obligated to consult with governmental agencies, specifically federal agencies that do the following:

> (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or

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[103] *Id.* § 1611(c)(1)(A).
[104] *Id.* § 1611 (c)(1)(B).
[105] *See id.* § 1611(a).
[106] *Id.* § 1611(b)(1)(B).
[107] *Id.* § 1611(b)(1)(A) (excluding transplants for undocumented immigrants).
[108] *Id.* § 1611(b)(1)(C).
[109] *Id.* § 1611(b)(1)(D).

> the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.[110]

The attorney general is only able to use discretion when agencies or departments meet these requirements.[111] Notably, the attorney general's discretion does not extend to agencies that predicate public assistance on financial need.[112] As such, undocumented immigrants are barred from many of the benefits which serve low-income populations.

Although exceptions to the ban on federal funds to undocumented immigrants exist, PRWORA is still quite restrictive.[113] It limits undocumented immigrants to short-term, noncash aid—which excludes funding to rebuild, evacuate using means other than government-sponsored transportation, or even purchase groceries and supplies.[114]

2. The Stafford Act and FEMA Programs

The Stafford Act (administered by FEMA) lays out the procedures for declaring a disaster, which is important because many of the Act's provisions are not triggered until a disaster[115] has been declared.[116] In order for a disaster to be declared, the governor of the affected state must petition the president to declare a disaster.[117] The governor must find "that the

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *See id.*; §1611(b)(2) (also containing other exceptions that relate to benefits held by undocumented immigrants prior to the passage of the PRWORA in 1996, but those will not be discussed in this article because the fifteen-year-old exceptions are unlikely to apply widely at this point); *see also* Plyer v. Doe, 457 U.S. 202 (1982).
[114] WASEM, *supra* note 14, at 8.
[115] The Stafford Act distinguishes between a "Major Disaster" and an "Emergency." An emergency is an all-hazards-included category that is declared when it is deemed that the states need federal assistance. A major disaster is a natural catastrophe, even, in some cases, when the cause is unnatural. The procedures governing emergencies and disasters are very similar, but because this article makes no explicit mention of emergencies, and for the sake of simplicity, I will only refer to disasters.
[116] FARBER ET AL., *supra* note 6, at 90.
[117] 42 U.S.C. § 5170 (2012).

disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary."[118] The governor must also show that he or she has complied with the state's emergency management protocols and that the state will comply with the Stafford Act's cost-sharing requirements.[119] Even after a state has satisfied these requirements, the president has discretion over whether to declare a disaster.[120]

When the disaster has been declared, the federal government may provide states with assistance in many forms. States may be able to utilize, with or without a reimbursement requirement, resources from federal agencies in all manners, from supplies and facilities to technical and advisory assistance.[121] FEMA is allowed to directly administer its programs in the affected state, or it can provide funding to the state and allow it to administer the benefits.[122]

While FEMA has assistance programs for small businesses and communities to recover and continue providing essential services,[123] this article is concerned with the specific types of aid available to individuals who are affected by disasters. Essentially, FEMA provides short-term and long-term aid to disaster victims, but the availability of aid for undocumented immigrants varies considerably.

FEMA provides short-term aid that is available regardless of one's immigration status.[124] The aid "warns people about dangers, helps them leave dangerous places, and searches for lost people and rescues them. FEMA also provides transportation, emergency medical care, crisis counseling, and emergency shelter to whomever needs them. And it

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] 42 U.S.C. § 5170(a)(1) (2012); 42 U.S.C. § 5170(a)(3) (2012).
[122] FARBER ET AL., *supra* note 6, at 97.
[123] *Id.* at 97–98.
[124] *Immigrant Eligibility for Disaster Assistance*, NAT'L IMMIGR. L. CTR., www.nilc.org/document.html?id=24 (last visited May 25, 2012).

provides emergency food, water, medicine, and other supplies to meet disaster victims' basic needs."[125] This sort of aid does not include cash benefits because FEMA must comply with PRWORA requirements, as discussed above.[126]

The receipt of long-term aid is contingent on immigration status. Long-term aid includes cash benefits as well as aid directed toward repairing or replacing one's home.[127] It can also include nonemergency medical expenses, clean-up, and legal fees.[128] This sort of aid is "restricted," meaning one must be either a US citizen or a "qualified alien" to receive the assistance.[129] Undocumented immigrants cannot obtain this sort of aid unless they are applying on behalf of their minor children who are US citizens.[130]

FEMA does not have a specific policy when it comes to its treatment of undocumented immigrants' personal information.[131] After 9/11 and after Hurricane Charley in 2004, FEMA announced that it would refrain from sharing an individual's immigration status, but such assurances are not made regularly, leading to the conclusion that FEMA does not have a policy on which undocumented immigrants or their advocates can rely.[132] This is particularly problematic because FEMA is an agency within the Department of Homeland Security (DHS), which also houses ICE.[133] Considering the close proximity of these two agencies, it seems necessary to have a strict confidentiality procedure in place for FEMA.

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Karen Tumlin & Jonathan Blazer, *Administration's Failure to Reassure Leads to Fear, Isolation, and Hardship in Immigrant Communities Affected by Hurricanes*, NAT'L IMMIGR. L. CTR. 4 (Oct. 31, 2005), http://v2011.nilc.org/disaster_assistance/IRU6-05.pdf.
[132] *Id*. at 4.
[133] *See id.*

3. Issue of Aid to Undocumented Immigrants Has Not Been Addressed Despite Opportunities to Do So

After Hurricane Katrina, the Stafford Act was amended by the Post-Katrina Emergency Management Reform Act of 2006 (Post-Katrina Act).[134] Mainly as a response to 9/11, FEMA was reorganized to address the threat of terrorism.[135] After the 2005 disaster response to Katrina, Congress restructured FEMA by elevating its position within the DHS and by giving the FEMA administrator a direct link to the president.[136]

The Post-Katrina Act reiterated FEMA's goals and made it clear that FEMA is meant to prepare and respond to national disasters of any kind:

> The primary mission of the Agency is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.[137]

By reiterating FEMA's broad focus in the Post-Katrina Act, Congress demonstrated that disaster response is a priority in the federal government.

The Post-Katrina Act addressed other concerns related to disaster response, such as banning discrimination based on English proficiency.[138] The Stafford Act now prohibits discrimination based on "race, color, religion, nationality, sex, age, disability, English proficiency, or economic status."[139] The Post-Katrina Act also explicitly requires the FEMA Administrator to identify Limited English Proficiency (LEP) populations in areas vulnerable to disasters.[140] The Post-Katrina Act requires the government to communicate with LEP populations by means which these

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[134] *Id.* at 133.
[135] *Id.* at 132–33.
[136] *Id.* at 133.
[137] 6 U.S.C. § 313(b)(1) (2012).
[138] 42 U.S.C. § 5151(a) (2012).
[139] *Id.*
[140] 42 U.S.C. § 5196f(a) (2012) (coordinating with state and local entities).

populations understand.[141] FEMA, however, has discretion over determining how many people constitute a "population," so if FEMA determines that there are too few people with limited English in an area, it remains exempt from providing information in the LEP population's language.[142]

The Post-Katrina Act represented an excellent opportunity to modify the law of disaster response in a way that allowed better coverage for more people. Indeed, requiring non-English materials for disaster victims is a good, but not perfect, step toward providing information to undocumented populations. The Act could have been amended to address undocumented immigrants specifically, and failing to do so ensures that a large number of people are excluded from certain kinds of benefits and even protection from prosecution after a disaster.

4. The Government Inconsistently Grants Temporary Protected Status and Agreements Not to Prosecute

After a disaster, the attorney general and the DHS secretary have the ability to ensure that undocumented immigrants, or the people who employ them, will not be prosecuted for immigration violations.[143] These agreements, however, are provided inconsistently and, thus, do not provide any real benefit to disaster victims. This section explores the kinds of protection available to employers and individuals when the disaster occurs both without and within the borders of the United States.

The attorney general or the DHS secretary has the ability to assure employers that they will not be targeted for employing undocumented immigrants after a disaster.[144] The Immigration and Nationality Act (INA) requires employers to verify the alienage of potential employees.[145] This

[141] *Id.* § 5196f(a)(2)(A).
[142] *Id.* § 5196f(b).
[143] WASEM, *supra* note 14, at 13–14.
[144] *Id.*
[145] *Id.* at 2.

requirement applies to foreign nationals as well as to citizens, and it makes it illegal for employers to hire employees without first verifying their employment eligibility.[146] The attorney general and the DHS secretary have the ability to waive this requirement by assuring employers that they will not be prosecuted for failing to verify alienage and employment eligibility.[147]

After Hurricane Katrina, DHS announced that it would not initiate employer sanctions for forty-five days.[148] This announcement made no mention of protection for undocumented immigrants directly, but it was enough to create an uptick in immigration, particularly of Latinos, to New Orleans after the storm.[149] Because employers were assured they would not be prosecuted, employers were actually actively seeking undocumented laborers to assist with the rebuilding effort.[150]

Although offering employers assurance that they will not be prosecuted for employing undocumented immigrants may seem like a decent solution, in practice it actually allows for exploitation and the furtherance of discriminatory attitudes.[151] After Katrina, when employers were assured they would not be prosecuted, employers in many states hired undocumented workers to do hard clean-up jobs for up to eighty hours per week at a rate of $8–12 per hour.[152] Due to the chaotic circumstances, there is little data relating to whether employees were provided with any safety equipment to protect them from toxic debris.[153] Further, there are reports of

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[146] *Id.*
[147] *Id.* at 10–11.
[148] Press Release, US Dep't of Homeland Sec., Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims (Sept. 6, 2005), *available at* http://www.worldatwork.org/waw/adimLink?id=15440.
[149] Katharine Donato & Shirin Hakimzadeh, *The Changing Face of the Gulf Coast: Immigration to Louisiana, Mississippi, and Alabama*, MIGRATION INFO. SOURCE (Jan. 2006), http://www.migrationinformation.org/usfocus/display.cfm?ID=368.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*

undocumented immigrants receiving less pay than promised, or no pay at all, for which there is little recourse.[154]

After the federal government agreed not to prosecute and the number of immigrants rose in the Gulf States, so did the prevalence of discrimination.[155] While speaking with a group of local business owners, New Orleans Mayor Ray Nagin asked, "How do I make sure New Orleans is not overrun with Mexican workers?"[156] While his city was being cleaned up and rebuilt by Latino immigrants, Mayor Nagin still expressed such sentiments. Although he attempted to distance himself from his comments, those words have often been repeated to illustrate the prevailing discriminatory attitudes post disaster.[157]

The federal government has the ability to provide direct assurances to immigrants living in the United States when the disaster occurs in a foreign country.[158] Temporary Protected Status (TPS) ensures that immigrants are not forced to return to their home nation when that nation is unstable due to a disaster.[159] While the goal is to protect immigrants with expired visas, TPS is also available to all undocumented immigrants from nations the United States deems unsafe. The undocumented immigrants, however, must apply for TPS, which means they must register with DHS.[160]

TPS has been conferred many times by the federal government to immigrants from certain countries. TPS is considered when US officials feel that deporting foreign nationals would be dangerous.[161] For instance, it was conferred upon foreign nationals of various Central American nations after

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[154] Monica Guizar, *Immigrant Workers Exploited in Katrina Cleanup Efforts*, NAT'L IMMIGR. L. CTR. (Oct. 31, 2005), http://v2011.nilc.org/disaster_assistance/IRU6-05.pdf.
[155] *See id*. at 4.
[156] *Id.*
[157] *Id.*
[158] 8 U.S.C. § 1254a (2012).
[159] FARBER ET AL., *supra* note 6, at 240.
[160] *See id.*
[161] *Id.*

Hurricane Mitch in 1998.[162] After the Haitian earthquake in 2010, Haitian nationals living in the United States were granted TPS. Although the status was set to expire, DHS Secretary Janet Napolitano extended it because conditions in Haiti had not improved.[163] Most recently, Secretary Napolitano granted TPS to Syrians living in the United States.[164] TPS can be conferred for a variety of reasons and can be extended if the conditions in the foreign country do not improve, which demonstrates the program's flexibility.[165]

When the disaster takes place inside the United States, however, there are no official, discretionary actions that the attorney general or DHS secretary can take to grant TPS to undocumented immigrants.[166] In fact, there are very few instances of undocumented immigrants obtaining amnesty or some sort of protected status in the wake of disasters that occurred in the United States. Even after Hurricanes Katrina and Rita, two of the most iconic and devastating natural disasters in recent history, undocumented immigrants were never promised freedom from prosecution, either in terms of evacuation or employment.[167]

After September 11th, however, Congress decided to grant amnesty to undocumented immigrants who had been victims of the attack.[168] Additionally, undocumented immigrants were not denied financial

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[162] *See* Steven David Forester, *Haitians Deserve Protected Status*, SUN SENTINEL, Sept. 25, 2006, http://articles.sun-sentinel.com/2006-09-25/news/0609220533_1_deportations-haitians-remittances.

[163] Press Release, US Dep't of Homeland Sec., Secretary Napolitano Announces the Extension of Temporary Protected Status for Haitian Beneficiaries (May 17, 2011), *available at* http://www.worldatwork.org/waw/adimLink?id=15440.

[164] Julia Preston, *Syrians in the U.S. Are Given Protected Immigration Status*, N.Y. TIMES, Mar. 23, 2012, http://www.nytimes.com/2012/03/24/us/syrians-in-the-us-are-given-protected-immigration-status.html.

[165] 8 U.S.C. § 1254a(b)(1)–(3).

[166] 8 U.S.C. § 1254(b)(1). TPS is only available when the disaster takes place in a foreign state. *Id.*

[167] Shore, *supra* note 73.

[168] OUT OF THE ASHES: 9/11 (Films for Justice Institute at Seattle University School of Law 2011).

compensation. They were able to participate in the September 11th Victims Compensation Fund, and were provided with free 9/11-related healthcare without having to provide documentation.[169] Certainly the benefits conferred after 9/11 are different because they were largely within the context of a bill to bailout the airline industry,[170] but is one disaster really so different from another?

B. Consequences Are Unsafe and Unjust

The consequences of these policies are both unsafe and unjust. Although FEMA is now required to provide language-specific information for LEP populations, it continues to struggle with disseminating information to disaster victims.[171] Even if FEMA were able to provide perfect information to LEP populations, there are still no policies to cure the fundamental lack of trust in the government that many immigrants have; thus, the barriers to obtaining disaster aid have not been removed.[172] FEMA, which has only recently been prohibited from discriminating based on language, must overcome a long history of discrimination[173] in order to gain the trust of the populations it is statutorily required to serve under the Stafford Act.[174]

Granting immunity from prosecution to employers who hire undocumented workers after a disaster, while neglecting to provide such assurances to individuals, further enforces the employer's superior bargaining power.[175] Instances of exploitation tend to be rampant after disasters, and are well-documented in employment relationships.[176]

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[169] *Id.*; *see* Devlin Barrett, *Immigration Issue Threatens 9/11 Bill*, WALL ST. J., Apr. 28, 2010, http://online.wsj.com/article/SB10001424052748704471204575210642778651102.html.
[170] OUT OF THE ASHES: 9/11, *supra* note 168.
[171] *See* Shore, *supra* note 73.
[172] *Id.*
[173] *Id.*
[174] 42 U.S.C. § 5151(a).
[175] *See* Donato & Hakimzadeh, *supra* note 149.
[176] *Id.*

Additionally, providing assurances only to employers sends the message that it is only undocumented immigrants that are doing something illegal while employers are simply given a free pass in terms of verifying documentation.[177] This message reinforces discriminatory attitudes and relationships.[178]

Inconsistently granting TPS, amnesty, or agreements not to prosecute exacerbates fear in an already traumatic situation.[179] It reinforces the idea that governments are not trustworthy and that laws are unequally applied.[180] It is also fundamentally unfair to privilege the victims of one disaster over the victims of another disaster. The victims of hurricanes are equally deserving of amnesty and non-prosecution agreements as are the victims of 9/11. Likewise, from a human rights perspective, undocumented immigrants who are the victims of disasters that take place in the United States are no less deserving of assistance than are foreign nationals whose home countries experience disasters.[181]

As a result of these policies, undocumented immigrants do not evacuate and do not seek disaster aid because there is little communication about the kinds of aid available and undocumented immigrants are unwilling to register with the state.[182] Furthermore, organizations providing assistance and guidance to undocumented immigrants are ill-equipped to give good advice regarding the best course of action after a disaster. It is unknown how an agency like FEMA will treat an undocumented person's information, or whether it is working in tandem with ICE, also a DHS agency.[183] The current federal policies have been revised, but not enough;

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[177] *Id.*
[178] *Id.*
[179] *See* Blazer & Murphy, *supra* note 52, at 3–4.
[180] *Id.*
[181] *See* FARBER ET AL., *supra* note 6, at 247.
[182] *See* HHS, CULTURAL COMPETENCE, *supra* note 15, at 15.
[183] *See* Tumlin & Blazer, *supra* note 131, at 4–5.

the current policies leave in place most of the barriers to obtaining disaster aid that undocumented immigrants face.

IV. HOW OTHER ORGANIZATIONS RESPOND TO UNDOCUMENTED IMMIGRANTS

Other organizations, both within the government and in the private sector, also contend with how to include undocumented immigrants in programs without disclosing immigration status to ICE. This section discusses some of the more successful models used by agencies and private entities, with a close look at the US Census Bureau and the American Red Cross, as well as the ideals espoused in the UN's Guiding Principles on Internally Displaced Persons.

A. Government Agencies

US government agencies must reconcile their missions, which are often related to serving and keeping safe the population, with restrictions on aid to undocumented people.[184] The PRWORA, discussed above, severely limits the amount and kind of aid available to undocumented people living in the United States.[185] Government agencies must also decide how to treat information supplied by undocumented immigrants. Such information is not treated consistently among the various agencies, and there is no governing statute in place.[186]

The Census Bureau has the most restrictive confidentiality policy.[187] The Census Bureau's mission is to accurately and completely obtain information for statistical purposes.[188] It is required to keep information about

[184] *See* FARBER ET AL., *supra* note 6, at 90.
[185] 8 U.S.C. § 1611(a).
[186] WHEN DISASTER STRIKES, *supra* note 12, at 15.
[187] *Id.*
[188] *Data Protection and Privacy Policy*, US CENSUS BUREAU (Feb. 16, 2011), http://www.census.gov/privacy/data_protection/federal_law.html.

individuals absolutely private. This restriction applies to every Census Bureau employee for life, and there is a severe penalty for violations.[189]

The goal of the Census Bureau is fundamentally different than the goal of FEMA. The Census Bureau is only concerned with accurately counting the people within the United States, while FEMA is charged with helping communities to plan for, respond to, and recover from disasters. Unlike FEMA, the Census Bureau is in no way concerned with distributing aid.[190] Despite this fundamental difference, the policies of FEMA should be similar to those of the Census Bureau because neither organization is concerned with prosecuting undocumented immigrants. Recent amendments to the Stafford Act demonstrate that FEMA is expected to carry out its mandate without regard to an individual's status, but in order to remove existing fear-based barriers, FEMA must adopt a strict policy of confidentiality so undocumented immigrants, as well as citizens and authorized immigrants with undocumented family members, are able to feel secure in obtaining life-saving aid.

B. Private Entities

Private entities have far more flexibility in terms of providing aid and not requiring immigration documentation. Because they are not bound by the strict constraints of the PRWORA, private entities may provide many kinds of aid to undocumented people.[191] Private organizations are the best resource available to undocumented immigrants after a disaster, and the American Red Cross presents, despite some instances of discrimination,[192] an excellent example of how to fairly provide aid to undocumented immigrants.[193]

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[189] *Id.*
[190] *About Us*, US CENSUS BUREAU, http://www.census.gov/aboutus/ (last visited May 25, 2012).
[191] *Immigrant Eligibility for Disaster Assistance*, *supra* note 124.
[192] WHEN DISASTER STRIKES, *supra* note 12, at 27.
[193] *See Immigrant Eligibility for Disaster Assistance*, *supra* note 124.

The American Red Cross emphasizes providing humanitarian aid.[194] Because it keeps this focus central, it is able to treat information about immigration status with respect, offer many kinds of relief, and mobilize effectively to serve vulnerable populations.[195] When interviewing disaster victims, the American Red Cross does not ask for information regarding immigration status.[196] Unlike FEMA, the Red Cross simply does not require such information.[197] Further, the American Red Cross has a strict policy that if information regarding immigration status is disclosed to a Red Cross employee, that information is neither shared nor recorded.[198]

The American Red Cross also provides many kinds of services, regardless of whether a disaster victim is an undocumented immigrant.[199] The benefits available from the American Red Cross include shelter, medical care, mental health care, and even cash benefits to "pay for groceries, new clothes, rent, emergency home repairs, transportation, medicines, and tools."[200] The American Red Cross helps to fill the significant gap left by the federal government's strict policies denying such aid to undocumented immigrants.[201]

Finally, the American Red Cross model allows for flexibility to meet the varying needs of specific populations.[202] It is a large organization with

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[194] *About Us*, AM. RED CROSS, http://www.redcross.org/portal/site/en/menuitem.d8aaecf214c576bf971e4cfe43181aa0/?vgnextoid=477859f392ce8110VgnVCM10000030f3870aRCRD&vgnextfmt=default (last visited Apr. 2, 2012).
[195] *Id.*
[196] *Statement on Impartiality of American Red Cross Disaster Services*, AM. RED CROSS, http://newsroom.redcross.org/disaster-response-guide/impartiality-services/ (last visited June 10, 2012).
[197] *Immigrant Eligibility for Disaster Assistance*, *supra* note 124.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] It is important to remember here that people can be "undocumented" even if they simply lost their documentation as a result of the disaster.
[202] *See* Abi Weaver, *Chapter Partners with Mexican Red Cross for Future Disasters*, AM. RED CROSS (Apr. 7, 2009), http://www.redcross.org/portal/site/en/menuitem.

many chapters, including international chapters.[203] After wildfires in California, the American Red Cross did not have the resources to meet the needs of Spanish-language-only populations.[204] To remedy this situation, the local Red Cross chapter enlisted the help of the Mexican chapter of the Red Cross, which was able to supply Spanish-speaking aid workers and Spanish-language materials to victims.[205] This scenario demonstrates that the American Red Cross is able to adapt and utilize resources in a way that actually keeps disaster victims at the center of the conversation.

As a final note, there are documented instances in which the Red Cross has discriminated based on language or national origin, particularly after Hurricane Katrina.[206] These instances, while certainly disappointing, seem to be isolated and not the norm. If anything, these instances further demonstrate the need for reform in terms of the universal availability of disaster aid.

C. The United Nations Guiding Principles on Internally Displaced Persons

The United Nations has established guiding principles for the treatment of internally displaced persons (IDPs) that are "consistent with international human rights law and international humanitarian rights law."[207] IDPs include those who has been forced to leave their homes as the result of "armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."[208] The principles, which include

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[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] WHEN DISASTER STRIKES, *supra* note 12, at 27.

[207] *Guiding Principles on Internal Displacement*, UNITED NATIONS 1 (Sept. 2004), http://www.unhcr.org/43ce1cff2.html.

[208] *Id.*

the right to food, shelter, and medical services,[209] are to be provided to *all* IDPs without discrimination, specifically including race- and status-based discrimination.[210] The principles also specify that IDPs should be able to remain with their families, have freedom of movement throughout the country, and be "protected from discriminatory arrest and detention as a result of their displacement."[211]

Although these guiding principles are legally unenforceable, the United States should use the sentiment behind the guiding principles to shape its disaster response policies.[212] The US Agency for International Aid (USAID) already uses these principles when establishing response plans in international areas that have been affected by disasters and conflicts.[213] Use of the UN guiding principles to shape disaster policy would promote a scheme in which it would be impermissible for the US government to discriminate against and detain undocumented immigrants after a disaster.[214] Two key reasons support this proposition: first, USAID requires other countries to follow the principles, and the United States should practice what it preaches;[215] second, as Robert R.M. Verchick writes, fairness requires "stay[ing] informed about the needs of others and [treating] them as your own."[216]

V. DISCUSSION OF A PROPOSED SOLUTION FOR FEMA

As the previous sections illustrate, there are many gaps and inequalities in the administration of disaster aid to undocumented populations. Not only would amending the Stafford Act and improving communication with and

[209] *Id.* at 9–10.
[210] *Id.* at 2–3.
[211] *Id.* at 7–9.
[212] VERCHICK, *supra* note 4, at 186, 189 (suggesting the establishment of a set of *binding* principles for the treatment of IDPs).
[213] *Id.* at 189.
[214] *See id.* at 188–89.
[215] *See id.* at 189.
[216] *Id.* at 191.

outreach to undocumented communities help fill those gaps, but such measures might also facilitate government entities' fulfillment of their humanitarian missions. Improving access to disaster aid might also provide for stronger communities.

A. Amend the Stafford Act

The Stafford Act, although it has been amended recently, should be further changed to allow for better implementation of disaster response policies. This section discusses three recommendations: (1) remove FEMA from DHS control completely; (2) keep any information collected about immigration status strictly confidential; and (3) allow a presidential disaster declaration to automatically trigger protection from detention and deportation for undocumented immigrants who are victims of the disaster.

1. Remove FEMA from DHS Control

The Post-Katrina Act elevated FEMA's status within the DHS,[217] but it should have removed it from DHS completely because DHS should not be home to agencies whose missions are completely discrete. FEMA, an agency that is charged with providing disaster preparation and relief, has goals that are fundamentally different than those of ICE, which include enforcing immigration laws and keeping US borders safe.[218] Essentially, ICE's enforcement duties conflict with FEMA's humanitarian mission because it could be in a position to prosecute the very people FEMA is charged with assisting.[219]

Separating FEMA completely from DHS will not be particularly difficult because it has a history as a standalone entity.[220] Before DHS was

[217] *See* FARBER ET AL., *supra* note 6, at 145–46.
[218] *Overview*, US IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited April 2, 2012).
[219] WHEN DISASTER STRIKES, *supra* note 12.
[220] *See* FARBER ET AL., *supra* note 6, at 145–46.

established in 2002, FEMA was completely independent.[221] Furthermore, due to recent reorganization, FEMA is now fairly independent within DHS, and, for instance, has its own administrator with a direct link to the president and Congress.[222] Any criticism that it would be too cumbersome to reorganize FEMA to be completely independent from DHS should simply be met with a recitation of FEMA's history as an independent agency.

2. Keep Any Information Collected About Immigration Status Confidential

The Stafford Act should also be explicitly amended to keep information related to immigration status confidential. Specifically, the Stafford Act should recognize the precarious situations in which many disaster victims find themselves, and should refrain from asking about immigration status altogether. FEMA should adopt the policies of the Red Cross and refrain from recording information relating to status.

Disregarding or keeping confidential the immigration status of disaster victims confidential has two key benefits. First, undocumented immigrants will be more likely to feel safe, and will be more likely to come forward, participate in evacuations, and request aid. Second, if information about immigration status is not collected, it will be more difficult to enforce the strict aid-related limits imposed by the PRWORA and undocumented immigrants would be more likely to obtain long-term and cash aid. These benefits further the ultimate goal of all disaster relief efforts, which is to improve quality of life for disaster victims.

Ideally, FEMA would refrain from considering any information related to immigration status, but even if it were to continue to consider this information, it should ensure that the information is kept unequivocally confidential. This solution would not allow undocumented immigrants to

[221] *See id.*
[222] *Id.*

receive long-term or cash aid, but it would, for example, provide security for undocumented parents who apply on behalf of citizen children. While this is not the ideal solution, it is certainly an improvement over the current policy.

Some may argue that allowing undocumented immigrants to receive aid without providing documentation, or that even forcing FEMA to keep immigration status information confidential, is wrongfully allowing undocumented immigrants to benefit at the expense of taxpayers. However, undocumented immigrants, regardless of one's views on immigration policy, are still *victims* of disasters and should be treated in a way that maximizes safety and health. In its most benign form, this suggestion simply allows undocumented immigrants to claim benefits to which they are entitled under the current state of the law, but without fear of detention as a direct result of seeking disaster relief.

3. Allow a Presidential Disaster Declaration to Automatically Trigger Protection for Undocumented Immigrants Who Are Victims of the Disaster

A presidential disaster declaration should automatically trigger TPS, or something similar, for undocumented immigrants who are victims of a disaster. There are three key benefits of this sort of program. First, eliminating some fear and uncertainty after a disaster will promote participation of undocumented immigrants in the disaster response process. Second, undocumented immigrants will be able to participate in rebuilding efforts without experiencing high rates of exploitation. Third, communities will be strengthened when all people are able to participate in the rebuilding effort.

As discussed previously,[223] many undocumented immigrants are unlikely to use government channels to receive aid for fear-based reasons. Allowing undocumented immigrants some kind of TPS, ideally one in which

[223] *See* discussion *supra* Section II.C.

individuals are not required to register with the Immigration and Nationalization Service (INS), will help alleviate the fear that many undocumented individuals have of encountering government officials while evacuating or staying in shelters. It will also alleviate the fear that undocumented members of families will be separated. Robert R. M. Verchick suggests that developing disaster-specific policies *before* a disaster actually occurs will increase certainty and response times.[224] In his example, ICE would have an established policy for evacuations, which would avoid "last-minute wrangling between social activists and immigration officials about document checks."[225]

If a firm, established policy was effectively communicated to immigrant populations, it would help undocumented immigrants by increasing certainty that they would not be detained while evacuating and, thus, encourage swift action to find safety.[226] After Hurricane Gustav, DHS announced that it would allow immigrants to use public transportation to evacuate, but activists said this announcement came too late.[227] While advocates would have preferred to send people into immigrant communities to explain DHS's statement in person, they settled on making announcements on Spanish-language radio stations.[228] Had the policy been in place before the evacuation was imminent, many more communities could have been notified.[229]

After disasters that take place inside the United States, undocumented immigrants are usually not given TPS although they themselves are victims. When employers are occasionally given assurances that they will not be

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[224] VERCHICK, *supra* note 4, at 177.
[225] *Id.*
[226] *See id.*
[227] Desiree Evans, *Gustav Coverage: Deportation Fears Kept Many Illegal Immigrants from Evacuating*, INST. FOR S. STUD. (Sept. 3, 2008, 10:07 PM), http://www.southernstudies.org/2008/09/gustav-coverage-deportation-fears-kept-many-illegal-immigrants-from-evacuating.html.
[228] *Id.*
[229] *Id.*

prosecuted for INA violations, the result is an influx of undocumented workers in communities.[230] However, the effect is a shadow community that ends up doing difficult post-disaster labor and can be exploited.[231] Allowing TPS for undocumented immigrants after disasters may help to eliminate exploitation and unsafe working conditions after disasters because the process would be completely legal and transparent.

Finally, allowing undocumented immigrants to safely participate in the community rebuilding process benefits everyone because communities can be rebuilt faster.[232] Further, providing a legitimate framework where undocumented immigrants are not afraid of detainment and deportation can result in communities that are better integrated.[233] This effect was partially illustrated when DHS agreed not to prosecute employers after Hurricane Katrina, but the stigma inflicted on the undocumented workers themselves remained, as evidenced by increased hostility toward immigrants now that construction jobs are available.[234] Allowing for a completely legal situation will help eliminate that stigma, enabling undocumented immigrants to benefit in the very communities they are helping to rebuild.

Critics of the suggestion to allow something like TPS for undocumented disaster victims following a presidential disaster declaration will also argue that undocumented immigrants would wrongfully benefit from the aid. This argument ignores the fact that undocumented immigrants will actually participate in rebuilding efforts. It is neither fair nor just to allow undocumented immigrants to complete the difficult and dangerous work of cleaning and rebuilding a disaster-stricken area while in fear of detention.

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[230] Kelly, *supra* note 95.
[231] *Id.*
[232] *See* Richard Gonzales, *Latinos Get Little Thanks for Rebuilding New Orleans*, NPR (Dec. 10, 2011) http://www.npr.org/2011/12/10/143390961/latinos-get-little-credit-for-rebuilding-new-orleans. New Orleans "has really been rebuilt on the back of Latino labor." *Id.*
[233] *See* WHEN DISASTER STRIKES, *supra* note 12, at 10.
[234] Gonzales, *supra* note 232.

Additionally, without TPS, there is an opportunity for the unscrupulous to exploit undocumented immigrants who have little viable recourse.

B. Improve Communication and Outreach in Undocumented Communities

FEMA should also improve communication and outreach in undocumented populations. The Red Cross provides an excellent example of how to do this.[235] The Red Cross has used an inter-agency approach to reach vulnerable populations with great results.[236] FEMA should collaborate with agencies—federal, state, and local—to learn about undocumented populations before a disaster strikes and to provide assistance to those populations after a disaster strikes.

FEMA needs to learn more about undocumented populations, especially those that are in places likely to be affected by a disaster. It needs to learn where these populations are located, how many people live in the areas, and how to best communicate with them so they can adequately plan for evacuations and adequately inform the populations.

FEMA also needs to tailor its practices to meet the needs of undocumented populations. After Hurricane Katrina, many immigrants chose ethnic centers over official shelters, and many such immigrants cannot remember a government official ever visiting their ad hoc shelters.[237] In addition to simply considering undocumented populations in disaster planning, FEMA needs to be proactive in preparing language- and culture-specific announcements and flyers, and in using methods of mass communication that will be heard by undocumented populations.[238]

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[235] Brenda Muñiz, *In the Eye of the Storm: How the Government and Private Response To Hurricane Katrina Failed Latinos*, NAT'L COUNCIL OF LA RAZA 19 (2006) http://www.fachc.org/pdf/mig_ncla_Katrina_Report_FINAL.pdf.
[236] *See* Weaver, *supra* note 202.
[237] WHEN DISASTER STRIKES, *supra* note 12, at 22.
[238] David Vlahov et al., *Strategies for Improving Influenza Immunization Rates Among Hard-to-Reach Populations*, 84(4) J. FOR URB. HEALTH 615 (2007).

Critics may argue that it is too cumbersome to require FEMA to improve outreach and communication with undocumented populations. There are two key responses to this argument. First, the Post-Katrina Act already imposes this duty on FEMA. Second, FEMA is meant to provide a coordinational framework between agencies and organizations to facilitate disaster response, relief, and recovery. Hence, of any agency currently operating, it should be the least cumbersome for FEMA to utilize the skills and resources of other groups.

VI. CONCLUSION

Undocumented immigrants make up 4 percent of the US population.[239] Current census information indicates that many undocumented immigrants have families that are established in the United States, or are part of families that are comprised of both authorized immigrants or citizens and undocumented immigrants.[240] There is also a significant level of disparity in terms of education and income that plagues undocumented immigrants, and as such, they are some of the people most vulnerable to disasters.

Further, undocumented immigrants face many barriers to obtaining disaster assistance. Logistic barriers range from inability to communicate in English or through "regular" channels to physical loss of documentation paperwork after a disaster. Other barriers are based on fear of government interaction, which is a real and legitimate concern. These barriers prevent undocumented immigrants from receiving aid after disasters.

Our current federal policies contribute to these barriers and recent reforms do little to remove them. The PRWORA effectively prohibits the federal government from providing undocumented immigrants with substantial aid, the Stafford Act does not require FEMA to provide all kinds of aid regardless of status or even to keep information regarding status confidential, and there is no clear guideline for conferring a protected

[239] Passel & Cohn, *supra* note 16 at 2–3.
[240] *Id.* at 3.

immigration status on undocumented immigrants after disasters. Despite opportunities to change these policies, they remain in place and prevent undocumented immigrants from obtaining aid.

In order to remedy some of these problems, FEMA should be removed from the DHS to prevent a conflict of interest with ICE and its enforcement mandates, immigration status should not be used as a factor in determining eligibility for any kind of FEMA disaster aid, TPS should be automatically conferred when the president declares a disaster, and FEMA should rework its communication and outreach practices to include (and better serve) undocumented populations. To do all of these things, FEMA should look to the policies of agencies such as the US Census Bureau and organizations like the American Red Cross.

Disasters are tragic events, but they are made more tragic by the ways in which our federal government responds to them. Instead of allowing disaster response to become an opportunity to demonstrate a "tough stance" on immigration, disaster response should center on offering comprehensive aid to every victim. It is patently unjust to allow immigration politics or fear to prevent people from seeking aid that would ultimately allow individuals, families, and communities to most effectively recover from disasters, whether they be natural or man-made.