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SUBSIDIARITY AND SUFFERING: THE VIEW FROM NEW ORLEANS

ROBERT K. VISCHER†

Tangible signs of a real and lasting recovery for New Orleans continue to be scarce, but the city's long-range future has become the subject of bolder and more ambitious talk. Even as the city struggles to find funding sources for its radically curtailed municipal services,¹ the high-profile commission appointed by Mayor Ray Nagin has proposed a sweeping array of redevelopment measures ranging from the wildly optimistic (a \$3.3 billion light-rail system) to the coldly realistic (a four-month moratorium on building permits to allow time to determine which flooded neighborhoods will be closed permanently).² Reactions have been grounded in a variety of political, ethical, sociological, and economic views, but a distinctly Catholic perspective has been largely absent from the debate, as well as from the broader public discussion about the nature of the government's responsibility for disaster recovery. The silence is not especially surprising, for while Catholics have little difficulty articulating the Gospel's message of compassion, they have a harder time speaking with a single voice about the government's role in channeling that compassion.

In reality, Catholics have ample resources for engaging even the thorniest questions about the substance and scope of the

† Associate Professor, University of St. Thomas School of Law (Minnesota). This essay was originally presented at the annual conference of the Christian Law Professors Fellowship in January 2006.

¹ See Gary Rivlin, *New Orleans Running Out of Options as It Scrambles for New Loans*, N.Y. TIMES, Feb. 26, 2006, § 1, at 20.

² Cf. INFRASTRUCTURE COMM., BRING NEW ORLEANS BACK COMM'N, PUBLIC TRANSIT FINAL REPORT (2006), available at <http://www.bringneworleansback.org/Portals/BringNewOrleansBack/Resources/Public%20Transit.pdf> (outlining a detailed plan for rebuilding the city's infrastructure); URBAN PLANNING COMMITTEE, BRING NEW ORLEANS BACK COMM'N, URBAN PLANNING FINAL REPORT 4 (2006), available at <http://www.bringneworleansback.org/Portals/BringNewOrleansBack/Resources/Urban%20Planning%20Final%20Report.pdf> (recounting the Katrina disaster in detail and suggesting solutions to New Orleans' extensive problems).

government's responsibility for rebuilding New Orleans. The fact that these resources have had little impact on our public discourse reflects the widespread disregard of the breadth and nuance of Catholic social teaching, a body of work that is regularly invoked in the hot-button "culture war" debates, but which too often remains untapped on vital questions at the intersection of human suffering and state power. To ensure that the insight offered by Catholic social teaching does not remain sidelined as the Katrina recovery moves forward and as large-scale disasters invariably arise in the future, its resources must be mined and located in a publicly accessible and workable framework.

Any such framework must be centered on the localizing principle of subsidiarity, as articulated by Pope Pius XI in *Quadragesimo Anno*:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.³

Stated as a criterion for public policy, subsidiarity calls for needs in our society to be met by the most localized body capable of meeting the needs effectively. Subsidiarity's real-world resonance is easy to see: imagine the public outcry if the government proposed that all children be fed at a central government warehouse by licensed nutritionists in order to ensure that they received balanced meals. We care not just that children's needs are met, but that their needs are met by those who are in relationship with them. Emphasizing the relational quality of service to others is the thrust of subsidiarity.

In the wake of Katrina, subsidiarity gives a few easy answers. At one extreme, no one reasonably disputes that a significant role for the federal government is in order. This is a paradigm case where local efforts cannot match the overwhelming need. At the other extreme, subsidiarity would

³ PIUS XI, ENCYCLICAL LETTER *QUADRAGESIMO ANNO* ¶ 79 (1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

not permit Congress to draw up detailed redevelopment plans for each town or city affected by Katrina. Such micromanagement would usurp the authority of more local bodies that are capable of carrying out such tasks and that have a greater ability to reflect a given community's values and priorities.

But the easy answers are rare in this context. Katrina has spawned a bevy of more difficult questions that subsidiarity does not seem particularly well-equipped to answer, as the prudent allocation of authority between lower bodies (i.e., more localized bodies) and higher bodies has been clouded by the immensity of the disaster. For example, what role does subsidiarity contemplate for nongovernment actors in alleviating such widespread suffering? Invoking "one thousand points of light" seems irrelevant to a crisis where a \$62 billion funding package is widely seen as merely the first stage of the needed government response and the unprecedented scope of destruction has precluded basic recovery needs, such as debris removal, even six months after the storm.⁴ In this case, what exactly do private charities have to offer? More broadly, at what point does the utter decimation of local markets and actors necessitate the effective suspension of subsidiarity?⁵ In a disaster of Katrina's magnitude—where a major city's very existence is imperiled—it seems unrealistic to proclaim a policy preference for the local. The population of New Orleans is forecast to shrink by almost half for the next few years, and the local economy will no longer bear the cost of extending services to the city's previous boundaries. If the city's physical "footprint" must be reduced to ensure the city's viability,⁶ it seems foolhardy to suggest that the decision to close down certain neighborhoods can be made at a grassroots level, rather than imposing a collective blueprint from above.

⁴ See Leslie Eaton, *After Hurricanes Come Tempests Over Cleanups*, N.Y. TIMES, Feb. 24, 2006, at A1 ("In Louisiana, of an estimated 60 million cubic yards of debris, about 32.7 million cubic yards of debris were picked up by early February . . .").

⁵ See Jennifer Steinhauer, *New Orleans Is Still Grappling with the Basics of Rebuilding*, N.Y. TIMES, Nov. 8, 2005, at A1 (reporting that "local officials are preparing for the loss of up to half the city's 115,000 small businesses").

⁶ See Jeffrey Meitrodt & Frank Donze, *Plan Shrinks City Footprint*, NEW ORLEANS TIMES-PICAYUNE, Dec. 14, 2005, at 1 ("Key members of Mayor Ray Nagin's rebuilding commission have endorsed a controversial proposal to shrink the city's footprint . . .").

The thorniness of these issues is compounded by the seeming vacuousness of subsidiarity. If subsidiarity's application turns simply on our evaluation of which level of society can handle a problem "effectively," it adds very little to the existing public discourse, for nearly every policy debate centers on competing conceptions of effectiveness. In most contexts, conservatives will tend to believe that local government and non-government actors can handle problems effectively, while liberals will be more likely to believe that action by the federal government is necessary for an effective response. In this regard, even libertarians and communists may be able to invoke subsidiarity by making their own bold normative claims about effectiveness.

Subsidiarity's malleability is reflected by its increasing popularity in political circles. On the right, President Bush's advisers have expressly defined "compassionate conservatism" as "subsidiarity conservatism."⁷ The principle has been invoked to justify the decentralization of environmental law, opposition to campaign finance reform, and the privatization of urban land use regulations. On the left, the European Union adopted subsidiarity as a founding principle,⁸ but with a distinctly individualist gloss, as the interpretive criteria suggest that the European Union cannot usurp a member state's authority unless the action increases individual freedom.⁹

⁷ John J. DiIulio Jr., former head of the White House Office of Faith-Based and Community Initiatives, claimed that "[m]orally, compassionate conservatism is 'subsidiarity conservatism.'" John J. DiIulio Jr., *Compassionate Conservatism—The Right Course, the Right Time*, ORLANDO SENTINEL, Sept. 26, 1999, at G1; see also Richard Morin, *Leading with His Right; John DiIulio, Ready To Go to the Mat with a Faith-Based Approach to Crime*, WASH. POST, Feb. 26, 2001, at C01 (reporting that for DiIulio, "subsidiarity is 'the meat on the bones of compassionate conservatism'"). Longtime Bush adviser Marvin Olasky contends that "we should emphasize what's called 'subsidiarity.'" Marvin Olasky, Editorial, *Let Them Eat Beans*, AUSTIN AM.-STATSMAN, Sept. 29, 2000, at A15. Bush has called Olasky "compassionate conservatism's leading thinker." Robert Westbrook, *Dubya-ism*, 117 CHRISTIAN CENTURY 912, 912 (2000) (reviewing MARVIN OLASKY, COMPASSIONATE CONSERVATISM: WHAT IT IS, WHAT IT DOES, AND HOW IT CAN TRANSFORM AMERICA (2000)).

⁸ See Treaty Establishing the European Community art. 5, Mar. 25, 1957, 2002 O.J. (C 325) 1 (providing that the Community will act only when individual Member States cannot achieve objectives individually).

⁹ OFFICE OF THE DEPUTY PRIME MINISTER, SUBSIDIARITY AND PROPORTIONALITY IN SPATIAL PLANNING (1999), available at <http://www.odpm.gov.uk/index.asp?id=1144731>.

When subsidiarity is used as a general political principle the criteria are not limited to those mentioned in Article 5. It is recommended that two

Both the Bush Administration's and the European Union's policies exemplify the ease with which the principle can be adapted to suit preexisting purposes. To be reclaimed, subsidiarity must be reconnected to the web of teachings from which it arose. In response to the devolutionary impulse of compassionate conservatism, Catholic social teaching reminds us that subsidiarity relies on empowered local communities, and that empowerment will often be illusory absent an active role for the federal government.¹⁰ In response to the individualist premises of modern liberalism, the social teaching reminds us that the ultimate objective of subsidiarity is not an individual's achievement of autonomy for autonomy's sake, but the facilitation of authentic human flourishing.

The path by which we can bring into the public discourse a conception of subsidiarity that is not so vulnerable to political or ideological manipulation is the same path by which we can begin to think more deeply about subsidiarity's implications for the human suffering spawned by Katrina: we must forego any attempt to analyze subsidiarity as an isolated or stand-alone concept and must locate it within the Church's broader vision of the good society. Four essential truths from the Catholic intellectual tradition allow us to frame the public response to Katrina in keeping with the localizing thrust of subsidiarity.

First, Catholic social teaching's relentless focus on individual human dignity—which is not, of course, equivalent with individual autonomy—informs our understanding of subsidiarity and can provide the impetus to oppose certain government actions fueled by concerns of efficiency or perceived public necessity.¹¹ For example, the city of New Orleans used a color-

additional criteria are applied which are derived from other parts of the Treaty and the general meaning of subsidiarity in political theory. They are that decisions should be taken as closely as possible to the citizen (the close to the citizen criterion) and that action should secure greater freedoms for the individual (the autonomy criterion).

Id.

¹⁰ See Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 128, 132 (2001) (stating that an active federal government is essential to realizing subsidiarity's ultimate objectives).

¹¹ "[T]he social order and its development must invariably work to the benefit of the human person," since the order of things is to be subordinate to the order of persons, and not the other way around. SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 26 (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council

coded tag system to designate over 5500 houses as unsafe to enter, and a city official suggested that roughly half of those would be demolished almost immediately.¹² The city claimed authority to do so without holding a court hearing or obtaining the owners' consent. The residents sued to block the demolitions,¹³ and the city eventually agreed to provide owners with advance notices and opportunities to contest the demolition decisions.¹⁴

Subsidiarity, coupled with a concern for human dignity, supports the residents' entitlement to at least an abbreviated procedure through which their voices can be heard. The value our society places on efficiency cannot trump the dignity of ownership, even if the financial cost is high. As we marshal the resources necessary to accomplish the physical rebuilding of New Orleans, we must also provide the resources necessary to protect human dignity in the process of that rebuilding.

Second, the principle of solidarity beckons us to focus on our human connection with Katrina's victims, reminding us that the residents of New Orleans are not mere objects of our strategizing, but fellow human subjects in the midst of great suffering. Serving as the second pillar of Catholic social teaching (alongside subsidiarity), solidarity represents the "commitment to the good of one's neighbour."¹⁵ In formulating a societal response to Katrina, we must engage the pain of those whose lives have been turned upside down, viewing the disaster, at least momentarily, through the eyes of the widower whose wife drowned in the attic, the small business owner who watched a life's work recede with the flood waters, or the young girl whose cherished dolls lie ruined in an uninhabitable bedroom. Coming alongside and grieving with those afflicted may not change the answers we reach in terms of a workable recovery plan, but it must impact the mindset with which we approach the work.

/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html.

¹² Gwen Filosa, Gordon Russell & Bruce Egger, *Lower 9th Ward Activists Chase Away Bulldozer Crew; Razing of Homes After Storm Disputed*, NEW ORLEANS TIMES-PICAYUNE, Jan. 6, 2006, at 1.

¹³ Cain Burdeau, *City Delays Home Demolitions: Move Comes as Group Battles To Save Houses Damaged by Flood*, CHARLOTTE OBSERVER, Jan. 7, 2006, at 14A.

¹⁴ Adam Nossiter, *New Orleans Agrees To Give Notice on Home Demolitions*, N.Y. TIMES, Jan. 18, 2006, at A12.

¹⁵ JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* ¶ 38 (1987).

In particular, solidarity's focus on the human connection means that we must be careful to allow those afflicted to participate in their own recovery. On that front, FEMA's woeful response to Katrina has prompted proposals for the government to outsource disaster relief by entering into pre-disaster contracts with corporations capable of providing an essential service anytime, anywhere.¹⁶ Subsidiarity, in combination with solidarity, does not necessarily preclude such measures, but it does raise a cautionary flag to the extent that such arrangements are unlikely to bring service providers into closer relationship with a disaster's victims. In fact, outsourcing may put another layer between the individuals served and those serving, i.e., there would be no direct accountability or responsiveness between the contracting corporations and the intended beneficiaries. Potential benefits in terms of efficiency or effectiveness may warrant further exploration of this idea, but the danger that the human connection will dissipate further in the wake of a disaster gives reason for hesitation.

Third, Catholic social teaching aims to create a society where the common good can be realized. The common good, as distinguished from the collective good, is not to be defined and imposed from above as a uniform, fixed norm; rather, the common good is realized from the bottom up, constituted by the decisions and day-to-day actions of local communities and their members.¹⁷ At the local level, centralizing key government functions, in service to the common good, may be perfectly in line with subsidiarity. One example is the Louisiana legislature's consolidation of the New Orleans levee boards,¹⁸ which promises

¹⁶ See, e.g., Daniel Henninger, *Wonder Land: To Understand Katrina's Problems Read 9/11 Report*, WALL ST. J., Sept. 2, 2005, at A14 (suggesting that the government should "[g]ive contract authority to organize these resources to a project-management firm like Bechtel . . . [and] use the bureaucracies as infantry."); Stephen Bainbridge, *The Invisible Helping Hand*, TECH CENT. STATION, Sept. 8, 2005, <http://www.tcsdaily.com/article.aspx?id=090805C> (posing the question: "If we can outsource war, why not disasters?").

¹⁷ "[T]he common good depends on a healthy social pluralism. The different components of society are called to build a unified and harmonious whole, within which it is possible for each element to preserve and develop its own characteristics and autonomy." UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Compendium of the Social Doctrine of the Church: Pontifical Council for Justice and Peace* ¶ 151 (2004).

¹⁸ Stuart Grudgings, *Reforms, Funds Seen Lifting New Orleans Recovery*, REUTERS, Feb. 18, 2006, <http://www.alertnet.org/printable.htm?URL=/thenews/newsdesk/N17324828.htm>.

to alleviate some of the maintenance and accountability problems accompanying the dispersal of authority over a vital public resource.

And the federal government, of course, cannot abdicate its own role in facilitating the common good. When Louisiana officials initially requested \$200 billion from the federal government without offering appropriate support or explanation,¹⁹ Congress was prudent in denying the request given the impact that such expenditure could have on the government's other responsibilities. Even with a feasible funding request, the federal government has the duty to ensure that spending by a lower body will empower bodies further down the chain for long-term self-sufficiency. In other words, while the common good is shaped largely by local communities, higher bodies have an important checking function to safeguard the viability of those communities.

The common good also shows why the government should not step back from disaster relief completely, even granting the (enormous) assumption that sufficient sums could be channeled through private charities chosen by individual citizens. In the days after Katrina struck, the columnist Ted Rall offered the infamous headline, *Charities Are For Suckers*, and argued that we need to "starve the beast" of private charities because they are used by the government to abdicate its duties to citizens.²⁰ The problem with this position—and with the broader tendency to marginalize the role of charities in large-scale disasters—is that it ignores the ability of charities to serve needs based on the priorities and worldviews of local communities. Charities are supported by groups of like-minded citizens attracted to an identifiable mission, a specialization not possible through top-down disaster relief funded by taxpayers. Indeed, in Katrina's wake, charitable contributions came from a much broader spectrum of Americans, most notably racial minorities and young people, than traditionally gives to charities.²¹ Charities allow a sense of ownership and moral agency among participants that government relief, no matter how effective, cannot duplicate. So

¹⁹ See Steinhauer, *supra* note 5.

²⁰ Ted Rall, *Charities Are for Suckers*, INFOSHOP NEWS, Sept. 13, 2005, <http://www.infoshop.org/inews/article.php?story=20050915110143470>.

²¹ See Marilyn Gardner, *Hurricane Katrina Changes the Pace and Face of Giving*, CHRISTIAN SCI. MONITOR, Sept. 21, 2005, at 13.

while the federal government will need to coordinate and facilitate relief efforts after a massive societal disruption like Katrina, displacing private charities would compromise the very premise of subsidiarity: the importance of empowering citizens to act as authors of the common good.

Fourth, the preferential option for the poor provides a lens for viewing the debate over what to do with the lower Ninth Ward—the very poor, predominantly black neighborhood that is among the most vulnerable to floods in New Orleans. Should it be rebuilt and protected at great expense, or allowed to return to marshland? A cursory evaluation under subsidiarity might lead to the conclusion that the common good can best be protected by ensuring the efficient expenditure of government funds, and that the neighborhood's vulnerability to floods makes it an unwise redevelopment project.²² The preferential option for the poor, though not dictating an answer, brings a different concern into relief in that the Ninth Ward became culturally distinct, in part because of our society's persistent disregard of poor blacks.²³ This disregard may be exacerbated by ignoring the neighborhood's meaning—we cannot just bulldoze a community and scatter its inhabitants to the wind with housing vouchers in hand. The typical cost-benefit analysis employed in circumstances like this is constrained by the failure to build into the equation the cost of providing new opportunities for meaningful community for the dislocated residents. Facilitating the maintenance of existing communities is prudently reflected in a state proposal to offer more relief funds to homeowners intending to rebuild or repair than to those who simply want a government buyout of their property.²⁴

Providing incentives to homeowners to help sway their decisions on whether to return or relocate, however, is different than removing homeowners from the decision making process

²² See Steinhauer, *supra* note 5 (noting that “some experts have warned that it makes little economic or environmental sense to rebuild low-lying areas like the Lower Ninth Ward”).

²³ See, e.g., Deborah Sontag, *Forced from New Orleans, but Neighbors Still*, N.Y. TIMES, Oct. 12, 2005, at A1 (reporting a historian's view that “the persistent neglect of the area also gave birth to political activism; the fight to improve streets, drains, sewers and schools came to define the Lower Ninth as a place that stood up for itself”).

²⁴ See Adam Nossiter, *Louisiana Unveils a Plan with Cash To Rebuild Homes*, N.Y. TIMES, Feb. 21, 2006, at A14.

completely. The preferential option for the poor is grounded in justice, not charity, and does not give the surrounding society license to assign a value to the Ninth Ward on behalf of its residents.²⁵ Rather, the residents should be empowered to place a value on their own neighborhood through a deliberate choice of return or relocation. Initially, it appeared as though the residential landscape of New Orleans would be decided by a commission and imposed by fiat, categorically ruling out certain areas for redevelopment. The ultimate proposal by the Commission calls for a four-month rebuilding moratorium during which neighborhood residents will meet with city officials regarding prospects for redevelopment.²⁶ If these meetings are evidence of the city's willingness to consider redevelopment of a vulnerable neighborhood if a critical mass of residents demonstrates an intention to return, the Commission has taken a prudent step. It is true that Ninth Ward residents could never bear the full cost of adequate flood protection, and perhaps a more accurate valuation by residents requires that some of the cost be passed onto them through reduced government flood relief payments should they choose to return. But from the standpoint of subsidiarity and the preferential option for the poor, the imperfection of an approach centered on participation and decision making by traditionally marginalized individuals and their families is much preferable to the imperfections of a one-size-fits-all edict.

Against these four background principles, subsidiarity's realization in post-Katrina New Orleans begins to take shape. In general terms, policymakers must remember that the distribution of authority among the various governmental and non-governmental actors is not a zero-sum game: problem solving tasks can and should be separated as appropriate. The fact that funding from a higher body is needed does not mean that decision making authority must be given to the higher body. As a corollary, subsidiarity does not call for blanket deference on substantive policy decisions from higher bodies to lower bodies.

²⁵ "When we attend to the needs of those in want, we give them what is theirs, not ours. More than performing works of mercy, we are paying a debt of justice." UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 17, ¶ 184 (quoting Saint Gregory the Great, *Regula Pastoralis*).

²⁶ James Dao, *In New Orleans, Smaller May Mean Whiter*, N.Y. TIMES, Jan. 22, 2006, § 4, at 1.

The higher body has the responsibility, in keeping with subsidiarity, of ensuring that funding facilitates conduct that will further the lower body's long-term viability and self-sufficiency. Thus, to the extent feasible, the lower body should originate plans and priorities, subject to the higher body's checking authority, and the checking authority should itself be grounded in subsidiarity—that is, it should be exercised with the aim of fostering the self-sufficiency of local communities.

This localizing dynamic is evidenced by the state of Louisiana's takeover of the New Orleans public school system²⁷—a system that was in shambles long before Katrina struck—in order to turn many of the schools into charter schools, which are far more capable of reflecting the needs and priorities of their constituents compared to the endemic non-responsiveness of a large, centralized bureaucracy. In this context, the higher body (the state) has trumped the lower body (the city) in order to empower the lowest body (students and their families). Such is the vision of subsidiarity—not easily subject to a caricatured capture by right or left, but devoted to the empowerment of the local.

By creating space for divergent visions of the good to be lived out side by side, subsidiarity makes pluralism possible. This function can be seen most obviously in the various culture war battles.²⁸ The clash of ideals here is less obvious, but the localizing impetus of subsidiarity is just as important. Nearly everyone can agree in theory with President Bush's call to restore New Orleans as a great American city, but at what price, and in what form? Myriad voices are clamoring to be heard and offering starkly different views.

Subsidiarity offers a framework for the conversation, pushing it local—which will sometimes require higher bodies to

²⁷ See Steve Ritea, *City Doesn't Plan To Go into School Business, Nagin Says; but He Visualizes Model Rebuilt System*, NEW ORLEANS TIMES-PICAYUNE, Feb. 11, 2006, at 1 (reporting on state legislature's "post-Katrina decision to sweep 102 of the city's low-performing public schools into a state-run recovery district, leaving New Orleans Public Schools with just [fifteen] campuses, many of which have already been chartered or are severely damaged").

²⁸ For example, *Roe v. Wade*, 410 U.S. 113 (1973), was decidedly anti-subsidiarity, and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), was decidedly pro-subsidiarity, regardless of one's views on whether abortion should be legal or whether openly gay men should be excluded from positions of leadership within the Boy Scouts.

facilitate the localization—and never letting us forget that the Christian tradition does not equate the local with the individual. The gaze of the decision maker should be concerned not simply with solving the problem currently at issue, but with a proposed solution's impact on the ability of a given community to address future problems. Subsidiarity asks how we can best empower local communities to contribute to an authentic vision of the common good. The answers will not be automatic or obvious, but the centrality of the question should remain constant.