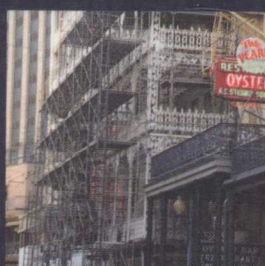


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# Disasters and the Law

KATRINA AND BEYOND



DANIEL A. FARBER

JIM CHEN

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# ***DISASTERS AND THE LAW KATRINA AND BEYOND***

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To my mother, Annette Farber Holland,  
who taught me always to expect the worst.

D.A.F.

To Kathleen, with love.

J.C.

# PREFACE

Why a book on disaster law? The reason is simple: It is hard to think of anything equally important that has received such little sustained attention from lawyers and law professors. Hurricane Katrina alone will involve at least a hundred billion dollars in compensation, insurance, and rebuilding efforts, and lawyers will be heavily involved for at least the remainder of the decade in disputes over these funds. Yet, legal thinkers have done little to think through in advance the issues posed by major disasters. Nor have law schools done much to prepare law students to deal with these issues in their later careers.

Part of the reason is that we are all stunned by each new disaster, but rapidly come to view it as exceptional and never to be repeated. Thus, we fail to prepare for the next one. Unfortunately, there is no reason at all to think that Katrina is the last word in disasters. Indeed, current projections regarding global warming indicate an increasing number of major weather disasters, which is consistent with the record of Katrina, Rita, and other major storms of the 2005 hurricane season.

Apart from its practical significance, disaster law also deserves more attention because of its intellectual challenges. At first glance, disaster law seems to be nothing but a collection of legal rules of various kinds that happen to come into play when communities have suffered severe physical damage. But at a deeper level, disaster law is about assembling the best portfolio of legal rules to deal with catastrophic risks—a portfolio that includes prevention, emergency response, compensation and insurance, and rebuilding strategies. Because of this unifying theme, we think that the topic is deserving of serious law school attention even beyond its newsworthy qualities.

The first half of the book is about the Katrina disaster itself. In the introductory chapter, we provide an overview of the issues raised by Katrina and of the evolution of modern disaster law. Chapter 2 explores federalism issues. Beginning with the great Mississippi flood in the 1920s, the federal government has played an ever-increasing role in disaster prevention and relief. As Katrina illustrated, however, the lines between federal and state authority remain unclear, which can sometimes impede responses. Chapter 3 turns to the topic of social vulnerabilities and disaster law. Whole communities feel the impact of disasters, but not everyone feels the impact equally. All too often, the most heavily impacted are those who are most



socially vulnerable to begin with. Chapter 4 considers the emergency response to Katrina, a topic that has already given rise to extensive reports by committees in both Houses of Congress and by the White House. Obviously, this phase went very badly in New Orleans, and we ask what went wrong and how the system could be improved.

The second half of the book looks beyond Katrina and its immediate aftermath toward the future. There are limits to how successfully we can prevent harm from disasters. When the harm occurs, the next question is compensation, which is the subject of Chapter 5. Should we use private insurance, government programs, or the tort system to provide a safety net for victims? Chapter 6 turns to the question of disaster mitigation. Disasters usually take place in areas that are already known to be at risk. Beyond the question of immediate response is a long-term issue: how to mitigate the potential impacts of natural disasters or terrorist acts, so as to limit the damage. While less dramatic than emergency response, mitigation may be far more valuable in the long run. Chapter 7 returns to Katrina to discuss the looming question of how to rebuild the city and the flood control system. In Chapter 8, we consider future disasters. Unfortunately, Hurricane Katrina is unlikely to be the last disaster to confront our society. Future hurricanes, earthquakes, floods, pandemics, and terrorist acts may well lie in wait for us. This chapter considers some of the challenges posed by these risks.

We are indebted to a number of individuals for their help in preparing this book on a very abbreviated schedule. We learned a great deal from the students who took our hastily assembled seminars on Katrina at Minnesota and Berkeley. Steve Errick suggested the idea of publishing the materials that we had already assembled for the seminars. Jessica Yarnall, Monami Chakrabarti, Kevin Wells, Nicole Harris, Tony Jones, Liz Kiechle, and especially Jenna Musselman provided important research assistance. The Boalt library staff worked tirelessly to help assemble our website, [www.law.berkeley.edu/library/disasters.html](http://www.law.berkeley.edu/library/disasters.html). We owe particular thanks there to Michael Lindsey, Linda Kawaguchi McLane, Jenna Musselman, Dean Rowan, Kathleen Vanden Heuvel, and Alice Youman. We received useful comments from Ann Carlson, Oliver Houck, Andrea Peterson, Bob Rabin, Steve Sugarman, and Rob Verchick. We learned a great deal from Bob Bea and Ray Seed about levees and their flaws. Mary Elliott and Laurie Newbauer worked ably on preparing the book for publication. Finally, the usual thanks to family for their patience apply to an even greater degree here. Both of us had full schedules when Hurricane Katrina struck, and our families bore the brunt of this additional demand on our time and energy.

Dan Farber  
Jim Chen

August 2006

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