Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits

Danshera Cords

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CHARITABLE CONTRIBUTIONS FOR DISASTER RELIEF: RATIONALIZING TAX CONSEQUENCES AND VICTIM BENEFITS

Danshera Cords:

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I. INTRODUCTION

During 2005, natural disasters affected over 161 million people worldwide, killing almost 89,000 people.¹ Almost every day disasters kill or leave homeless a significant number of people.² The annual property damage from disasters is tens of billions of dollars.³ Disasters causing tens of millions of dollars of damage occur somewhere in the world about twice a day,⁴ and twice a month in the United States.⁵ Over the past thirty years, the number of people affected by disasters has continually increased, although the number killed has declined.⁶

Following a disaster, victims often need help satisfying their immediate needs for food, housing, and medical care, as well as help locating family members.⁷ Some aid comes from local, state, and federal governments.⁸ In many instances government resources are insufficient to satisfy the disaster victims' needs, especially following large scale disaster.⁹ Other aid comes from private disaster relief organizations (DROs), which

¹. INT'L FED'N OF RED CROSS AND RED CRESCENT SOC'YS, WORLD DISASTERS REPORT 195 (2006).
². See Francine J. Lipman, Anatomy of a Disaster Under the Internal Revenue Code, 6 FLA. TAX REV. 953, 958 (2005) (noting the fact that major disasters occur worldwide twice a day, and in the United States twice a month).
³. INT'L FED'N OF RED CROSS AND RED CRESCENT SOCIETIES, WORLD DISASTERS REPORT 173 (2002) (reporting that the average annual damage from disasters during the prior decade was $69 billion).
⁴. Lipman, supra note 2, at 958.
⁵. Id.
⁶. INT'L FED'N OF RED CROSS AND RED CRESCENT SOCIETIES supra note 3, at 173; see also Roger Bennett & Rita Kottasz, Emergency Fund-Raising for Disaster Relief, 9 DISASTER PREVENTION & MGMT. 352, 352 (2000) ("Disasters are an integral part of life, and their incidence is increasing."). There is evidence that although disaster relief organizations may be improving in their ability to respond to disasters, the number of disasters is increasing. D. Clay Whybark, Issues in Managing Disaster Relief Inventories, 108 INT. J. PROD. ECON. 228, 229 (2007).
⁷. See HARRY HATRY, MARTIN ABRAVANEL & SHELLI ROSSMAN, THE URBAN INSTITUTE, WHAT HAPPENS TO VICTIMS? A RESEARCH GUIDE FOR DISASTER-RESPONSE STUDIES 4 (2006) (listing the types of services likely to be needed by disaster victims). This Article will not discuss the role of insurance in meeting either the short- or long-term needs of disaster victims.
Charitable Contributions for Disaster Relief

Charitable Contributions for Disaster Relief provide essential aid to victims and reduce the burden on government. These organizations are primarily funded by contributions from individuals and businesses.

After a mega-disaster like Hurricane Katrina, massive aid is needed, making the delivery of aid a major logistical challenge. Following a mega-disaster, even combined government and private efforts may be unable to meet the immediate and long-term needs of those affected by the disaster.

Charitable organizations such as the American Red Cross and the Salvation Army assist victims of a variety of disasters. In addition, following many disasters, new charities are often formed to help the victims of a specific disaster. For example, the Twin Towers Fund, which was formed after the 9/11 terror attacks, was organized specifically to aid the victims in the World Trade Center and their families.

DROs, which encompass both broad scope charitable organizations like the Red Cross and specific purpose charities, ease the societal burdens created by disasters in at least two ways. First, DROs reduce the cost, types, and extent of services that the government must provide during and immediately following a disaster to meet disaster victims' basic needs. Second, DROs may be able to distribute aid to victims.

10. See id. at 7 (describing the disaster relief efforts of the American Red Cross); Sar, supra note 8, at 133 ("[P]rivate and nonprofit aid still play a significant role in disaster relief."); see also infra note 13 and accompanying text.

11. See HATRY, ABRAVANEL & ROSSMAN, supra note 7, at 4; U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 9, at 8 ("After Hurricanes Katrina and Rita, the Red Cross estimated that it will have provided more than 3.7 million hurricane victims with financial assistance, 3.4 million overnight stays in almost 1,100 shelters, and more than 27.4 million hot meals and 25.2 million snacks for survivors of the Gulf Coast hurricanes.").

12. See infra note 247 and accompanying text.


16. See American Red Cross, supra note 13 (providing an overview of the disaster relief services of the Red Cross and noting that "[e]ach year, the American Red Cross responds immediately to more than 70,000 disasters, including house or apartment fires . . . hurricanes, floods, earthquakes, tornadoes, hazardous materials spills, transportation accidents, explosions, and other natural and man-made disasters," which obviously helps reduce the amount of services the government must provide).
established national and international organizations, such as the Salvation Army, the International Committee of the Red Cross, and the American Red Cross, have extensive networks of volunteers and engage in extensive advanced planning for a wide range of scenarios involving the types of disasters that are most likely to occur. This may permit DROs to be on the ground with supplies and volunteers quickly, without the delay required by the bureaucratic machinations of modern government. Widespread networks of volunteers and resources also help reduce the cost to government and alleviate some of the need for local, state, and federal governments to keep disaster relief supplies and personnel on hand.

The National Response Plan provides for the Red Cross and the Federal Emergency Management Agency (FEMA) to coordinate efforts following an "incident[] of national significance" resulting from a major natural disaster or terror attack. However, given the need to obtain cooperation among entities and individuals, the theory and promise of the National Response Plan may not work out in practice, as demonstrated during the post-Katrina relief efforts.

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17. See Imagining America, Hurricane Katrina Web Resource, Faith-Based Groups, http://www.imaginingamerica.org/katrina-faith-based-groups.html (discussing the relief efforts of private faith-based groups after Hurricane Katrina and noting that "many of these organizations' relief workers mobilized more quickly and effectively than federal emergency workers"); see also U.S. GEN. ACCOUNTING OFFICE, supra note 15, at 15 ("[C]harities are expected to be among the first agencies to provide assistance to those affected [in the event of a presidentially declared disaster] . . .").

18. See supra note 16 and accompanying text.

19. See Sar, supra note 8, at 133 (discussing the Los Angeles earthquake relief efforts, and noting that ")[the Salvation Army, Red Cross, and other national organizations naturally take on more of the relief effort. They supply volunteers, food, water, and . . . shelter.").

20. U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 9, at 1. The efficacy of this plan was called into question following Hurricane Katrina, the first situation in which the National Response Plan was put into action. See, e.g., id. at 3-4.

21. See Whybark, supra note 6, at 229 (discussing the difficulties both governmental agencies and nongovernmental organizations have in getting quick relief to disaster victims). The effectiveness of both private and government agencies at providing immediate aid to the victims of major disasters may be questioned in light of the problems that were encountered in rendering aid to the victims of Hurricane Katrina in August 2005. See, e.g., Jennifer Steinhauser & Eric Lipton, FEMA, Slow to the Rescue, Now Stumbles in Aid Effort, N.Y. TIMES, Sept. 17, 2005, at A1; Stephanie Strom & Campbell Robertson, As Its Coeffers Swell, Red Cross is Criticized on Gulf Coast Response, N.Y. TIMES, Sept. 20, 2005, at A24; John Tierney, Op-Ed., From FEMA to WEMA, N.Y. TIMES, Sept. 20, 2005, at A29. But see Michael Luo & Campbell Robertson, A New Meaning for 'Organized Religion': It Helps the Needy Quickly, N.Y. TIMES, Sept. 9, 2005, at A18. Critics also have raised concerns about the use of donations by the American Red Cross with respect to the 9/11 terror attacks. See David Barstow, In Congress, Harsh
Funding for charitable organizations is encouraged by the tax system, which permits a deduction for certain contributions. Economic literature shows that the availability of a tax deduction increases charitable contributions, but a tax deduction or other tax benefit does not explain all charitable giving. Many individuals who make charitable contributions do not itemize their deductions and, therefore, cannot benefit from current tax incentives for charitable contributions.

Over the past twenty years, a number of record-setting disasters, measured in size, deaths, and scale of property damage, have occurred in the United States and abroad, including Hurricane Hugo (1989), Hurricanes Andrew and Iniki (1992), the Northridge Earthquake (1994), the 9/11 terror attacks (2001), Hurricanes Charley, Frances, Ivan, and Jeanne (2004), the Indian Ocean tsunami (2004), Hurricanes Katrina, Rita, and Wilma (2005), and the San Diego Fires (2007). As this Article discusses, Congress has intervened after disasters to create tax incentives for individuals to give to charities and DROs, as well as to provide additional tax relief to victims on their losses and prevent victim relief payments from inclusion in income. However, this favorable tax

Words for Red Cross, N.Y. TIMES, Nov. 7, 2001, at B1 (discussing the congressional fallout from the Red Cross's decision to redirect 9/11 contributions); see also Diana B. Henriques & David Barstow, Red Cross Pledges Entire Fund to Sept. 11 Victims, N.Y. TIMES, Nov. 15, 2001, at A1 (discussing the Red Cross's change of position on the use of contributions for 9/11 terror attack victims).


24. DAVID JOULFAIAN, U.S. DEP'T OF THE TREASURY, OTA PAPER 95, BASIC FACTS ON CHARITABLE GIVING 16-17 (2005) (indicating that in 2002 there were 158,000 returns reporting an additional $200 million in charitable contributions with no deduction). Because many taxpayers do not itemize, the contributions reported on individual tax returns likely underestimate the true value of nondeductible charitable contributions. In recent years a number of proposals have been made to permit a charitable deduction, even to taxpayers who do not itemize. See e.g., Charitable Giving Act of 2005, H.R. 3908, 109th Cong. § 101 (2005) (introduced in the House, but not passed during the 2005 legislative session); CARE Act of 2005, S. 1780, 109th Cong. § 101 (2005) (introduced in the Senate, but not passed during the 2005 legislative session). Even among itemizers, not all contributions are deducted for a variety of reasons, including lack of adequate documentation and deduction limitations.


26. See Jeff McDonald & Liz Neely, 300,000 Flee Fires, SAN DIEGO UNION-TRIB., Oct. 23, 2007, at A1 (quoting San Diego county Sheriff Bill Kolender as saying "[i]t's probably the worst fire this county has ever had").

27. See infra Part II.C-D.
treatment has been inconsistent because Congress has intervened following some, but not all, disasters.\(^{28}\)

Until relatively recently, Congress generally provided few added incentives following a major disaster to encourage giving and little additional relief to disaster victims beyond the casualty loss, insurance, and relief provisions already included in the Internal Revenue Code (the Code). Nonetheless, the Department of Treasury and the Internal Revenue Service (the Service) exercised their available discretion to provide extensions and other procedural relief to victims of a wide range of disasters.\(^{29}\) Following some of the largest recent disasters, Congress has created some additional tax incentives for charitable contributions and permitted additional tax relief to disaster victims.\(^{30}\)

The additional tax relief for donors to and victims of some disasters causes disparate tax treatment vis-à-vis donors to and victims of other disasters. Many disasters do not result in a large enough number of deaths and injuries, or cause a sufficient amount of property damage to attract the media’s, Congress’s and the public’s attention long enough to lead to legislative change. Unfortunately for the victims, however, the magnitude of a disaster does not determine the extent of harm to the victims who are displaced, injured, or otherwise harmed by the disaster.

The treatment of both victims and donors providing aid after recent disasters has differed from disaster to disaster.\(^{31}\) As a result, charitable organizations may not be able to provide the same amount of assistance in all disasters, even though such organizations may be of paramount importance to victims unable or ineligible to receive assistance from governmental agencies. A person who has the misfortune of not only suffering physical harm, property damage, or loss of life during a disaster, but also experiences that harm as a result of a disaster that did not receive much media coverage—because there was very limited geographic damage or the disaster was not spectacular—is no less a victim and no less in need of assistance. However, with less publicity, less aid may be available after a smaller scale disaster because there may be fewer targeted donations and fewer tax benefits for victims unless the disaster area becomes a Presidentially declared disaster.\(^{32}\) The lack of support for these victims is particularly troubling given that smaller disasters occur more frequently and impact more people.\(^{33}\)

\(^{28}\) See Tolan, supra note 25, at 813-29.

\(^{29}\) See id. at 813-17, 820.

\(^{30}\) See id. at 818, 822 (discussing tax legislation passed after 9/11 and Hurricane Katrina).

\(^{31}\) See infra Part III.

\(^{32}\) See infra notes 85-88 and accompanying text.

\(^{33}\) See infra note 78 and accompanying text.
Major disasters present their own challenges. Victims face the difficulty of meeting their immediate survival needs. They may also face other challenges. The formation of many new DROs in the wake of a mega-disaster can create a chaotic situation in which victims have difficulty obtaining available aid. This may result from differing rules for obtaining aid from various DROs and government agencies, as well as the need to complete multiple applications.

In the case of each disaster for which Congress provided relief through tax legislation, the relief differed in kind and extent. Tax relief legislation followed only the disasters that received extraordinary media coverage and involved a large number of victims. Moreover, the amount of disaster relief available may be influenced not only by the media coverage of the disaster, but also by the tax treatment of donations.

This article advocates a consistent approach to the tax treatment of disasters, both with respect to charitable contributions to DROs and the treatment of disaster victims. Consistent treatment of DRO donors and relief recipients would increase both horizontal and vertical equity among donors and disaster victims, improve efficiency, and add certainty of results in the tax system. Consistent treatment of victims will increase the likelihood that victims of one disaster are not disadvantaged vis-à-vis victims of another disaster. Most important, a consistent approach could help ensure that needed aid is available to all disaster victims. Part II will discuss the charitable deduction currently available for those who contribute to charitable organizations generally, as well as the temporary tax relief afforded to contributions to relief efforts from the 2004 tsunami and Hurricanes Katrina, Rita, and Wilma. This Part will also discuss the tax consequences of property damage and payments from DROs and government agencies to disaster victims. Part III will discuss the rationales that are available to justify preferred tax treatment for charitable contributions. Part IV will discuss the pitfalls that may result from the massive outpouring of charitable aid that often occurs in response to a mega-disaster, using the 9/11 terrorist attacks as an example. Part V will explain how a consistent approach to charitable contributions, especially to DROs, could benefit all disaster victims. Part V will also discuss how a consistent approach to taxing disaster relief payments could further the goals of equity, efficiency, and certainty in

34. See, e.g., U.S. GEN. ACCOUNTING OFFICE, supra note 15, at 3 ("While charitable organizations took immediate steps to get aid to those in need [after 9/11], families of victims generally believed they had to navigate a maze of service providers, and confusion existed about the range of services available to people, particularly those facing job or housing losses.").
the tax system. This Article concludes that the tax treatment of donors and disaster victims should be established prior to the occurrence of the disaster. Congress should avoid post-disaster temporary tax legislation as a means to aid disaster relief efforts. Moreover, further study should be used to identify the most effective ways to encourage contributions to disaster relief efforts, and to ensure that victims quickly and efficiently receive needed aid. Finally, if different scales of disasters warrant different tax treatment, that should be established in advance, along with the criteria for determining when a disaster warrants additional relief, as after the fact tax relief is not an efficient or effective means of addressing the immediate needs of disaster victims.

II. TAX CONSEQUENCES TO DONORS AND DISASTER VICTIMS

A. In General

United States citizens are very generous in supporting charitable organizations. Adoption of the income tax raised concerns that citizens might reduce their charitable giving, so the charitable deduction was created to prevent such a result. The charitable deduction was first permitted in 1917 for contributions made to certain tax-exempt organizations, including religious, charitable, scientific, public safety testing, community service, literary, or educational organizations.

In 2002, individuals reported making $108 billion in cash contributions to charitable organizations. Following a disaster, individuals and businesses frequently donate not only cash, but also food, shelter, expertise, and time to DROs.

Historically, the tax treatment of contributions to and payments from DROs has not varied much from disaster to disaster. For example, after Hurricane Hugo in 1989, Congress did not provide any additional tax relief to the victims or incentives to increase charitable contributions. Similarly, after Hurricane Andrew in 1992, although Congress provided minimal additional tax relief for victims, there were no additional

35. But see Hurricane Katrina: Community Rebuilding Needs and Effectiveness of Past Proposals: Hearing Before the S. Comm. on Finance, 109th Cong. 131 (2005) [hereinafter Katrina Hearing] (testimony of George K. Yin, Chief of Staff, Joint Comm. on Taxation) ("Disasters by their nature are location specific, and thus any tax measures to be considered as relief for those disasters will in general be location specific.").
39. JOLFAIAN, supra note 24, at 4.
40. See Tolan, supra note 25, at 813.
Charitable Contributions for Disaster Relief

incentives for giving to DROs.\textsuperscript{41} Once again, following the 1994 Northridge Earthquake in Los Angeles, neither the victims nor donors received additional tax relief.\textsuperscript{42} Recently, however, Congress has taken a more active role in encouraging giving to DROs following certain disasters, as well as providing tax relief to the victims of those disasters. Congress has done this through post-disaster temporary relief legislation.\textsuperscript{43}

With or without tax incentives for charitable giving, people in the United States tend to be generous. After the 9/11 terrorist attacks—which killed 2,749 people when two planes crashed into the World Trade Center, 184 when a third plane crashed into the Pentagon, and 40 when passengers brought down a fourth plane in a Pennsylvania field—U.S. charities received $2.4 billion to aid the victims of the attacks and their families.\textsuperscript{44} After the attacks, up to two-thirds of United States households contributed to victim relief funds.\textsuperscript{45} When a tsunami struck the coastal cities along the Indian Ocean on December 26, 2004, U.S. citizens (along with individuals, businesses, and governments worldwide) rushed to make cash and in-kind contributions to aid the victims, even though most of the victims were not U.S. citizens.\textsuperscript{46} U.S. charities received $1.6 billion in aid for tsunami victims.\textsuperscript{47} Similarly, when Hurricanes Katrina, Rita, and Wilma struck the United States Gulf Coast in rapid succession, charitable contributions poured in to the relief efforts. U.S. charities received more than $3.3 billion after Hurricane Katrina.\textsuperscript{48}

\begin{thebibliography}{99}
\bibitem{41} See \textit{id.} at 814-15. The insured damage was more than $15.5 billion. Congress did permit victims additional time to replace a home that was destroyed without recognizing gain and excluded gain from some. \textit{Id.}
\bibitem{42} See \textit{id.} at 817.
\bibitem{43} See \textit{id.} at 818, 822, 820.
\bibitem{45} U.S. GEN. ACCOUNTING OFFICE, \textit{supra} note 15, at 1.
\bibitem{47} Brown & Minty, \textit{supra} note 44, at 2-3. Such a high level of giving may be attributable to a number of factors, including: the closeness in time to the holiday season, the ease of online giving, the closeness in time to the end of the taxable year, the extension of the tax benefits of charitable contributions made for tsunami relief until January 31, 2005, and the extensive media coverage of the disaster. \textit{Id.} at 5-6. The relief was donated to United States charities because a charitable deduction is available only if contributions are made to a domestic organization, even if it is to be used in other countries. \textit{See infra} notes 56-62 and accompanying text.
\bibitem{48} Brown & Minty, \textit{supra} note 44, at 3.
\end{thebibliography}
Some of the giving may have been encouraged, even if not caused, by tax benefits. Congress provided donors additional tax deductions or benefits for contributions to DROs for the 2004 Indian Ocean tsunami during 2005; and following Hurricanes Katrina, Rita, and Wilma, Congress provided tax benefits for some individuals and businesses making charitable contributions during certain parts of 2005.49

1. Disaster Relief Contributions

In general, a charitable deduction is available for contributions made to qualified nonprofit organizations.50 Organizations to which contributions are deductible are a small subset of all nonprofit or tax-exempt organizations.51 There are three requirements that a tax-exempt organization must satisfy to entitle its contributors to a charitable deduction. First, the organization must operate exclusively for one of the following purposes: "religion, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals."52 Disaster relief is considered a charitable purpose.53 Second, the earnings of the organization must not "inure[] to the benefit of any private shareholder or individual."54 Third, the organization cannot lobby for legislation as a substantial part of its activities and cannot participate in campaigns for political office.55

In addition to the other requirements for deductibility, charitable contributions are usually only deductible if they are made to a domestic entity.56 Contributions to foreign entities are not deductible, whether for disaster relief or for any other charitable purpose, unless a bilateral treaty provides otherwise.57 However, an individual donor can choose to make a contribution to a foreign charity and still receive a charitable deduction58 by making her contribution to a United States charity that

49. See infra Part II.C-D; see also Tolan, supra note 25, at 826-28.
51. See id. § 170(c); 8 JASON B. BINIMOW, ET AL., MERTENS LAW OF FEDERAL INCOME TAXATION § 31:05 (Supp. July 2007).
54. I.R.C. § 501(c)(3).
55. Id.
56. Id. § 170(c)(2)(A).
will use the funds to assist the foreign charity. This is permissible, because although a public charity, domestic charitable corporation, or private foundation must have discretion and control over the donation, it can use the contribution abroad to fulfill charitable purposes. A second way an individual can aid disaster victims abroad and obtain a charitable deductions is to make the contribution to an organization that is established in a country with which the United States has a tax treaty that permits deductions. However, corporations cannot deduct charitable contributions unless they are used for domestic charitable purposes.

The drafters of the charitable deduction did not explain the rationale for placing geographic restrictions placed on the recipient charity’s place of formation, but not on the place of use of donated funds. However, the legislative history of subsequent amendments indicates that at least part of the rationale for the charitable deduction is that nonprofit organizations will bear some of the burden that would otherwise be borne by the government. This is consistent with the theory that providing a tax preference for charitable contributions is a bargain struck between groups that independently prefer certain causes but do not alone form the majority necessary to have the government fully fund their cause. Nevertheless, Congress acknowledged that a portion of the deductible contributions from individuals to domestic charities would be used abroad. This is less likely to reflect a bargain to support causes lacking a majority, as foreign beneficiaries are unlikely to be contributors to the tax system. However, if many U.S. taxpayers, but less than a majority, want to provide aid to foreign causes or the victims of a foreign disaster, there is little reason for those with domestic preferences to

59. Pozen, supra note 57, at 541.
60. See id.
61. Countries with which the United States has such a treaty are Canada, Mexico, and Israel. See Crimm, supra note 58, at 51-55. Other treaties have proposed such an override of the domestic entity restriction, but the Senate has been reluctant to allow such provisions. See id. at 47-49 & n.138. For example, both Brazil and the United States failed to ratify the United States-Brazil tax treaty. Id. at 51. Some have criticized the domestic limitation on charitable contributions. Pozen, supra note 57, at 537.
62. I.R.C. § 170(c)(2) (2000). This article is focused primarily on individual charitable contributions. Because the incentives for corporate philanthropy are different, incentives for corporate philanthropy will not be addressed. However, as is often the situation with respect to tax laws, consistency in approach over time is generally considered desirable.
63. See Crimm, supra note 58, at 37-47.
64. See id. at 43 (discussing the legislative history to the 1938 act that made the requirement that the recipient of a donation be a domestic charity).
66. See Crimm, supra note 58, at 43.
object more to foreign preferences than any other preferences.\textsuperscript{67} Other rationales for this limitation include a concern about the inability of the U.S. to control foreign policy or oversee and control foreign entities.\textsuperscript{68}

The charitable deduction that is available depends on the taxpayer making the contribution and the taxpayer's income. First, the charitable deduction is only available to individual taxpayers who itemize their deductions.\textsuperscript{69} The standard deduction includes as a component of its calculation an assumed amount of charitable contributions.\textsuperscript{70} Individuals generally cannot deduct contributions that exceed fifty percent of their adjusted gross income.\textsuperscript{71} Taxpayers can carry forward excess contributions and deduct them in a subsequent taxable year.\textsuperscript{72} Corporations generally cannot receive charitable contribution deductions exceeding ten percent of the corporation's taxable income.\textsuperscript{73}

Many people make charitable contributions for non-tax reasons, including a desire to give to those less fortunate, to support causes that the individual believes are inadequately funded by the government, or to support religious organizations that cannot be funded by the government. Thus, many individuals make charitable contributions even though they do not itemize their deductions and, therefore, will be unable to receive a tax deduction for their contributions.\textsuperscript{74}

There are many other factors that may influence charitable giving. For instance, there is a strong correlation between media coverage of a disaster and contributions to DROs aiding victims of that disaster.\textsuperscript{75} Given the high correlation, record giving following the 9/11 terror attacks, the 2004 Indian Ocean tsunami, and Hurricanes Katrina, Rita, and Wilma, may not be surprising, as each disaster received extensive 24/7 media coverage.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{67} See Fleischer, supra note 65, at 16-19.
\item \textsuperscript{68} Pozen, supra note 57, at 594-96.
\item \textsuperscript{69} JOULFAIAN, supra note 24, at 1.
\item \textsuperscript{70} Ellen P. Aprill, Churches, Politics, and the Charitable Contribution Deduction, 42 B.C. L. REV. 843, 850-52 (2001).
\item \textsuperscript{71} I.R.C. § 170(b)(1)(A) (2000). Lower limits apply to certain contributions to private foundations and contributions of capital gain property. \textit{Id.} § 170(b)(1)(B)-(C).
\item \textsuperscript{72} \textit{Id.} § 170(d)(1). It has been argued that the common rationales for the limitation on the charitable deduction do not make sense when viewed in connection with the availability of an unlimited carry forward. Fleischer, \textit{supra} note 65, at 51-52.
\item \textsuperscript{73} I.R.C. § 170(b)(2) (West Supp. 2007). Excess contributions can be carried forward for up to five years. \textit{Id.} § 170(d)(2).
\item \textsuperscript{74} See \textit{supra} note 24 and accompanying text.
\item \textsuperscript{75} Brown & Minty, \textit{supra} note 44, at 3-4; see also Bennett & Kottasz, \textit{supra} note 6, at 354.
\item \textsuperscript{76} Charitable Giving in U.S. Nears Record Set at End of Tech Boom, USATODAY.COM, June 19, 2006, http://www.usatoday.com/news/nation/2006-06-19- charitable-giving_x.htm ("The urgent needs created by three major natural disasters—the
Because charitable organizations are generally governed by the standards established in common law for trusts, charitable organizations are obligated to respect and follow the wishes of the donor. Contributions made to aid the victims of a specific disaster may pose a number of problems to the charity and to society. First, donations directed to benefit the victims of a mega disaster may leave less aid available to victims of less well publicized and smaller disasters. Such contributions also leave the DRO less discretion as to how to deploy the resources at its disposal. Second, as a result of frequent pleas for assistance, donors may be less willing to contribute to aid efforts, which may reduce the amount of victim aid available. Philanthropy professionals often worry that frequent pleas for assistance will make donors less likely to contribute to disaster relief efforts. This is sometimes referred to as "donor fatigue." Third, it may be difficult for newly-formed DROs to fulfill their charitable purposes because they are less well-known. Finally, if donors contribute more aid to victims of a particular disaster than can be used for the reasonable needs of the disaster victims, charitable organizations face the difficult task of


78. See Somini Sengupta & David Rohde, When One Tragedy Gets More Sympathy Than Another, N.Y. TIMES, Nov. 14, 2005, at F30 ("There should be predictability in the right to getting life-saving relief . . . . It should not be a lottery.").

79. See Colum Lynch, Donations Slowing as Disasters Mount Worldwide, WASH. POST, Oct. 16, 2005, at A23 ("Two major disasters during the past year—Hurricane Katrina and the Indian Ocean tsunami—have sapped funding for other causes . . . .").


81. See Lynch, supra note 79; Purtill, supra note 80. However, there is some evidence that donor fatigue is less likely to occur with respect to disaster relief than other charitable appeals. Bennett & Kottasz, supra note 6, at 353.

82. See Bennett & Kottasz, supra note 6, at 356 tbl. 1, 358 (listing major fundraising triggers, one of which is whether "the charity making the appeal is a well-known charity," and suggesting that a combined appeal for disaster relief will be most successful if "'fronted' by the most well-known and 'non-political'" charities).
simultaneously fulfilling their missions, using the funds in accordance with donors’ wishes, maintaining their tax-exempt status, and avoiding the negative publicity associated with redeploying aid to other worthy causes. The problems faced by charitable organizations that have received more contributions for a specific disaster than can be used for permissible relief of the needs of victims include: the risk that distributions will violate the donor’s wishes, that the organization’s tax-exempt status will be put in jeopardy, and that negative publicity will follow an organization’s decision regarding the use of “excess” contributions.

Not all disaster relief comes from DROs or governmental relief agencies. Certain additional relief is available to victims of Presidentially declared disasters through the Code. Victims of these disasters may have greater opportunities to deduct casualty losses, obtain replacement property without gain or loss recognition, or receive certain aid payments without recognizing income. In addition, despite the historic lack of legislative relief during disasters, the Department of Treasury is able to afford some relief in the form of extensions of time to file and perform other tasks, as well as delays in collections and other processes.


84. See infra Part IV.A. This was the case with respect to the American Red Cross in the wake of the 9/11 terror attacks. See Barstow, supra note 21. Even after closing the Liberty Fund, the American Red Cross received more donations than could be distributed under the traditional charitable guidelines. See id. The Red Cross decided to divert some of the funds to other areas with greater need, and a huge outcry resulted. See id. This left the Red Cross in the unenviable position of trying to appease the victims, the donors, and the media to accomplish both its mission in the short term (to provide aid to the terror attack victims) and in the long term (to ensure that donors would continue to contribute and provide aid in future events). See id.


86. I.R.C. § 165(i).
87. Id. § 1033(h).
89. Tolan, supra note 25, at 811-12; see also I.R.C. § 7508A (2000) (showing that the Internal Revenue Code provides the Department of Treasury some discretion to adjust deadlines for disaster victims).
2. Disaster Relief Payments from Charitable Organizations

State law generally controls the day-to-day operations of charitable organizations. Nonetheless, federal tax law plays a significant role in funding charitable organizations by limiting federal income tax contribution deductions, which encourage charitable giving, to contributions to certain tax-exempt entities. To determine whether an organization is a charitable organization, and whether contributions are entitled to a charitable deduction, the tax law has generally followed the common law of trusts. Therefore, to successfully permit donors to make tax deductible contributions, charitable organizations must be cognizant of both state laws regarding their operation and federal tax laws regarding their classification as a tax-exempt organization under Code section 501(c)(3).

Disaster relief payments that are made to help a victim pay for immediate needs like food, housing, and clothing have long been excluded from income. However, before 2002, such treatment was not included in the Code, leaving the Service to determine the appropriate treatment of such payments. Distributions made by charitable organizations to disaster victims were considered gifts because they were made with "'detached and disinterested generosity,'" and were therefore excluded from the income of the recipient. The Service viewed a charitable organization's "gifts" to a disaster victim as including medical expenses, temporary housing costs, transportation, and similar expenses. Because transfers from a charity to a victim to pay for expenses of this type generally satisfy the requirement of detached and

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90. See generally EDITH L. FISCH, DORIS JONAS FREED & ESTHER R. SCHACHTER, CHARITIES AND CHARITABLE FOUNDATIONS §§ 684-94 (1974) (discussing the regulation and supervision of charitable organizations by the different states); EDWIN S. NEWMAN, LAW OF PHILANTHROPY 23-26, 28-47 (1955) (discussing state regulation of charitable organizations); see also BOGERT & BOGERT, supra note 77, § 361.
91. See I.R.C. § 170(c) (2000); see also supra notes 50-55 and accompanying text.
92. See generally BOGERT & BOGERT, supra note 77, § 361.
93. See generally I.R.C. § 501(c)(3) (2000) (listing the requirements an organization must meet to be considered tax-exempt).
94. See, e.g., Rev. Rul. 2003-12, 2003-1 C.B. 283 (applying newly enacted section 139 of the Internal Revenue Code to hypothetical disaster scenarios); Rev. Rul. 76-144, 1976-1 C.B. 17 (applying the exclusion to payments made under the Disaster Relief Act of 1974); Rev. Rul. 53-131, 1953-2 C.B. 112 (concluding employer aid to employees following a tornado was not gross income for the recipients).
96. See generally id.
disinterested generosity, the receipt of the payment is usually nontaxable to the victim.\textsuperscript{99}

Prior to the enactment of Code section 139 in 2002, some payments frequently made to disaster victims, such as payments from an employer to a victim-employee, were not as easily excluded from the victim's income because they did not easily fit within the definition of a gift.\textsuperscript{100} To exclude payments from an employer to an employee, a different rationale is needed because such payments are seldom made out of a disinterested spirit of generosity.\textsuperscript{101} Nonetheless, in early rulings, the Service concluded that disaster assistance payments made to help employees meet basic needs like obtaining food and shelter following a disaster should not be included in the employee's income, even though the payments did not qualify as gifts.\textsuperscript{102} Similarly, employer reimbursement of medical, temporary housing, and transportation expenses, which were not otherwise covered by insurance, could be excluded from the employee's income.\textsuperscript{103} This treatment was first permitted by the Service in a 1953 revenue ruling considering victim assistance payments from an employer to an employee following a tornado.\textsuperscript{104} Similarly, a 1976 revenue ruling excluded government grants of aid disaster to victims following a flood from the recipient's gross income.\textsuperscript{105}

The exclusion of government- and employer-provided disaster relief in certain cases has now been codified in section 139 of the Code.\textsuperscript{106} However, to be excluded from income, such expenses must be reasonable and necessary and the employee must provide documentation of the expenses.\textsuperscript{107}

The nature and extent of the disaster also play a role in determining the tax consequences of disaster relief payments. The tax consequences of aid to disaster victims depends in part on whether the aid was received as a result of a Presidentially declared disaster.\textsuperscript{108} A Presidentially

\textsuperscript{99}. Id.
\textsuperscript{100}. Duberstein, 363 U.S. at 285. See generally I.R.C. § 139.
\textsuperscript{101}. Cf. Duberstein, 363 U.S. at 285 (noting that payments made in anticipation of economic benefit or for services rendered cannot be considered gifts).
\textsuperscript{102}. Rev. Rul. 53-131, 1953-2 C.B. 112 (concluding than an employer's aid to employees following a tornado was not gross income for the recipients because the aid was "not related to services rendered, but . . . based solely on need").
\textsuperscript{104}. Rev. Rul. 53-131, 1953-2 C.B. 112.
\textsuperscript{105}. Rev. Rul. 76-144, 1976-1 C.B. 17 (applying the exclusion to payments made under the Disaster Relief Act of 1974).
Charitable Contributions for Disaster Relief

declared disaster is "any disaster which, with respect to the area in which the property is located, resulted in a subsequent determination by the President that such area warrants assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act."\(^{109}\)

Qualified disaster relief payments to victims of a Presidentially declared disaster are excluded from income.\(^{110}\) Qualified disaster relief payments are payments that are not otherwise compensated and that are paid for one of the following reasons:

1. to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster,

2. to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster,

3. by a person engaged in the furnishing or sale of transportation as a common carrier by reason of the death or personal physical injuries incurred as a result of a qualified disaster, or

4. if such amount is paid by a Federal, State, or local government, or agency or instrumentality thereof, in connection with a qualified disaster in order to promote the general welfare.\(^{111}\)

A qualified disaster is one that fits one of the following categories:

1. a disaster which results from a terroristic or military action (as defined in section 692(c)(2)),

2. a Presidentially declared disaster (as defined in section 1033(h)(3)),

3. a disaster which results from an accident involving a common carrier, or from any other event, which is determined by the Secretary to be of a catastrophic nature, or

4. with respect to amounts described in subsection (b)(4), a disaster which is determined by an applicable Federal, State, or local authority (as determined by the Secretary) to warrant

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\(^{110}\) I.R.C. § 139(a)-(c). These payments are also excludable if certain other governmental authorities determine that the payments are needed for the general welfare of the recipient. *Id.*
\(^{111}\) *Id.* § 139(b).
assistance from the Federal, State, or local government or agency or instrumentality thereof.\textsuperscript{112}

Qualified disaster relief payments from the government and DROs are not the only aspects of a disaster that have tax consequences. First, some payments to victims of a disaster may not meet the requirements for qualified disaster relief payments, either because of the nature of the payment or the nature of the disaster.\textsuperscript{113} Nonetheless, some tax relief is possible for disaster victims who receive payments other than qualified disaster relief payments. Earlier IRS revenue rulings established a number of circumstances under which gross income did not include payments made to victims of natural disasters to assist them in obtaining food, shelter, clothing, medical care, and other basic needs.\textsuperscript{114}

Insurance payments may also be excluded from income.\textsuperscript{115} Insurance payments may be qualified disaster relief payments\textsuperscript{116} if they are made to cover living expenses incurred as a result of the loss of use of a principal residence in a Presidentially declared disaster area.\textsuperscript{117} Alternatively, loss of use may result from a fire or storm that may not be large enough to warrant making the area a Presidentially declared disaster area.\textsuperscript{118} However, even without that declaration, insurance payments may not be included in income. To the extent that insurance pays for the repair or replacement of insured property, the payments are made to restore the taxpayer to his prior position and if used for repairs are not included in income, but reduce the amount of loss that can be deducted.\textsuperscript{119}

At least two other types of tax relief may also be available for disaster victims who suffer losses. First, upon the sale of a principal residence that the taxpayer has owned and in which he has been living for at least two of the previous five years, the taxpayer can exclude from income up to a $250,000 gain ($500,000 for married couples filing jointly).\textsuperscript{120} If the taxpayer does not meet the two year use test, the taxpayer can still claim the exclusion if there is an unexpected loss as a result of a natural or

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} § 139(c).
\item \textsuperscript{113} \textit{See id.} § 139(b)-(c) (listing the requirements of qualified payments and qualified disasters).
\item \textsuperscript{114} \textit{See, e.g.,} Rev. Rul. 76-144, 1976-1 C.B. 17 (applying the exclusion to payments made under the Disaster Relief Act of 1974); Rev. Rul. 53-131, 1953-2 C.B. 112 (concluding that employer aid to employees following a tornado was not gross income for the recipients).
\item \textsuperscript{115} I.R.C. § 123(a) (2000).
\item \textsuperscript{116} \textit{See generally} I.R.C. § 139.
\item \textsuperscript{117} I.R.C. § 123(a).
\item \textsuperscript{118} \textit{Id.; see also} I.R.C. § 1033(h)(3) (Supp. V 2005).
\item \textsuperscript{119} \textit{See} I.R.C. § 165(a), (h)-(i).
\item \textsuperscript{120} \textit{Id.} § 121.
\end{itemize}
man-made disaster.\textsuperscript{121} This may help taxpayers whose principal residence is destroyed and who are unable to or choose not to rebuild, but have insurance coverage exceeding their basis.

Second, when a taxpayer's property is involuntarily converted or destroyed, as when it is destroyed in an earthquake, fire, or a storm, the taxpayer may exclude any gain realized.\textsuperscript{122} For any gain to be excluded from income, the taxpayer must use any money received as a result of the conversion, destruction, theft, seizure, requisition, or condemnation of the property to obtain replacement property.\textsuperscript{123} Nonrecognition has two components: first, payment must be compensation for the property; second, the property must be replaced with similar property within two years of the loss.\textsuperscript{124} The two year replacement period may be extended following certain disasters.\textsuperscript{125} Additional time for replacement may be important, particularly following a large scale disaster like Hurricane Katrina, because of the degree to which victims' lives are disrupted. Following disasters with massive property destruction, victims may have significant difficulty even locating suitable replacement property. Even with property destroyed during a disaster that is not a Presidentially declared disaster, a taxpayer who is unable to replace the destroyed property within two years can request an extension of time from the Secretary.\textsuperscript{126}

The following sections will discuss the changes Congress made to the tax treatment of disaster victims and, in some cases, charitable donors following some of the worst recent disasters. These changes were contrary to the treatment established following earlier disasters, which left the charitable landscape largely unchanged but permitted some relief to victims.

\textbf{B. Tax Consequences of Payments to Victims of the 9/11 Terror Attacks}

The 9/11 terror attacks on the World Trade Center and the Pentagon, along with the crash of Flight 93 in Pennsylvania, led to unprecedented charitable contributions. More than $2 billion was contributed to aid the victims and their survivors.\textsuperscript{127}

The victims experienced massive need. Approximately 3,000 people were killed and upwards of 100,000 lost their income in New York City

\begin{itemize}
  \item \textsuperscript{121} Treas. Reg. § 1.121-3(e)(2) (2007).
  \item \textsuperscript{122} I.R.C. § 1033(a) (2000).
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id. § 1033(a)(2)(B).
  \item \textsuperscript{125} See id. § 1033(h)(1)(B).
  \item \textsuperscript{126} Id. § 1033(a)(2)(B)(ii).
  \item \textsuperscript{127} Michael Burnstein, \textit{Charities and Disaster Relief for September 11 and Beyond}, 13 \textit{TAX'N OF EXEMPTS} 283, 284 (2002).
\end{itemize}
alone following the terror attacks.\textsuperscript{128} Residents of the area surrounding ground zero were left at least temporarily homeless.\textsuperscript{129}

These attacks were followed in the fall of 2001 by the delivery of several letters containing anthrax spores.\textsuperscript{130} The anthrax attacks were much less extensive, sickening twenty-two people and killing five.\textsuperscript{131} However, the anthrax attacks disrupted postal operations at several facilities, interfered with government mail delivery, and also increased the national anxiety regarding the safety of citizens and visitors to the United States, making these attacks a serious threat.

Some victim relief funds dedicated to aiding the victims of one or both of these events received more contributions than they could distribute under the traditional guidelines for distribution of disaster aid by charitable organizations. The traditional guidelines stated that disaster relief "[could not] be distributed to individuals merely because they are victims of a disaster."\textsuperscript{132} Under the traditional guidelines, aid had to be distributed based on objective criteria that reflected the recipients' needs.\textsuperscript{133}

As a result, both well-established charities and newly formed DROs were placed in a very difficult position because they had received restricted contributions that could not be distributed to 9/11 survivors and their families based on the traditional guidelines. Should the organizations follow the wishes of the donors and potentially risk their tax-exempt status, or should they shift the aid to other disasters? Donations in many cases exceeded the reasonable objective needs of the victims or subclass of victims and survivors whom donors intended to benefit. This left many DROs who received excess contributions with the quandary of whether to return funds to the donors, risk their tax-exempt status by continuing to make distributions to intended beneficiaries beyond their objective needs, or redirect the funds to other causes and risk public furor.\textsuperscript{134} Even returning the funds to the donors presented problems, as many contributions were made anonymously and the donors could not be identified.

\textsuperscript{128} U.S. GEN. ACCOUNTING OFFICE, \textit{supra} note 15, at 1.
\textsuperscript{131} Id.
\textsuperscript{133} See, e.g., I.R.S. Notice 06-10, 2006-5 I.R.B. 386.
\textsuperscript{134} See Katz, \textit{supra} note 83, at 253-54.
When the American Red Cross announced that it would divert some of the aid it received for 9/11 survivors, a huge public outcry against this plan resulted. In light of the strong public sentiment, it is fortunate for the disaster relief organizations that Congress ultimately acted to permit charities to use the money for the purposes for which it was donated, in most cases. In January 2002, Congress passed and President Bush signed the Victims of Terrorism Tax Relief Act of 2001, which relaxed the traditional standards for the distribution of aid by charities. As long as distributions were made to victims of the 9/11 terror attacks or anthrax attacks occurring before January 1, 2002, were made in good faith, were reasonable, and were made according to objective standards, the distributions would not place the organization’s tax-exempt status in jeopardy. This legislation helped relieve the pressure on both Congress and the relief organizations that were trying to help victims and their survivors.

Unfortunately, even though it addressed the immediate concerns that DROs faced regarding their tax-exempt status and public relations, the 2002 legislation did not address all of the problems. First, contributions to the 9/11 terror attack and anthrax attack victims meant there may have been less aid available to victims of other disasters. Second, the legislation addressed the problem only with respect to these specific relief efforts, not with respect to other relief efforts, meaning DROs attending to victims of future disasters could face similar problems.

C. Charitable Contributions for 2004 Indian Ocean Tsunami Relief

The 2004 Indian Ocean tsunami occurred on December 26, 2004. This massive tsunami left hundreds of thousands dead and over a million people displaced. The response to this disaster was unprecedented. Worldwide, private contributions to help the tsunami victims totaled

136. See Katz, supra note 83, at 290-92.
138. Id. § 104(a), 115 Stat. at 2431.
140. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-488, FOREIGN ASSISTANCE: USAID HAS BEGUN TSUNAMI RECONSTRUCTION IN INDONESIA AND SRI LANKA, BUT KEY PROJECTS MAY EXCEED INITIAL COST AND SCHEDULE ESTIMATES 1 (2006). More than 230,000 people were killed by the 2004 Indian Ocean Tsunami. Id. In addition, over 1.7 million people were displaced. Id.
more than $5 billion.\textsuperscript{141} Governments worldwide also contributed billions of dollars of aid to the relief effort.\textsuperscript{142}

To permit and encourage United States taxpayers to help those affected by the tsunami, Congress passed a temporary change to the charitable giving rules.\textsuperscript{143} The legislation to permit tax relief to charitable contributors made its way through Congress and into law with unprecedented speed. Under this legislation, contributions for tsunami relief made after December 31, 2004, and on or before January 31, 2005, could be deducted as though they were made on December 31, 2004.\textsuperscript{144} The new law gave taxpayers a choice between reporting the deduction for charitable contributions to domestic charities for tsunami relief either during 2004, thereby accelerating the deduction, or 2005, when the contribution was made.\textsuperscript{145}

The adjustment to the charitable contribution deduction was very limited. Only cash contributions made for tsunami relief to domestic charitable organizations were eligible for the acceleration into 2004.\textsuperscript{146} In addition, contributions had to be made by January 31, 2005.\textsuperscript{147} Finally, single contributions could not be treated as partially made in 2004 and partially made in 2005, but separate contributions could be classified individually.\textsuperscript{148} The deduction acceleration permitted some taxpayers to engage in limited post-tax year tax planning, which taxpayers ordinarily cannot do with charitable contributions.

\textbf{D. Charitable Giving and Disaster Relief Following Hurricanes Katrina, Rita, and Wilma}

Hurricane Katrina, which made landfall on August 29, 2005, "caused more damage than any other single natural disaster in the history of the United States."\textsuperscript{149} Many were killed and hundreds of thousands of people were displaced when their homes and businesses were damaged or

\begin{itemize}
  \item \textsuperscript{141} \textsc{Int'l Fed'n of Red Cross and Red Crescent Soc'y's}, \textit{supra} note 1, at 8, 168.
  \item \textsuperscript{144} Act of Jan. 7, 2005, § 1, 119 Stat. at 3.
  \item \textsuperscript{145} \textit{See id.}
  \item \textsuperscript{146} \textit{Id.}
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{See Press Release, Internal Revenue Serv., New Law Encourages Tsunami Relief Contributions (Jan. 10, 2005), available at} http://www.irs.gov/newsroom/article/0,,id=133843,00.html ("The new law gives taxpayers the option of deducting the contributions on either their 2004 or 2005 returns, but not both.").
  \item \textsuperscript{149} U.S. GOV'T ACCOUNTABILITY OFFICE, \textit{supra} note 9, at 6.
\end{itemize}
Property damage from the hurricane exceeded $96 billion. Following Hurricane Katrina, the National Response Plan (NRP) was put into action. The NRP, recognizing the need to use both government and private resources in the event of a major incident, was established after the 9/11 terror attacks, and called for cooperation between government agencies (i.e. FEMA) and private relief organizations (the American Red Cross and others). The NRP is designed to address the response to both natural and man-made disasters.

Hurricane Katrina was devastating. However, unfortunately for residents of Louisiana and Mississippi, Hurricane Katrina was not all nature had to offer. Shortly after Hurricane Katrina, Hurricanes Rita and Wilma struck, increasing the damage and suffering. These hurricanes, which overlapped the area hit by Hurricane Katrina, killed and displaced even more people, and further property was damaged and destroyed. All told, the three hurricanes killed over 1200 people and caused massive property damage in a tri-state area. The result of all three hurricanes was an unprecedented need for both government and private aid.

The amount of need overwhelmed many agencies. FEMA determined that almost 950,000 applicants were eligible for housing assistance.

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151. U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 9, at 6.
152. Id. at 8-9 ("The National Response Plan is designed on the premise that disaster response is generally handled by local jurisdictions. . . . Local jurisdictions can also call on state resources to provide additional assistance. If an incident is of such severity that it is deemed an incident of national significance, DHS and FEMA coordinate with other federal agencies to provide the affected state and local governments with additional resources and supplemental assistance.").
153. Id. at 9.
154. See id. at 1 (noting that the NRP is designed to respond to "incidents of national significance, such as natural disasters and terrorist attacks").
155. See METRO. POLICY PROGRAM, supra note 150, at 13 ("[Hurricane Katrina's] death toll stands around 1,200 people in the multi-state affected area, with about 1,000 of the dead having resided in Louisiana."); RICHARD D. KNABB, DANIEL P. BROWN & JAMIE R. RHOME, NAT'L HURRICANECtr., TROPICAL CYCLONE REPORT: HURRICANE RITA 8 (2006), available at http://www.nhc.noaa.gov/pdf/TCR-AL182005_Rita.pdf; ("Seven fatalities have been directly attributed to the forces of Rita. . . . At least 55 'indirect' fatalities have [also] been reported . . . ."); RICHARD J. PASCH, ERIC S. BLAKE, HUGH D. COBB III & DAVID P. ROBERTS, NAT'L HURRICANECtr., TROPICAL CYCLONE REPORT: HURRICANE WILMA 5 (2006) ("Twenty-three deaths have been directly attributed to Wilma . . . ."), available at http://www.nhc.noaa.gov/pdf/TCR-AL252005_Wilma.pdf.
following Hurricane Katrina alone. The American Red Cross stated that it assisted more than 1.4 million families following Hurricanes Katrina, Rita, and Wilma. In May 2007, more than twenty months after Hurricane Katrina made landfall, over 30,000 families who were displaced by Hurricanes Katrina and Rita remained spread across the country and were still receiving housing aid from FEMA; 13,000 families remained in FEMA trailers.

In the wake of the 2005 record-setting hurricane season, Congress enacted several tax incentives for individuals and corporations to engage in charitable giving, and also provided tax relief for victims of Hurricanes Katrina, Rita, and Wilma. The temporary nature of the relief may not be sufficient to address the long-term needs of these victims.

The following sections discuss the temporary incentives Congress created for charitable giving. These sections also discuss the temporary tax relief provided to the victims of Hurricanes Katrina, Rita, and Wilma.

1. Tax Incentives for Charitable Giving

The Katrina Emergency Tax Relief Act of 2005 ("KETRA") amended the Code to temporarily increase the charitable deduction available to individuals and corporations. The deduction limits under KETRA differed for individuals and corporations.

Individuals could deduct qualified contributions made between August 28, 2005 and December 31, 2005 equal to as much as one hundred percent of their adjusted gross income. Qualified contributions had to
be cash, and could not be made to establish or maintain a segregated fund or account over which the donor (or his designee) had, or was reasonably expected to have, advisory privileges.

KETRA also increased the deduction available to corporations for charitable contributions. KETRA permitted corporations a deduction for cash charitable contributions of up to the amount of the corporation's taxable income. To receive the increased charitable deduction under KETRA, corporate contributions had to be made for relief efforts related to Hurricane Katrina. The expanded AGI limit was extended by the Gulf Opportunity Zone Act of 2005 (GO Zone Act) to include contributions for relief efforts related to Hurricanes Rita and Wilma.

Increased charitable deductions were not the only incentives Congress provided to encourage aid to the hurricane victims. Other more targeted tax incentives were included in KETRA and expanded by the GO Zone Act to encourage the provision of assistance to victims. First, a $500 exemption from income was provided for individuals who provided housing to a person displaced by one of the hurricanes. Second, the standard mileage rate for deduction or reimbursement of mileage for the use of a vehicle for charitable purposes was increased. There were also additional incentives for the contribution of food inventories, and book inventories to public schools. These additional incentives were designed to get aid directly to the victims.

2. Tax Relief for Victims of Hurricanes Katrina, Rita, and Wilma

Along with the tax incentives to encourage individuals and corporations to give aid to victims, KETRA and the GO Zone Act provided some additional tax relief to the victims of Hurricanes Katrina, Rita, and Wilma. The relief available to victims of these hurricanes is described below.

..."). "[T]he term 'contribution base' means adjusted gross income (computed without regard to any net operating loss carryback to the taxable year . . . )" I.R.C. § 170(b)(1)(G) (West Supp. 2007) (note that at the time KETRA was passed, this definition was codified at I.R.C. § 170(b)(1)(F) (2000)).

163. KETRA § 301(d)(1)(A).
164. Id. § 301(d)(2).
165. Id. § 301(b)(2).
166. Id. § 301(b)(2)(A).
167. Id. § 301(d)(1)(B).
169. KETRA § 302(a). The exemption, available in 2005 and 2006, was capped at $2,000 per taxpayer providing housing. Id. § 302(b).
170. Id. §§ 303-04.
171. Id. §§ 305-06.
First, the areas affected by the hurricanes were Presidentially declared disaster areas. That designation entitles victims to certain basic statutory relief. It allows victims to deduct casualty losses, obtain replacement property without gain or loss recognition, and receive certain aid payments without recognizing income.

In addition, KETRA permitted a victim of the hurricanes to exclude certain discharges of indebtedness from an individual's gross income. The legislation excludes certain discharges of indebtedness occurring before January 1, 2007. However, if the indebtedness was incurred in connection with a trade or business, or related to real property located outside the core disaster area, a discharge of indebtedness was not eligible for exclusion from income under KETRA. Individuals could not receive benefits from both KETRA and section 108(a) of the Code.

Second, the limitations on personal casualty losses were suspended for losses on property in the disaster areas. Ordinarily, taxpayers can only deduct casualty losses exceeding ten percent of their adjusted gross income and in excess of $100. Under KETRA and the GO Zone Act, these limitations do not apply to losses attributable to the hurricanes or any other personal casualty losses. In addition, a taxpayer can elect to accelerate the loss deduction to the year preceding the disaster for loss attributable to any disaster in a Presidentially declared disaster area.

Third, taxpayers in the affected areas were permitted to make withdrawals of up to $100,000 from qualified retirement accounts, including IRAs, without paying the ordinary penalties. Although no penalties were imposed on these withdrawals, ordinary income taxes had to be paid; but KETRA permitted taxpayers to spread the income, and therefore the taxes, over three years. Taxpayers who made such withdrawals were also permitted to repay the withdrawals within three years, thereby avoiding payment of the taxes altogether. In addition,

172. Id. § 2; GO Zone Act § 101, I.R.C. § 1400M (Supp. V 2005).
174. Id. § 1033(h).
176. KETRA § 401(a).
177. Id. § 401(e).
178. Id. § 401(c).
179. Id. § 401(d).
180. Id. § 402.
182. KETRA § 402; GO Zone Act § 201, I.R.C. § 1400S(b) (West Supp. 2007).
185. KETRA § 101(e).
186. Id. § 101(c).
taxpayers who had previously made withdrawals to help pay for the purchase of a home were permitted to repay the distributions without penalty, if the hurricanes resulted in the cancellation of the purchase.\textsuperscript{187}

Fourth, taxpayers in the affected areas were also permitted to take larger loans against their qualified retirement accounts.\textsuperscript{188} The usual $50,000 limit for loans from a qualified retirement plan was increased to $100,000 for victims of Hurricanes Katrina, Rita, and Wilma.\textsuperscript{189} In addition, the time for repayment of such loans was extended.\textsuperscript{190}

III. JUSTIFICATIONS OF DEDUCTION FOR CHARITABLE CONTRIBUTIONS

A. Explanations for Donor Behavior in Making Charitable Contributions

It is difficult to determine precisely why donors give to charity. It is clear that different donors to a single cause may have different motivations, and that a single donor may have different motivations depending on the cause. Some reasons are intrinsic and depend on how giving makes the donor feel. Survey responses indicate that charitable contributions are driven by feelings of approval or obligation, group membership, individual benefit, and peer pressure.\textsuperscript{191} However, economic considerations are also important to the decision to give money to a charitable cause. The availability of a tax deduction or credit for charitable contributions will increase the likelihood that individuals and corporations will make contributions.\textsuperscript{192}

\begin{footnotes}
\item 187. Id. § 102.
\item 188. Id. § 103.
\item 189. Id. § 103(a)(1).
\item 190. Id. § 103(b).
\item 191. Gergen, supra note 23, at 1430.
\item 192. See Michael J. Boskin & Martin Feldstein, Effects of the Charitable Deduction on Contributions by Low Income and Middle Income Households: Evidence from the National Survey of Philanthropy, 59 Rev. Econ. & Stat. 351, 354 (1977) ("Tax incentives to encourage giving by low and middle income households would induce a substantial increase in the flow of funds to charitable organizations."); Martin Feldstein & Amy Taylor, The Income Tax and Charitable Contributions, 44 Econometrica 1201, 1217, 1221 (1976) ("[T]he current deductibility of charitable gifts is a very efficient incentive, yielding more in additional gifts than the Treasury forgoes in potential additional revenue."); see also Harold M. Hochman & James D. Rodgers, The Optimal Tax Treatment of Charitable Contributions, 30 Nat'L Tax J. 1, 13-15 (1977) (recommending a tax credit in lieu of deductibility for charitable contributions); Joel Slemrod, Are Estimated Tax Elasticities Really Just Tax Evasion Elasticities? The Case of Charitable Contributions, 71 Rev. Econ. & Stat. 517, 522 (1989) (analyzing the tax responsiveness of charitable giving in relation to misreporting, and concluding that "the responsiveness of actual giving is higher than is suggested by studying reported contributions").
\end{footnotes}
B. Selected Justifications for the Charitable Deduction

When the deduction for charitable contributions was first permitted in 1917, the reason appears to have been "to ensure that the income tax would not suppress giving to charity."\(^{193}\) Over time, additional justifications based on both economic and social philosophy theories have been put forward to support the continued tax subsidization of charitable contributions.\(^{194}\)

A determination regarding whether and to what extent a deduction or other tax benefit should be implemented should involve a consideration of not only the impact on the tax system, but also overall tax policy. Among the most frequently asserted goals of tax policy are equity, efficiency, and ability-to-pay.\(^{195}\) Each of these goals can be defined in more than one way and may be in tension with the other goals.\(^{196}\) However, in the abstract, most agree that these are important goals to be achieved by the tax system, though many would include other goals as well.\(^{197}\)

One commonly used definition of efficiency is the Pareto optimality theory, under which, as a result of a change in the system, at least one person's position is improved and no person's position is worsened.\(^{198}\) It has been argued that a deduction for charitable contributions cannot result in Pareto improvements, because some will either not want to support charity or will not want to support charity to the extent that they bear the burden of the tax subsidy.\(^{199}\)

Another approach to determining efficiency is the Kaldor-Hicks model, which considers a policy to be efficient if the societal gains resulting from a change more than offset the societal losses from the change and no further improvement can be obtained by making

\(^{193}\) Gergen, supra note 23, at 1396.

\(^{194}\) See id. at 1396-97.


\(^{196}\) See id. at 301 ("[Tax policy] goals have their shortcomings. For one, they often conflict. Equity often clashes with benefit and efficiency.... The conflict and imprecision of tax policy norms lead[s] to considerable disagreement.").

\(^{197}\) See, e.g., id. at 299-303; Leandra Lederman, "Stranger than Fiction": Taxing Virtual Worlds, 82 N.Y.U. L. REV. 1620, 1658 (2007) ("The tax policy concerns usually considered in evaluating the appropriateness of a tax or provision are equity, efficiency, and administrability.").

\(^{198}\) Jules C. Coleman, Efficiency, Utility, and Wealth Maximization, 8 HOFSTRA L. REV. 509, 515, 517 (1980) ("Allocations that are Pareto superior increase at least one person's utility without adversely affecting the utility of another; they produce winners but no losers.").

\(^{199}\) Gergen, supra note 23, at 1412.
additional changes in policy. A policy can be a Kaldor-Hicks improvement if the policy achieves better results than would occur without the policy, but does not reach Kaldor-Hicks efficiency because additional improvements are possible.

Because the charitable deduction creates a disparity of treatment between donors based on whether they itemize, some have argued that the charitable deduction should not be limited to itemizers. In addition, because the benefits of a deduction depend on the taxpayer's marginal tax rate, high income taxpayers receive a greater benefit than lower income taxpayers, violating the principle of vertical equity.

Moreover, inequity is created among donors when different rules apply to contributions to aid different disasters. Differential treatment may also create inequities for the victims both in aid available and in tax consequences to the victims. Eliminating the disparity of the treatment of contributions by eliminating the requirement that taxpayers itemize deductions could create a Kaldor-Hicks improvement.

On the other hand, providing a tax credit for a charitable contribution may not be an improvement under either of these theories because although it would benefit non-itemizers and those in lower tax brackets, it would likely adversely impact higher-rate taxpayers if it were subject to an income phase-out. But even if efficiency is not improved, vertical equity could be, because the results could further the idea that those who have higher income should pay more and those with lower incomes pay less. Higher taxes at higher income levels are also consistent with the ability-to-pay principle.

There are also several economic justifications for permitting a deduction for contributions to DROs. First, individuals may believe that

200. Id.
201. See id. at 1412-13.
204. Some people might still prefer that no deduction be permitted because they do not like the choices that are made about which causes are supported by charities. Therefore, an argument could still be made that such a change would not achieve Pareto optimality.
they do not need to contribute because others will. This belief, a variant of the free-rider problem, may lead to too little aid being available.\textsuperscript{205} A charitable deduction may help alleviate this problem by creating a tangible incentive to make charitable contributions.\textsuperscript{206} Second, gifts to DROs tend to provide a means of wealth redistribution.\textsuperscript{207} This may cause a tax subsidy for contributions to DROs to result in a Pareto improvement.\textsuperscript{208}

Disaster relief, along with certain other charitable purposes, may permit justification of the charitable deduction on the grounds that the functions performed by the charity relieve a government burden.\textsuperscript{209} Under the common law, charitable organizations were required do works that promoted the social welfare or benefited the community.\textsuperscript{210}

In the wake of a devastating man-made or natural disaster, most people and companies express an interest in and willingness to help those in need. The fact that so many say that they are interested in and willing to help may make the free-rider problem even greater. Thus, if allowing a greater deduction for contributions to disaster relief increases contributions and provides more and better aid to the victims, the result is likely a Pareto improvement. One benefit of a deduction for charitable contributions is that it spreads the cost of providing charities' services over all taxpayers, meaning that even those few who do not want to help will bear little of the burden.\textsuperscript{211} At the same time, those who feel strongly about providing assistance can do so at a reduced cost.

It is more difficult to support some of the arguments that favor the charitable deduction in some cases. An example that might be harder to justify is the short-term acceleration of the deduction permitted for the 2004 Indian Ocean tsunami relief effort.\textsuperscript{212} In that case, the aid was being sent to another country. That means that United States taxpayers were

\begin{itemize}
\item \textsuperscript{205} See Gergen, \textit{supra} note 23, at 1399, 1448.
\item \textsuperscript{206} See \textit{id.} at 1448.
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.} at 1449. Few would argue that no aid of any kind should be given to disaster victims, making less likely the argument that some will be worse off because they do not in any way want to fund relief efforts.
\item \textsuperscript{209} See H.R. REP. NO. 75-1860, at 19 (1938) ("The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare."). \textit{quod in Bob Jones Univ. v. United States, 461 U.S. 574, 590 (1983); see also Christine Holland Anthony, Note, The Responsible Role for International Charitable Grantmaking in the Wake of the September 11, 2001 Terrorist Attacks, 39 VAND. J. TRANSNAT'L L. 911, 917-18 (2006).}
\item \textsuperscript{210} See BOGERT & BOGERT, \textit{supra} note 77, § 361.
\item \textsuperscript{211} Fleischer, \textit{supra} note 65, at 24-26.
\end{itemize}
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paying for a benefit to those that were hurt, displaced, or killed in another country. Although some victims were United States tourists, they did not make up the bulk of those in need as a result of the tsunami.\textsuperscript{213} With respect to domestic relief, DROs often provide services that would otherwise fall to government agencies, including providing emergency shelter, clothing and food.\textsuperscript{214} Thus, it is not hard to see that contributions to DROs in the United States, made to aid domestic victims relieve a government burden.

However, whether this justification supports the requirement that donations be made to a domestic organization is a more difficult question, especially given that domestic DROs are not limited to providing domestic aid, nor are foreign DROs prohibited from providing aid in the United States. The answer depends on one's view of government responsibility. One view is that each government has an obligation to provide aid to other countries as members of the global community.\textsuperscript{215} If this is the case, and the government has a responsibility to provide foreign aid, a deduction should be available regardless of whether contributions are made to a foreign or domestic charity, because regardless of the charity's location, the contributions will be used to fulfill a government obligation.

Even if a charitable deduction for contributions to foreign charitable entities can be justified as fulfilling a government obligation to provide global aid, oversight problems remain. The United States government has very little ability or authority to oversee the operations of foreign entities to ensure that funds are used for purposes that would qualify the entity as a charitable organization in the United States.\textsuperscript{216} Moreover, there is an added concern that the funds could be diverted to uses that are at odds with United States foreign policy or its interests.\textsuperscript{217}

Perhaps requiring that contributions be made to a domestic organization, which can then transfer the funds to a foreign aid organization, or use the funds to help with foreign relief efforts is a reasonable compromise. This may also effectively transfer some oversight responsibilities to the domestic charity. The domestic entity,


\textsuperscript{214} See supra notes 16-19.

\textsuperscript{215} See Pozen, supra note 57, at 599-601 (discussing how a deduction for contributions to foreign charities could generate good will toward the government, and stating that "[a]gainst the widespread belief that the U.S. is stingy with international aid, dismantling the water's edge policy would demonstrate our commitment to foreign charity").

\textsuperscript{216} See supra note 93.

\textsuperscript{217} See Pozen, supra note 57, at 594-97.
which wants to keep its tax-exempt status, has a strong incentive to ensure that it is working with reputable aid agencies abroad, and will only give funds to organizations that meet the United States definition of charity. The domestic charity may also be in a better position than individual or corporate donors to know which foreign aid agencies satisfy the requirements of our tax laws.

Moreover, if the cost and benefit of aiding the displaced and preventing the spread of disease is looked at on a global basis, all of humanity benefits from the reduction of suffering. In fact, with respect to the Indian Ocean tsunami, the United States government seemed to take this position, with President George W. Bush encouraging charitable giving to the cause, former Presidents Bill Clinton and George H.W. Bush leading a fundraising drive, and Congress passing legislation to encourage additional contributions. However, this may not be an adequate justification. Since consistency in treatment is important, there is little harm that is likely to result to the United States tax system as long as deductible contributions are made to domestic charities, the donor intends for the aid to go to foreign victims, and the aid is within the mission of the charity.

It seems that the benefits conferred on disaster victims by the availability of aid from DROs significantly outweighs the costs to individual dissenters who do not want to subsidize charitable deductions. As a result, expanded deductions for contributions to disaster relief will be, at a minimum, a Kaldor-Hicks improvement. Moreover, the effectiveness of private disaster relief, at least immediately following the disaster, may be greater than that of having the government provide food, shelter, and water to those who have lost their homes. Although smaller scale disasters are not as widely publicized, it still may be more efficient for DROs, rather than government agencies, to provide aid.

C. Other Justifications for Government Subsidization of Private Relief

In a 1988 article, Professor Mark Gergen used a variety of rationales to explain justifications for a deduction for contributions to social service

218. Pozen, supra note 57, at 582; see also Anthony, supra note 209, at 918, 920-21; Crimm, supra note 58, at 8, 12-13.


222. See Gergen, supra note 23, at 1412 ("If winners win more than losers lose, a policy is a Kaldor-Hicks improvement.").
organizations, including DROs. In the context of disaster relief, Professor Gergen posits that giving to charitable relief might be akin to the insurance system. Individuals might contribute to a disaster that did not directly impact them, based on a belief that others would contribute in the event they were affected by some other disaster. However, Professor Gergen correctly dismisses the possibility, especially when the disaster is distant and the aid primarily helps the poor. In dismissing this rationale, he notes the significant opportunity to free ride and the unlikelihood that a donor will ever receive a reciprocal benefit.

Another rationale for providing a subsidy for charitable contributions, such as a tax deduction, is that in some instances a private charity will be better able to meet the needs of those to be benefited. Moreover, private charity may be more flexible and able to adjust to changing needs than would the government. However, neither delivery mechanism is without problems, as evidenced by the fact that both government and private aid providers experienced substantial failures following Hurricane Katrina. In addition, the U.S. government had problems getting personnel in place and was unable or unwilling to accept foreign aid that was offered to assist in the aftermath of Hurricane Katrina. On the other hand, charities are not always perceived as being better able to efficiently distribute aid. For example, following the 9/11 terror attacks, many of the charities that received aid for the victims and their survivors were criticized for not distributing funds quickly enough. For instance, the Salvation Army offered to pay the expenses of the victims and their families. This was an optimistic promise, and the Salvation Army rapidly fell behind in performing this task because of the enormity of the job.

223. See generally id.
224. Id. at 1431.
225. Id.
226. Id.
227. See U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 9, at 3-5.
228. John Solomon & Spencer S. Hsu, Most Katrina Aid from Overseas Went Unclaimed, WASH. POST, Apr. 29, 2007, at A1. Unclaimed aid included "manpower, supplies, and expertise worth untold millions," and $854 million in cash and oil that could have been sold. Id. In addition, of the $126 million in foreign aid that was received, the government had distributed only about half of it by February 2006. Id. Contributions were offered by Canada, Britain, Israel, and Kuwait. Id.
231. Id.
IV. THE PROBLEMS OF DIRECTED DONATIONS

A. Surplus Funds

Restricted gifts—gifts to charity that must be used for a purpose specified by the donor—may ultimately be difficult for a charity to use. When charities receive more funds than are needed for the specified charitable purpose, the charity may spend more than is optimal to meet the needs of the specified purpose; such spending may also result in inadequate funding for another cause.232

This was illustrated in the aftermath of the 9/11 terror attacks. Excess funds may result if the number of victims and the amount of damaged property for which the funds were donated is fixed.233 Unprecedented giving occurred following the attacks.234 Much of this giving was directed to the victims of the terror attacks and their families.235 As a result of giving being directed to 9/11 relief, other charities received lower contributions, which meant that those charities had less money available to help those who depended on their assistance.236

The excess contributions to the 9/11 funds made it difficult for charities to accomplish their charitable missions while maintaining their status as tax-exempt organizations. First, specific purpose charitable organizations that were formed to aid the victims could not fulfill their mission and satisfy traditional guidelines for making charitable distributions, which required distributions be based on need.237 Second, organizations like the American Red Cross faced very negative publicity if they redirected funds from victims of the 9/11 terror attacks to other uses, regardless of the degree of need.238

One way that charities can address the problem caused by directed donations is through the doctrine of cy pres: the charity could apply to a court for permission to use the money to a help similar group, furthering as much of the donors' intent as possible.239 However, cy pres is generally applied only if no other option exists and it has become illegal,
impossible, or impractical to realize the donor’s original purpose.\textsuperscript{240} The Restatement (Third) of Trusts puts it this way:

Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.\textsuperscript{241}

The donor’s contribution is generally applied as nearly as possible to the donor’s intent under this doctrine.\textsuperscript{242} However, not all charitable contributions for which the donor’s intent cannot be carried out can be cured through the application of cy pres.\textsuperscript{243} The gift must have been made in trust for a charitable purpose, the charitable purpose must be recognized by the law, and the accomplishment of the donor’s purpose must have become illegal, impossible, or impractical.\textsuperscript{244} Many gifts will not satisfy all of the requirements, such as in the case of the 9/11 victim funds, which will make reformation of the gift difficult or impossible. In the case of the 9/11 victim funds, the victims could be identified, but the donations were such that all of their short-and long-term needs were met. However, in the case of a surplus, where the impossibility or impracticality of using the funds for the designated cause can be clearly shown, it may be possible to convince a court to apply the doctrine of cy pres.\textsuperscript{245} However, before the doctrine of cy pres will be applied, the court must determine whether the donor intended that surplus funds be returned to her or her heirs rather than used for another purpose.\textsuperscript{246} Moreover, this still does not address the negative publicity that may accompany a diversion of funds from one disaster to another.

Of course, a surplus of funds is not a problem for all widely publicized disasters. For instance, the number of people displaced during the 2005

\textsuperscript{240} See id. ("[Cy pres] may also apply to a charitable trust if, at the time of its creation, the particular purpose of the trust has been fully accomplished or cannot possibly or practicably be accomplished."); see also Newman, supra note 90, at 27 ("[C]y pres is only a last resort, to be invoked where it is totally impossible for a trustee to realize the objectives of the trust’s creator through reasonable interpretation of the trust agreement.").

\textsuperscript{241} Restatement (Third) of Trusts § 67.

\textsuperscript{242} Id. § 67 cmt. a; Fisch, Freed & Schachter, supra note 90, § 562.

\textsuperscript{243} Fisch, Freed & Schachter, supra note 90, § 572.

\textsuperscript{244} Id. §§ 572, 574.

\textsuperscript{245} Id. § 583.

\textsuperscript{246} See id.
hurricane season was great enough to overwhelm charities' resources as well as government disaster programs. However, the potential that there will be surplus contributions should nevertheless be considered when drafting provisions that will encourage charitable giving.

B. Diversion from Other Uses

In the face of a highly publicized disaster, a donor may direct charitable contributions to one or more DROs. However, this may result in the diversion of funds from other worthwhile causes because most donors can make only limited contributions during a year. One source of the limitation on contributions a particular donor will make during a single year may be the limitation on deductible charitable contributions. Another limitation may be the amount of money that the donor has available; the donor must balance the utility of donating to charity against the utility of other uses of the money including personal consumption or savings.

V. SYSTEMIC IMPROVEMENTS FROM CONSISTENT TREATMENT OF DISASTERS BY THE TAX CODE

Temporary tax relief enacted following a disaster is not likely to be an effective or efficient means of providing relief to the victims. First, the legislative process is not conducive to the speed with which relief needs to be provided to the victims of a disaster. Displaced or injured disaster victims generally require immediate assistance with food, housing, and medical care. Legislation takes time. With legislation following a disaster, neither donors nor victims will know what to expect in terms of relief or incentives that may be provided. Nonetheless, temporary tax relief may be politically expedient for politicians who want to be seen “doing something” to help victims.

In addition, because of the localized nature of disasters, there is a tendency toward short-term, localized relief when any temporary relief is provided. Such relief may not be efficient or equitable:

247. U.S. Gov't Accountability Office, supra note 9, at 17.
248. Ellen P. Aprill & Richard L. Schmalbeck, Post-Disaster Tax Legislation: A Series of Unfortunate Events, 56 Duke L.J. 51, 52, 56-57 (2006) (“[T]he legislative process was glacial in comparison to the dire needs developing on the ground. Hurricane Katrina hit the Louisiana and Mississippi coastline on August 29, 2005. Two weeks passed without legislative action . . . . Both the House and the Senate passed resolutions on September 21 adopting the final provisions of the Katrina Emergency Tax Relief Act (KETRA).”); id. at 67-68 (describing the slow reaction to 9/11, with the tax relief bill being signed into law more than four months after the attacks).
249. Katrina Hearing, supra note 35, at 131-32 (testimony of George K. Yin, Chief of Staff, Joint Comm. on Taxation).
[S]hort-lived tax relief may be problematic due to both lack of awareness of the relief on the part of taxpayers and limited enforcement incentives on the part of the IRS. As a result, we might expect above-average noncompliance with such provisions, both intentional and inadvertent, as well as below-average utilization. Tax provisions, especially short-lived ones, are also not well-suited to providing benefits to low-income beneficiaries.

The legislation passed in the wake of Hurricanes Katrina, Rita, and Wilma resulted in the creation of six categories of victims. Each category of victim was entitled to different tax relief. The more categories of victims permitted by the Code, the greater the complexity of the tax system. The greater the complexity, the harder it is for victims to figure out to what relief they are entitled.

In addition, more categories may result in less equity as otherwise similarly situated taxpayers are treated differently. Although it is possible that the categories could be structured to increase equity among victims, increased equity is not possible when the categories vary from disaster to disaster.

Although the time period within which charitable contributions could be made was limited following Hurricanes Katrina, Rita, and Wilma, the expansion of the charitable deduction for individuals up to their adjusted gross income permitted a benefit to accrue to nonrelief charities. As a result, this measure was not well targeted to the disaster at hand. Moreover, it provided a benefit to nonrelief donors that in no way aided disaster relief. In fact, charitable giving after an adjustment for inflation increased significantly from 2004 to 2005. The increase applied to DROs such as the Red Cross International and the Salvation Army, and also other charitable organizations. Sixty percent of the charities responding to a survey by the Giving USA Foundation and the Center

250. Id. at 132.
252. Tolan, supra note 25, at 800. Similar to tax policy, disaster relief programs should strive to be "efficient, consistent and equitable." Barry J. Barnett, US Government Natural Disaster Assistance: Historical Analysis and a Proposal for the Future, 23 DISASTERS 139, 144 (1999).
255. Id.
for Philanthropy at Indiana University reported that they had received more charitable contributions in 2005 than in 2004, even after adjusting for inflation.256

One means of preventing the inequity often associated with enacting temporary tax legislation following individual disasters would be to enact legislation to provide relief for particular kinds of disasters.257 This would address the problem that a victim made homeless by one hurricane receives different tax benefits than a victim of another hurricane. It could also address potential disparities in treatment to victims of a hurricane and a flood or forest fire. However, this would require Congress to foresee a variety of disasters and provide specific tax relief appropriate to each. It could also add significant complexity to an already overburdened tax system.

Adopting this solution, but limiting it to very broad categories of disasters, would alleviate many of the potential problems. One problem that might remain is that line-drawing questions would arise when various disasters have overlapping elements, such as flooding, high winds, and fires. One possible way to limit that problem would be to use very broad classifications such as man-made disasters and natural disasters.

Man-made disasters would include things like the Oklahoma City bombing, the 9/11 terror attacks, and the 2001 anthrax attacks. Natural disasters would include hurricanes, tornadoes, tsunamis, earthquakes, floods, wildfires, and other similar events. In addition, thresholds for the amount of damage or the number of people affected could be used to determine the types of tax relief available. Current law is similar to this approach, with greater relief available following a Presidentially declared disaster than a disaster that does not receive that designation.258

Ambiguity and questions regarding which category of relief is available could still arise if different treatment is afforded based on whether the disaster is natural or man-made. For instance, within which category should a massive wild-fire fall if the original trigger for the fire was man-made but natural causes result in its expansion to a major disaster? Even leaving aside the question of whether that original trigger was intentional or accidental, this raises a number of questions. If the fire is triggered by human action and is therefore considered man-made, and the relief available differs from the relief provided if it had started as a result of natural conditions, horizontal equity is harmed. This means that a new

256. Id.
257. See Aprill & Schmalbeck, supra note 248, at 69 ("A more even response to taxpayers who are victimized in particular ways would be desirable from a tax policy viewpoint.").
258. See supra note 85 and accompanying text.
category would be needed, thereby increasing the complexity of the tax system.

Similarly, if the dollar value of the damage or number of victims is set as a threshold, there may still be ambiguities. For instance, it will be necessary to determine who is a victim eligible for relief. Presidentially declared disaster areas in some ways address this by providing a geographic area that is covered. The geographic area could continue to be used to determine who is eligible for relief. A different approach, which might ensure that relief is provided to those most affected and most in need, would be to use thresholds such as minimum harm or maximum income. Such thresholds would potentially increase the record-keeping burden on victims or reduce compliance. In addition, although more accurate relief could be provided, the more thresholds that are used, the more complexity that will be added to the system.

With respect to disaster relief, the use of a charitable deduction permits the cost of relief to be spread across society. It eliminates the free-rider problem to the extent that the cost of the charitable contributions is placed on the tax system and the difference is added to the overall societal tax burden. Moreover, tax preferences for charitable contributions to disaster relief result in funding for what is arguably a collective public good. All citizens benefit from the provision of food, medical care, shelter, clothing and other necessary goods and services to those that have been harmed by a disaster, even if some members of society are unable to see how they benefit from the providing those goods and services to someone they do not know who lives thousands of miles away. The use of a deduction shifts some of the cost from the donors to the rest of society. Professor Gergen theorizes that although this shifting mechanism is imperfect, when coupled with the pleasure donors receive from giving, it makes contribution to privately provided public goods tolerable.

In addition, the use of a deduction results in a relatively small cost in government revenues compared to the cost of directly providing disaster victims with needed relief. Tax subsidies may result in a lower cost to government than direct government programs providing the same services. With a tax deduction, the government pays only a portion of

260. See supra note 211 and accompanying text.
262. Id. at 1403.
263. See Hochman & Rodgers, supra note 192, at 3 (advocating a tax credit instead of a deduction for charitable contributions, but noting that government subsidization is generally preferable to direct involvement).
the cost of the contribution to the charity. The availability of a
deduction or credit may encourage individuals to make greater
contributions to charity.

However, temporary or disaster-by-disaster tax relief is less likely to be
effective. It generally will not provide immediate relief to the poor, who
are the victims who need it most. It takes time for legislation to make it
crash through Congress. In addition, it may be difficult to target the relief to
benefit only the poor. The poor often pay little or no tax and do not
generally have a financial cushion that will permit them to absorb
additional expenses associated with injury or property damage. Lower
income individuals and families will often require much more immediate
aid than can be provided by tax relief, even if they will receive some of
the benefits.

Second, as in the case of KETRA and the GO Zone Act, the
legislation may not be targeted sufficiently well to ensure that tax relief
actually goes to disaster relief. Increasing the limits on the deduction
available for charitable contributions without restricting the types of
charities to which contributions can be made may cause contributions to
be made to causes other than disaster relief.

In addition, some disasters require longer-term relief than others. For
instance, many victims of Hurricanes Katrina, Rita, and Wilma are not
able to return to New Orleans over two years later. Estimates suggest
that about half of the pre-Katrina populations may never return.
Sixteen months after the hurricanes, up to 200,000 displaced victims
remained scattered across the United States, and thousands of families
remained in FEMA trailers.

Legislative reactions to major disasters may be both too narrowly
drawn and overly broad to address the concerns at hand, creating
disparate treatment to victims of disasters. Some victims will be swept in
to the relief offered as a result of a major disaster; for instance, the

265. See Katrina Hearing, supra note 35, at 132 (testimony of George K. Yin, Chief of
Staff, Joint Comm. on Taxation).
266. JANE G. GRAVELLE, CONG. RES. SERV., TAX POLICY OPTIONS AFTER
HURRICANE KATRINA 2, 5 (2005) ("In general, tax benefits cannot easily be targeted to
lower income individuals."); see also Tolan, supra note 25, at 837-39.
267. The increase in charitable giving in 2005, even apart from giving to disaster relief,
may support this possibility. See supra notes 254-56 and accompanying text.
268. See Adam Nossiter, New Orleans of Future May Stay Half Its Old Size, N.Y.
TIMES, Jan. 21, 2007, at All.
269. Bob Herbert, The Not Wanted Signs, N.Y. TIMES, Jan. 1, 2007, at A11. However,
as a result of CDC studies indicating unexpectedly high levels of formaldehyde in the
FEMA trailers, FEMA has expedited its plans to move victims out of its trailers. See
supra note 158.
victims of Hurricanes Rita and Wilma received much, but not all, of the relief offered to victims of Hurricane Katrina.\textsuperscript{270} Similarly, the victims of the Oklahoma City bombing and the anthrax attacks were rolled into some of the 9/11 relief.\textsuperscript{271} Rolling the victims of an earlier disaster into the relief provided to victims of subsequent disasters increases equity among these disaster victims, but it does not create equity for victims of all disasters. Moreover, the relief enacted may be different from disaster to disaster, as has been the case following recent disasters, which reduces certainty in the tax law and decreases the equity of treatment among taxpayers.

John Rawls suggested that in structuring a just society the rules of law should be constructed from behind a "veil of ignorance."\textsuperscript{272} Behind the "veil," one would not know where one would fall within the society in terms of position or social status.\textsuperscript{273} Because those who wrote the rules could possibly wind up as the least fortunate in society, they would design rules that would be fair across all of society.\textsuperscript{274}

Rawls posited that those designing the rules for a just society would consider the worst possible outcomes and would strive to obtain the best of the worst possible outcomes, which he called the "maximin."\textsuperscript{275} Starting from behind the veil of ignorance, those making the rules would have an incentive to achieve the maximin because they would not know at the outset the position that they would occupy, or if they might be victims of a disaster.\textsuperscript{276}

Using such a model to design disaster relief may be more realistic than using such a model to redesign all of the laws that apply to society as a whole. Disasters by their very nature do not distinguish between rich and poor or powerful and weak, although some types of disasters may be more likely to affect one group over another. If broad-based rules are

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\textsuperscript{271} I.R.C. § 692(d)(4) (Supp. V 2005); see also Aprill & Schmalbeck, supra note 248, at 69 ("[W]hen one disaster is so great that it seems to call for heaving congressional artillery, other, smaller but more or less similar disasters get caught up in the wave.").
\textsuperscript{272} JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed. 1999).
\textsuperscript{273} Id.
\textsuperscript{274} See id.
\textsuperscript{275} Id. at 132-33.
\end{flushleft}
designed before the occurrence of a disaster and then applied equally to all disasters, equity will be increased.

As a result, before the occurrence of the next mega-disaster, it would be advisable to consider the results of recent mega-disasters, as well as both current charitable giving laws and the temporary measures that followed these and other mega-disasters. After such study, legislation could be designed that would address equity concerns and optimize contributions to disaster relief.

VI. CONCLUSION

The tax system is not well-suited to be a primary delivery mechanism for disaster relief, especially through temporary post-disaster legislation. Legislation tends to be slow moving, as a result of the time required to get an act through Congress. However, providing temporary tax relief may be politically popular. Congress may feel compelled to enact relief legislation to prove that it is doing something to relieve the victims’ suffering.

In addition, congressional action is likely only in the wake of massive disasters like the 9/11 terror attacks, the 2004 Indian Ocean tsunami, and Hurricanes Katrina, Rita, and Wilma. Without intense media attention, there may not be sufficient pressure from the legislators’ constituents, far from the disaster, to cause legislators to act. However, the victims of less widely publicized disasters need help no less than the victims of more high profile disasters.

Sound tax policy generally requires that there be equity between taxpayers who are similarly situated and that taxes be imposed based on a taxpayer’s ability to pay. The temporary relief provisions enacted in the wake of recent massive disasters violated both of these principles.

Many temporary relief provisions for disaster relief are hastily crafted and often not well targeted. This is clearly seen in the increase in the limitations on charitable contributions for individuals in KETRA and the GO Zone Act. The increase in giving to other charities, even after adjustment for inflation, is evidence that at least this part of the legislation was not effective. This increase in individual giving to charities with purposes other than disaster relief may also be inefficient.

Moreover, temporary tax relief legislation is not be an efficient means of encouraging charitable contributions or getting aid to disaster victims. Because of their temporary nature, the contributions may not get where they are needed most. Temporary relief is often inefficient.

Congress should adopt a single set of tax provisions to be applied to disaster relief. In doing so, there should be careful study of the behavioral impact of each of the approaches that have been taken in each of the temporary provisions relating to disaster relief. Moreover,
such legislation should be undertaken without the pressure of a recent disaster. Once disaster relief has been addressed, it should not be hastily modified in the face of new disasters. Although there will not be the same pressure to pass this legislation without a crush of victims from a recently past disaster, post-disaster legislation generally cannot be completed in time to provide meaningful relief to the victims.

Perhaps the Rawlsian maximin would be helpful. If the veil of ignorance is applied, those writing the policy cannot know whether they will fall victim to a disaster, therefore they have an incentive to ensure that even if they are among the unfortunate, they will receive adequate aid, which could result in a better tax model. An increase in the equity, efficiency, and effectiveness of the tax code, as well as improving its adherence to the ability-to-pay principle, will benefit all taxpayers. Such improvements could also improve our ability to get relief to the victims of disasters, both here and abroad. If the aid is more easily obtained and distributed, all of society is better off. In addition, victims will be able to quickly get the aid that they need and the donors will be able to ensure that their contributions will go to help the project or cause that the donor thinks is most important.