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SYMPOSIUM: *AFTER THE TEMPEST: HOW THE LEGAL COMMUNITY RECOVERS FROM DISASTERS*

INTRODUCTION: THE ROLE OF LAWYERS IN A DISASTER-PRONE WORLD

DANIEL A. FARBER*

The Symposium is a welcome opportunity for lawyers and legal academics to explore disaster issues in depth. In the past, disasters have rarely received more than passing attention in law reviews. Consequently, issues in disaster law have not received in-depth analysis of the kind they need. *Nova Law Review* is performing an important public service by providing a forum for analysis and debate about the challenges facing lawyers in a disaster-prone world.

This Symposium discusses the broader impact that natural disasters can have on the legal community and how it may affect lawyers' offices, their work, their clients, and their perception by the community at large.¹ Hurricane Katrina revealed how severe these impacts can be along a broad swath of the Gulf Coast, but most dramatically in New Orleans. Disasters directly affect lawyers, as they do others, by destroying homes and offices, ruining records, and causing serious business interruptions. But in the long run, the most important question is how lawyers relate to the broader social and legal issues posed by disasters.

For anyone who doubts the seriousness of these issues, a good lesson can be learned with a tour of New Orleans today. Block after block of ruined houses stretch out, representing hundreds of thousands of dislocated lives. Boarded-up and gutted homes go on for miles, in neighborhoods where only sporadic signs can be seen of current human occupation. Some of the devastation on the Gulf Coast was even more dramatic, though fortunately fewer people were directly impacted. The legal profession cannot afford to ignore a social problem of this magnitude, and it is foolhardy to wait until after the fact to begin thinking through the issues.

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1. A wide array of materials relating to disaster issues and the legal system can be found at: Disasters and the Law: Katrina and Beyond, <http://www.law.berkeley.edu/library/disasters.html> (last visited May 29, 2007).

One of the key roles that lawyers can play is to help clarify and reform disaster law, a generally neglected subject.² This field of law is ripe for re-examination. Disaster law sometimes seems like an unrelated 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 strategies for prevention, emergency response, compensation and insurance, and rebuilding. Our current strategies for each of these tasks are, at best, passable.

Moreover, the individual strategies often fail to mesh effectively. The reality is that the issues addressed by these legal strategies are interrelated. To determine how much to invest in prevention, we need to consider the extent to which a strong emergency response can limit damages. We also need to be sure that precautions like higher levees do not backfire by causing more people to move into high-risk areas—the extent to which this happens will be influenced by land use policies and insurance availability. Poor land use policies and subsidized insurance can actually be counterproductive, encouraging people to move into areas that are vulnerable. In turn, preventive measures help shape plans for emergency response. To plan the emergency response we need to take into the forecast which areas are vulnerable, and where precautions may fail. We also need to design the emergency response so as to set the stage for rebuilding, rather than responding in ways that will make reconstruction more difficult. And rebuilding, of course, begins a new round of the cycle; for what we rebuild will itself be subject to disaster risks. If we do not rebuild better than what we had, we are likely to find ourselves in precisely the same vulnerable position, with another disaster being only a matter of time.

Because it involves these interlinked issues, disaster law calls upon the skills of a wide range of lawyers. Land use lawyers help determine what will be built—or rebuilt—and where, and hence, what will be at risk.³ Torts lawyers may bring actions for compensation; insurance lawyers help determine the extent to which victims are able to receive compensation in order to re-

2. It is notable that the first law school text on the subject was not published until 2006. See generally DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* (2006).

3. For example, land use lawyers must grapple with claims that restrictions on building in vulnerable areas constitute unconstitutional takings under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 (1992). In *Lucas*, the United States Supreme Court held that a complete ban on the use of beachfront property was a per se taking, unless use of the property was a common law nuisance or fell within some other “background” restriction of state law. *Id.* at 1030–32.

build. Practitioners of administrative law can provide needed guidance to disaster planning efforts.⁴ After the disaster takes place, family law practitioners must deal with families divided by the disaster; bankruptcy lawyers must assist the financially devastated; criminal lawyers must try to function in what may be the wreckage of the criminal justice system, and so forth. Every field of law is, somehow or another, involved at some stage of the process, from disaster preparation to emergency response to reconstruction.

Lawyers may make a particular contribution in terms of victim compensation. Our current system of laws is poorly designed to compensate disaster victims.⁵ America is, among other things, the “promised land” for trial lawyers. Tort recovery, however, is faced with some serious obstacles, even if it can be shown that the government or private contractors were at fault in causing the damage. The federal government is almost completely immune from suit for flood damage.⁶ Private firms, such as the contractors who build levees, may lack deep pockets. Even apart from these barriers, given the complex dynamics of major disasters, problems of causation may be severe, for it may be hard to show that a particular harm was caused by an absence of due care by a defendant. In the case of a levee failure, for example, the plaintiff would have to show that his injury was caused by that specific failure and would not have occurred anyway due to other breaches, overtopping, wind, or other causes.

For these reasons, recovery under the current tort system looks like a long shot. Other possible routes to compensation do exist. The Federal Emergency Management Agency (FEMA) provides grants and loans to disaster victims to help with recovery—assistance that may be slow to arrive but does provide a route to rebuilding. Moreover, many victims have insurance of one kind or another. But private insurance is often limited to wind damage as opposed to flood damage. After a major hurricane there may be thousands, if not hundreds of thousands, of disputes on the wind versus flood issue, as well as other insurance issues such as coverage and valuation. Moreover, after floods, FEMA typically requires localities to upgrade their

4. On the need for reform in this area, see FARBER & CHEN, *supra* note 2, at 93–108.

5. The Litigation Section of the American Bar Association is currently embarking on a project to reassess disaster compensation rules. This project was prompted by an awareness of the need to reconsider existing legal rules in this area. See Kim J. Askew, *The Rule of Law: Still the Cornerstone*, LITIGATION, June 2006, at 2–3, available at http://www.abanet.org/litigation/journal/opening_statements/06summer_openingstatement.pdf.

6. See *United States v. James*, 478 U.S. 597, 611–12 (1986) (construing the Flood Control Act broadly to eliminate federal liability). In some states such as California, however, the state government may be liable for inadequate design or maintenance of levees. See *Paterno v. State*, 6 Cal. Rptr. 3d 854, 879–80 (Ct. App. 2003) (applying reasonableness test to assess government liability).

building codes for rebuilding—but the added expenses are not covered by the typical insurance policy, even if the policy covers “replacement cost.” An additional problem is that insurance companies tend to withdraw from the market after catastrophes—so people may be very vulnerable if another big hurricane hits in the next few years. Federal flood insurance picks up some of the slack, but is not purchased universally and has other problems of its own.⁷

None of these alternatives to the tort system provides compensation for those who die or are injured due to disasters. Some families may benefit from life insurance or social security survivors’ payments. But for many, these forms of compensation will prove inadequate. The 9/11 Victim Compensation Fund is one model of an alternative to conventional tort recovery.⁸ So far, however, even though the federal government clearly has the moral responsibility for hundreds of deaths after Hurricane Katrina, it has not seen fit to offer any form of recompense.

Lawyers play a crucial role in resolving disputed claims for private insurance and public compensation such as flood insurance. Rebuilding also requires major contributions by lawyers. Rebuilding is not just a matter of mortar and bricks. It also involves restoring critical social infrastructure, such as the criminal justice system, family structures, and business relationships. Lawyers need to restore their own organizations, whether they are private law firms or public sector institutions. They need to resolve the custody issues of disrupted families. When changes in land use or infrastructure are needed, lawyers are inevitably involved. Business arrangements that were ruptured by disaster need to be resolved. In short, when winds die down and flood waters recede, lawyers become key players in restoring the community.

Environmental lawyers also have a particularly important role to play. First, disaster decisions involve assessing and managing a special kind of risk—small probabilities of very serious harm. This kind of problem is familiar to environmental lawyers because of their work on the regulation of toxic substances. Thus, they are intimately aware of the analytical methods and controversies surrounding such decision-making. Second, one of the lessons of Hurricane Katrina is that wetlands and other buffer zones can be critical in mitigating the harmful effects of disasters. Protecting these wetlands is a core focus of environmental law. Third, disaster prevention can involve complex decisions about infrastructure and land use planning. Major

7. For discussion of these and other insurance issues, see FARBER & CHEN, *supra* note 2, at 178–200.

8. For a description of the Fund, see Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 576–77 (2001).

infrastructure investments will require in-depth environmental assessments. Fourth, disaster can also cause environmental harm such as toxic substance releases, and again, environmental lawyers are on the forefront. It is not surprising that one of the first comprehensive reports on Katrina was issued by a group of environmental law professors.⁹

It might seem initially surprising that lawyers should play such an important part in disaster issues. On further reflection, however, the issues are especially well-fitted for the legal profession. In planning transactions, lawyers are used to envisioning future contingencies and planning against even unlikely events; as litigators, they are all too familiar with how carelessness and organizational failures can lead to major harm. If first-year torts students learn nothing else from their classes, they should learn that accidents can always happen and that it pays to wear a seatbelt. Much of lawyering is either about getting clients to “wear their seatbelts”—at least metaphorically—or sorting out liability when they have failed to do so.

Lawyers are also in the business of solving problems—often unexpected ones—and disasters trigger an avalanche of personal, family, institutional, and economic problems. Individuals are injured or lose their jobs or homes; custodial parents are separated from their children; courts close down or lose their records; and companies suffer crippling business interruptions and loss of inventory. If lawyers are to perform their roles effectively under the heightened pressure of disaster conditions, they need to be educated about disaster law in law school courses, and later through continuing legal education. At all levels of the profession—law students, law professors, practitioners, judges—we need to work now to devise solutions for future disasters, which assuredly will come someday.

Indeed, the role of lawyers in disasters is likely to grow even more important in the future for the simple, if unfortunate, reason that the disasters themselves are likely to become more frequent and more severe. There seems to be no end to the flow of people into vulnerable coastal areas, drawn there by scenery and good weather. Thus, many more people and properties become subject to hurricane and flooding risks.

There are also good reasons to fear that hurricanes like Katrina may be growing in likelihood. There has been a dramatic rise in powerful tropical storms during the past three decades. It is plausible to connect this increase with global warming. Tropical storms feed off of warm ocean waters, and global warming is expected to increase ocean temperatures. Some experts

9. CENTER FOR PROGRESSIVE REFORM, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA (Sept. 2005), http://www.progressivereform.org/Unnatural_Disaster_512.pdf.

think there is a link between increased storm intensity and global warming. However, we do not have very good historical records about storms, and the records we do have suggest there may be a natural, decades-long cycle. That cycle could be the cause of the recent increase, not global warming. Whether the cause is climate change or a natural cycle, however, the implication is still that we are likely to see many more mega-storms in the near future than we saw in the past few decades.¹⁰

It is time to take counsel about the enormous problems arising from Hurricanes Katrina, Rita, and Wilma across the Gulf Coast region. And it is time to start making plans so that next time the legal system will be better prepared. This Symposium reflects a healthy awakening of interest in these issues by academics, judges, and lawyers. Hopefully, we can begin assembling the intellectual capital now that we will need to weather future storms.

10. For discussion of the potential linkage between hurricanes and climate change, see JOHN MCQUAID & MARK SCHLEIFSTEIN, *PATH OF DESTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS* 347–56 (2006).