

CCELP

CALIFORNIA CENTER FOR ENVIRONMENTAL LAW & POLICY

DISASTER LAW AND THE LEGAL ACADEMY:

*Curriculum, Research and Law Reform*

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REPORT ON A WORKSHOP HELD AT  
U.C. BERKELEY LAW SCHOOL  
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## **EXECUTIVE SUMMARY**

The legal system ostensibly plays a central role in disaster prevention, response, and management. Attorneys, members of the judiciary, and decision-makers at every level of government must anticipate and respond to disasters in a coordinated manner. It is increasingly clear, however, that the law is woefully unprepared to handle disasters. A growing community of academics recognizes this problem, and is formulating solutions under the rubric of disaster law. This emerging legal academic field encompasses a wide-ranging, intra- and inter-disciplinary body of thought, research and dialogue which seeks to inform and improve disaster-related decision-making.

On June 25th, 2007, eighteen law professors and legal practitioners who count disasters among their primary research interests, gathered at U.C. Berkeley Law School to chart disaster law's course for the immediate and long-term future. *Appendix A, Workshop Participants and Agenda.* Over the course of the day, participants highlighted a wide variety of important intellectual concerns and potential problem-solving strategies regarding disaster management.

In a series of productive discussions, participants first addressed central normative issues of disaster law, including terminology and the role of the legal academy. The group then addressed four sub-areas of disaster law: international collaboration, social justice, compensation and insurance, and prevention and response. Participants' recommendations for action included the creation of an annual disaster law conference, the integration of disaster law into law teaching, and an increased internet presence.

This white paper, a record of the milestone June 25th workshop, is intended as a tool for use by disaster law practitioners and academics in mapping the direction and future of the field.

## **I. Introduction**

More than any other natural or man-made disaster in American history, Hurricane Katrina brought into sharp relief the limitations in the law's capacity to anticipate and respond to catastrophic events. From the exacerbation of already-entrenched social injustices then left uncorrected in court or by legislation, to the exhaustion and willful failure of compensation systems, to the paralysis on the ground resulting from ambiguous divisions of disaster management responsibilities among state and federal governments, Katrina and its aftermath made manifest the American legal system's veritable inability to skillfully handle disasters.<sup>1</sup>

While sustained scholarly attention to these issues is arguably a necessary precursor to crucial policy change, academic interest in disaster-related concerns waned steadily in the two years following Katrina. *Appendix B, Selected Disaster Law Symposia and Conferences at Law Schools*. As such, the legal system and its stewards remain gravely unprepared for the next major disaster—the occurrence of which is nothing short of a certainty in a world characterized by global warming and international conflict. It is therefore incumbent upon the legal academy to undertake an intensive effort to examine and reform the interlocking structures of governance and regulation that pertain to disasters.

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<sup>1</sup> See American Bar Association Section of Litigation Report to the House of Delegates Recommendation [regarding Major Disasters] (Aug. 2007), available at <http://www.abanet.org/leadership/2007/annual/docs/hundredthirteen.doc>.

In order to make this kind of contribution, the legal academy must engage professors, students, and practitioners in a process of interrogating current disaster management systems and developing thoughtful, comprehensive solutions to the problems inherent in these systems. A primary goal is to analyze the structural and philosophical limitations of the legal system's disaster planning and response mechanisms, in order to right present wrongs and inform the work of practitioners in the immediate future, as well as to prepare future generations of attorneys to effectively handle the disaster-related issues that they may encounter in a wide variety of practice areas. Although some individual scholars are already engaged with this work, there has been little recognition of the need to recognize Disaster Law as a coherent field of scholarship.

This project may be compared to the nascence of environmental law in the early 1970s, in which a small group of practitioners and professors recognized the dire need for a coordinated legal approach to a sprawling and life-threatening problem. Their focused efforts brought forth a body of law that has arguably stemmed the tide of ecological devastation in the United States; the task and the potential of disaster law are no less critical in this tumultuous era.

With the generous support of the Koret Foundation, the California Center for Environmental Law and Policy at Berkeley Law hosted the first Workshop on Disaster Law and the Legal Academy in June 2007. Eighteen participants, including professors from U.C. Berkeley Law School, Stanford Law School, Georgetown Law School, DePaul University School of Law, and Haifa Law School, as well as a Washington, D.C. emergency management attorney, convened to discuss the current state of the law

regarding disasters and to generate ideas for curriculum development, research agendas and law reform.<sup>2</sup>

Topics discussed included the scope of disaster law, the development of disaster law within the legal academy, the integration of disaster law into the law school curriculum, and the formation of a sustained law reform agenda. Participants also sought to examine and define the parameters of four thematic areas within the larger body of disaster law: international collaboration, social justice, compensation and insurance, and prevention and response. Participants brought to bear a remarkable variety of scholarly expertise and practical experiences upon the day's dialogue; from the discussions emerged a rich, multifaceted, and expansive picture of this new field.

This white paper will address the issues raised during the workshop, providing an overview of each topic and explaining its general contours as discussed by the participants.<sup>3</sup> Much, if not most, of the discussion was open-ended; as such, and in keeping with the evolving nature of the field, this paper will not attempt to reach conclusions regarding the questions raised. Instead, the paper will seek to advance the discourse by exploring the ideas and themes articulated at the June 2007 workshop in Part II, and offering recommendations for future action in Part III.

## **II. Disaster Law: Emergence and Central Themes**

### ***A. Disaster Law as a developing legal field***

#### ***1. Terminology***

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<sup>2</sup> See Appendix A of this paper for a list of participants in the Workshop.

<sup>3</sup> Primary responsibility for drafting this White Paper was taken by Caitlin Sislin, who was then serving as Interim Administrator for the California Center for Environmental Law and Policy.

In positing a vision of disaster law as an integrated field of study and practice, it is first necessary to answer the question, what is a disaster? While the Federal Emergency Management Agency's definition of "disaster" casts it as an easily-categorized phenomenon, one that is "sudden, significant, and natural,"<sup>4</sup> the practical meaning of the word "disaster" is arguably more complicated and context-driven than FEMA's characterization would suggest. "Disaster" is in practice a malleable term,<sup>5</sup> and this malleability can have a reductive influence which arguably ought to be countered with rigorous intellectual inquiry into the true breadth of the notion of disaster. The ways in which the public and governments define "disaster" can powerfully shape disaster preparation, response, and management strategies – a simple, narrow definition may disregard vast realms of human experience and contextual complexity. Scholars and practitioners participating in the developing field of disaster law ought not to disregard the myriad temporal, causal, and societal considerations that come into play when articulating a definition of "disaster."

The workshop participants' critiques of FEMA's three-part characterization of disaster (sudden, significant, and natural) aptly demonstrate that the term "disaster" is not susceptible to simple definitions.<sup>6</sup> With respect to *suddenness*, it may be argued that any definition of disaster is incomplete that excludes ongoing catastrophes such as poverty, malnutrition, post-conflict turmoil, and environmental degradation. These enduring,

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<sup>4</sup> This definition was provided by Ernest Abbott, a Workshop participant and lead attorney of FEMA Law Associates in Washington, D.C.

<sup>5</sup> Michele L. Dauber, "*Let Me Be Next Time 'Tried By Fire'*": *Disaster Relief and the Origins of the American Welfare State*, 92 Nw. U. L. Rev. 967, 971 (1998). "Although the category 'disaster' at first may seem unproblematic, I suggest that we should see its definition and boundaries as precisely what is at stake in many contests over the allocation of federal resources."

<sup>6</sup> See David D. Caron, "*Addressing Catastrophes: Conflicting Images of Solidarity and Self Interest*," in *Les Aspects Internationaux des Catastrophes Naturelles et Industrielles/The International Aspects of Natural and Industrial Catastrophes* (David D. Caron & Charles H. Leben, eds., The Hague Academy of International Law, 2001).

entrenched conditions can exert a strong destabilizing influence on the social and physical infrastructure of a given community. When a sudden natural or manmade catastrophic event occurs, this infrastructural instability worsens – or, infrastructures may shatter entirely – and the community doubly experiences the impact of the immediate catastrophe. As such, scholarly analyses of disasters ought to account for the insidious, protracted catastrophes that bear upon and usually magnify abruptly-occurring natural catastrophes. Moreover, the FEMA definition emphasizes the emergency period, but an important consideration in defining the field is whether prevention and development of resilience before the event, and compensation and rebuilding after the event are to be included.

With respect to *significance*, the relative importance assigned to a disaster by lawmakers and the public may vary extensively according to social mores and prejudices. It has been argued that the collective decision to identify a certain event as a disaster is heavily dependent on a pre-existing moral economy – that is, preconceptions of the moral worth of a given group of people, based on long-standing racial or socio-economic prejudices, can influence determinations of that group’s relative innocence or blameworthiness when natural catastrophe strikes.<sup>7</sup> Those same preconceptions can then inform the extent of resources directed towards disaster response. The solution to this problem may be nothing short of a restructuring of legal and political disaster response systems, to prevent prejudicial attitudes from influencing disaster response mechanisms and timelines, and to explicitly equalize access to disaster response resources.

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<sup>7</sup> Michele L. Dauber, *Fate, Responsibility and ‘Natural’ Disaster Relief: Narrating the American Welfare State*, 33 *Law & Soc’y Rev.* 257, 261 (1999). “...federal subsidies for needy and destitute beneficiaries who have lost out in a ‘disaster’ have increased at the same time that an astonishingly similar array of human needs are attributed to the moral failures of the claimants, and left to their ‘personal responsibility’ to ameliorate.”

Also with respect to significance, the determination that a catastrophic event qualifies as a “disaster” often precedes the partial or total suspension of the rule of law. Upon recognizing a given event as a disaster, the legislature and the executive may implement special laws, bypass established procedures and permit others to do so as well, and disregard certain laws entirely. Such exceptions and exemptions are viewed as necessary, in order to remove substantive and procedural obstacles to rapid response and recovery from disasters.<sup>8</sup>

Yet the granting of unlimited or nearly-unlimited authority to government bodies and officials is an extreme action, one that disrupts the elaborate system of intra-governmental checks and balances at the federal level, and intrudes upon the rights retained by the states and the public. Such an action must arguably be taken only when a catastrophic event truly rises to the level of disaster. As such, scholarly inquiry into the appropriate parameters of the “significance threshold” may bear directly upon declarations of disaster and consequently upon the reasonable exercise of governmental authority.

With respect to *naturalness*, it has been argued that there is, in fact, “no such thing as a natural disaster.”<sup>9</sup> The damage wrought by a naturally-occurring event – extreme weather or earthquakes, for example – is inextricably bound with human agency and the extent to which humans have manipulated the natural environment, both at the site of the disaster itself and more generally with anthropogenic climate change. Physical

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<sup>8</sup> See Michael B. Gerrard, *Emergency Exemptions from Environmental Laws After Disasters*, 20 *Natural Resources & Env't* 10 (ABA, 2006).

<sup>9</sup> Neil Smith, *There's No Such Thing as a Natural Disaster* (June 11, 2006), available at <http://understandingkatrina.ssrc.org/Smith>. “It is generally accepted among environmental geographers that there is no such thing as a natural disaster. In every phase and aspect of a disaster – causes, vulnerability, preparedness, results and response, and reconstruction – the contours of disaster and the difference between who lives and who dies is to a greater or lesser extent a social calculus.”

“phenomena are a necessary component of risk, but they are only the starting point in addressing safety concerns” – to be fully effective, the work of calculating and planning for disaster risk must account for “acts of nature, ... weaknesses of human nature, and ... side effects of technology.”<sup>10</sup> Therefore, as a precursor to and informant of the planning process, any robust scholarship of disaster must arguably begin with a definition of the term “disaster” as an event with both natural and artificial, human-induced causes, or perhaps with solely human-induced causes, as in the case of terrorism events.

The preceding discussion provides a basic illustration of the contentious and evolving nature of disasters as a subject of study. The range of terminological issues identified by workshop participants and reviewed here is by no means exhaustive, but hopefully demonstrates that the seemingly simple act of defining “disaster” can broaden or narrow the scope of inquiry, and can cause the inclusion or exclusion of important ideas, affected populations, and potential solutions. Terminology is thus an important consideration in any comprehensive examination of disasters and the law.

## ***2. Role of the Legal Academy***

Presently, disasters and their applicable legal regimes are addressed within broad areas of legal study and practice, most notably tort, contracts, administrative, and constitutional law. Issues such as liability and liability-sharing, breach of contract, and federalism each bear upon disaster response and management. One of the fundamental questions to be addressed by scholars interested in disasters is whether the emerging field of disaster law ought to be treated as a distinct academic subject, or whether it is best integrated into the aforementioned foundational courses. While disaster law may ultimately take shape in a variety of forms across the landscape of legal scholarship and

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<sup>10</sup> Daniel A. Farber et al., *Reinventing Flood Control*, 81 Tul. L. Rev. 1085, 1090 (Dec. 2006).

teaching, it is useful to consider the benefits and characteristics of each potential form, as delineated by participants at the June 2007 Workshop.

Some members of the group supported the development of disaster law coursework, teaching, and textual materials, especially given the recent successful implementation of a disaster law course at U.C. Berkeley Law School,<sup>11</sup> and of a series of courses on Hurricane Katrina launched at Tulane Law School after the hurricane.<sup>12</sup> Participants also noted the potential for disaster law's fruition as a clinical program rather than a lecture or seminar course, given the dynamic and interdisciplinary nature of the issues.<sup>13</sup>

Some members of the group expressed skepticism about the feasibility of teaching disaster law as a unique course. Participants noted that a distinct body of disaster law coursework would likely become sprawling and difficult to manage, especially in light of the malleability of the term "disaster" as discussed above. Participants also suggested that disaster law is naturally decentralized, given, for example, that the legal regimes governing critical infrastructural systems (such as public power, transportation, and emergency services) each contain a subset of rules and regulations dealing specifically with disasters. According to these views, disaster law as an academic discipline would

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<sup>11</sup> The course entitled "Disasters and the Law: Katrina and Beyond" was taught by Professor Daniel Farber, Sho Sato Professor of Law and Faculty Director of the California Center for Environmental Law and Policy, in Spring 2006. The textbook for the course was Daniel A. Farber & Jim Chen, Disasters and the Law: Katrina and Beyond (Aspen Publishers 2006). A resource index for the course is available online at <http://128.32.29.133/disasters.php>.

<sup>12</sup> See E-mail responses collected by Daniel A. Farber, Law School Responses to Hurricane Katrina (on file with author).

<sup>13</sup> *Id.* (describing UCLA's environmental law clinic experience in dealing with disaster-related issues). "UCLA's environmental law clinic worked during the spring of 2007 with a local Sierra Club chapter to evaluate the impacts of an oil refinery expansion project in Pascagoula, Mississippi, in an area devastated by Katrina. The clinic worked to protect the interests of local residents in administrative proceedings regarding approval of the expansion. Many residents there continue to live in FEMA-issued housing trailers, with income levels well below the national average. The proposed refinery expansion comes at a time when the community is ill-equipped to participate in the public phase of the process."

naturally manifest as several groupings of information, integrated separately into their corresponding foundational courses.

However, since these areas are functionally interrelated – for example, the availability of insurance coverage and public benefits after a disaster may affect pre-disaster mitigation measures – it follows that issues in land use, disaster response, mitigation, and compensation cannot be considered in isolation. These interrelationships are presented diagrammatically in Appendix C.

Finally, participants noted that legal issues and disputes are often peripheral to the substance and procedure of disaster planning, response and management; a comprehensive disaster course would have to include public policy, economics, urban planning, environmental science, and other relevant academic disciplines, as well as law. This again is a common feature between disaster law and the more established field of environmental law.

Participants generally agreed upon the importance of training future lawyers to think about the constellation of legal issues associated with disasters,<sup>14</sup> regardless of whether that training occurred in a discrete disaster law course or in materials associated with several foundational courses.

Participants also generally agreed that disaster law scholarship could catalyze and provide momentum to much-needed law reform efforts. Presently, the legal regime governing disasters is often inconsistent across legal fields; not reflective of best practices, as identified and implemented both in and outside of the United States; out of

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<sup>14</sup> See Ernest B. Abbott, *Representing Local Governments in Catastrophic Events: DHS/ FEMA Response and Recovery Issues*, 37 Urb. Law. 467 (Summer 2005).

sync with market-based preparation and response systems; and otherwise problematic and limited.<sup>15</sup>

A multi-year agenda to rationalize and improve this legal structure might focus, for example, on stabilizing the criminal justice system and assuring due process after a disaster; evaluating and drawing upon the legal traditions of nations that are constantly responding to disasters; streamlining liability and compensation rules; and ensuring, through comprehensive evaluation of response and recovery processes in past disasters, that decision-makers do not make the same mistakes twice. These are just a few of the myriad issues ripe for analysis and treatment in the legal academy, where such analysis may foment crucial changes in disaster-related legislation or common law.

**In sum:**

- The meaning attributed to the term “disaster” can greatly impact the scope and form of disaster preparation, relief and management.
- Disaster law can be taught as a unique course, as a module in existing foundational courses, or in a clinical program. Regardless of form, it is crucial that professors introduce disaster law to the legal curriculum in a systematic way, both to train future attorneys to handle disaster issues, and as a catalyst for law reform.

***B. Central Themes within Disaster Law***

In addition to addressing broader normative issues regarding disaster law as an emerging field within the legal academy, participants discussed four distinct topics identified as centrally-relevant to the development of the field – international collaboration, social justice, compensation and insurance, and prevention and response. In small groups, participants discussed the need for work in each of these areas, potential agendas for research, apparent curricular issues, organizational and funding issues, and next steps. Each of the four topics discussed illustrates the notion that, by driving

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<sup>15</sup> See Farber and Chen, Disasters and the Law.

already-flawed legal and social structures into crisis, disasters present unique opportunities for meaningful inspection and reform of those structures.

### ***1. International Collaboration***

Because the risks of environmental instability, industrial accidents, conflict and terrorism are omnipresent, disasters represent a pressing policy concern for nations around the world.<sup>16</sup> Many nations have developed or are developing sophisticated, comprehensive preparation and response systems which far surpass systems in place in the United States.<sup>17</sup> An important topic for internationally-focused research is greater harmonization and consistency among international and domestic disaster law programs and policies. Participants in this sub-group also called for the development of minimum universal standards for disaster preparation, response, compensation, and related human rights concerns; such standards would draw from international and domestic disaster-related systems already in place, culling the best practices from each. The implementation of these minimum universal standards would guide governments in their disaster preparation and response, and would also endow the public with a mechanism to hold governments accountable for failures and inequities in disaster management practices.

The discussants emphasized the importance of distinguishing between international and comparative research programs, where international research focuses on international organizations and arrangements between nations, while comparative research attempts to arrive at best practices through investigation of national systems.

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<sup>16</sup> See Amnon Reichman et al., *State or Family? Pursuant to the Nationality and Immigration Law (Temporary)*, (Hebrew) 1 Lawatch 69 (2004).

<sup>17</sup> See United Nations, International Strategy for Disaster Reduction, *Lessons for a Safer Future: Drawing on the experience of the Indian Ocean tsunami disaster* (Jan. 2007).

Both of these research agendas can aid policy-makers in developing thoughtful disaster management strategies, and can facilitate crucial international cooperation, given a world where the effects of disasters are increasingly likely to reverberate across political boundaries.

Participants at the June 2007 Workshop proposed three strategies for teaching disaster law in the international and comparative law curricula. These were: the use of problem-based teaching in the foundational international law course; comparative study that actively engages students from different national jurisdictions in shared learning; and in clinical programs, empirical research and policy development focused on the law reform priorities mentioned above.

## **2. Social Justice**

Poverty, old age, and disability can heighten an individual's vulnerability to catastrophic loss. Such individuals often possess limited or no access to the economic and social resources necessary for self-care and self-rescue during a disaster—when the government's own resources are overtaxed, disorganized or insufficient—and thereby are much more likely to suffer during a disaster.<sup>18</sup> As Hurricane Katrina demonstrated, when these economically- and socially-disadvantaged communities are largely composed of people of color, the disaster's results take on even more epic proportions, both because racial minority status and limited resources often go hand-in-hand, and because of the chilling effects of entrenched racism on disaster response and management.<sup>19</sup> For example, it may be that the failure by federal and local leadership to support social order

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<sup>18</sup> See David D. Caron, *Catastrophes afflict poor the most*, San Francisco Chronicle, Jan. 5, 2005, at B9.

<sup>19</sup> See Nils Gilman, *What Katrina Teaches about the Meaning of Racism* (Sept. 14, 2005), available at <http://understandingkatrina.ssrc.org/Gilman>; see also Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism* 170 (Richard C. Leone & Greg Anrig eds., 2003).

in post-Katrina New Orleans was not reported accurately as such, but was instead transformed by media coverage into a familiar and stereotype-reinforcing script regarding lawlessness among African-American communities.

It is arguably necessary for the legal academy to engage in a broad, ongoing conversation about race and society, because disasters simply exacerbate pre-existing, long-standing problems of racial privilege and racial bias. While such a conversation takes shape, however, the academy might turn its attention to several discrete areas of disaster-related social injustices, with the intention of promoting law reform in those areas.

For example, legal scholarship might explore the critical importance of a diversity of experience and perspective among disaster planners, and other officials in disaster response agencies. Where disasters may be reasonably predictable regionally (as was the case in the Gulf), and where a given, disaster-prone region is home to a certain community with particular economic, health, or other vulnerabilities, it is incumbent upon planners to account for these vulnerabilities in their preparations. Legal scholars may play a unique role in developing legal rules to mandate the transmission of this kind of information to higher-level management.

Scholars might also consider questions of compensation and insurance simultaneously with social justice, instead of as two separate categories. Most often, systems of compensation seek solely to restore people to the status quo ante; when that status quo was characterized by vast inequality, however, the compensator's supposedly neutral compensation policies may actually reinvigorate and even augment the unequal conditions. Scholars can encourage the development of legal rules based in the notion

that disasters are occasions for delivering delayed justice, and compensation ought to be redistributive and not merely restorative.

These are merely a few of the many areas suitable for law reform at the nexus of social justice and disaster law. Discussants were clear that disaster preparation and response systems have historically been racially and economically non-neutral, and that a major focus of disaster law research should be ensuring that social justice becomes and remains a primary goal of disaster management practices.<sup>20</sup>

### ***3. Compensation and Insurance***

Post-disaster compensation to victims generally takes one of three forms: “private insurance, government programs, or the tort system.”<sup>21</sup> Each of these three forms of compensation is contentious, and is often characterized by the particular provider’s resistance to bearing, or inability to bear, the tremendous costs of disaster relief.<sup>22</sup> Additionally, each of these three forms contains built-in limitations with respect to the type and amount of damage it will compensate; as such, though the losses from a particular type of disaster may reasonably be deemed catastrophic, if those losses do not fall within the parameters of compensable damage as defined by a given compensation system, victims must bear the losses themselves.<sup>23</sup>

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<sup>20</sup> See Laurel E. Fletcher et al., *Rebuilding After Katrina: A Population-Based Study of Labor and Human Rights in New Orleans* (June 2006) (describing the exploitative and hazardous conditions facing undocumented immigrant workers involved in recovery efforts).

<sup>21</sup> Farber and Chen, *Disasters and the Law* at 161.

<sup>22</sup> See *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Jonathan Simon and Tom Baker, eds., University of Chicago Press 2002) (positing a fundamental shift within the insurance industry from risk-spreading to embracing risk, which requires individuals to assume greater responsibility for risk).

<sup>23</sup> Stephen D. Sugarman, *Role of Government in Compensating Disaster Victims*, *Issues in Legal Scholarship* 8 (2007), available at <http://www.law.berkeley.edu/faculty/sugarmans/Disaster%20losses%20ils%20final.pdf> (describing difficulty of tort recovery after a disaster).

Disaster law scholars and practitioners therefore ought to devote substantial attention to questions of compensation. These questions may include, what are the benefits and failures of current methods for compensating disaster victims?<sup>24</sup> Are there models of compensation that successfully balance the importance of minimizing risk to individual members of a society, with the importance of spreading risk across compensation systems instead of concentrating responsibility in one system?<sup>25</sup> Should the public expect compensation systems to engage with the often-lengthy recovery processes that follow disasters, serving as facilitators of recovery instead of simply parceling out funds? What rules are necessary to ensure that compensation systems are equally accessible and equally responsive to all victims of a disaster? Disaster law scholars might address these, as well as myriad other questions, in order to assist policy-makers in developing and implementing appropriate, just, and comprehensive post-disaster compensation systems.

#### ***4. Prevention and Response***

Underlying the discussion of appropriate prevention and response systems is the issue of responsibility, which encompasses important policy questions such as: which agencies within the federal government hold the primary responsibility for disaster management; what is the balance of disaster prevention and response tasks among federal, state and local governments; and what is the role of government at any level in managing society's social, physical, environmental and economic infrastructures so as to

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<sup>24</sup> See Stephan Landsman, *A Chance to Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DePaul L. Rev. 393 (2003) (evaluating the development and precedent-setting effects of the September 11th Victim Compensation Fund).

<sup>25</sup> Robert L. Rabin and Suzanne A. Bratis, *Financial Compensation for Catastrophic Loss in the United States* (2005), in Farber and Chen, *Disasters and the Law* at 195 (explaining the Terrorism Risk Insurance Act).

minimize the impact of disasters when they do occur. Given the acknowledged failure of federal and state responses to Katrina – a failure arising in part from the application of September 11th-generated, terrorism-oriented response plans to a naturally-induced disaster, as well as from the faulty implementation of those plans at all levels<sup>26</sup> – it is likely that federal and state policy would benefit from thorough scholarly analyses of effective prevention and response systems.

One issue identified by discussants as a topic for disaster law scholarship is the importance of the “long view” in disaster planning. While media and public attention is often devoted to the response phase, the prevention phase offers a critical opportunity for sustained risk reduction. State government officials, regional planners, and members of the public may mitigate the impact of disasters by working to identify and account for disaster risks present in a region, and subsequently reducing those risks through informed land-use planning and infrastructural development. As such, legal scholars might create recommendations or guiding principles to assist planning officials and policy-makers in incorporating disaster preparation into their plans for a given region.

Another important, abiding issue is the organization of federal authority, both intra-governmental and between federal and state governments. For example, several federal administrative agencies underwent major structural changes after and in response to September 11th, 2001.<sup>27</sup> In light of the lessons of Katrina, scholars might consider whether this restructuring was effective, or whether the administrative agencies currently responsible for disaster management ought to be further reorganized. What changes are advisable, and of those, which are politically feasible? Once the power to respond to

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<sup>26</sup> Farber and Chen, *Disasters and the Law*, at Chapter 3.

<sup>27</sup> See Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal. L. Rev. 1655 (Dec. 2006).

disasters has been delegated to a set of administrative agencies, what disaster management powers – either absolute or constrained – remain with, or ought to remain with, the president?

Similarly, once the federal government's disaster response powers have been delineated, what powers and responsibilities ought to be reserved to the states? Which levels of government are more appropriately situated to manage the various aspects of disaster response and management? Where government is not so situated, or cannot otherwise constitutionally engage in a certain action, to what extent can and should the government contract with private actors? These questions represent just a few of the potential avenues for research within the larger topic of disaster prevention and response.

**In sum:**

- The experiences of the international community can inform the development of minimum universal standards, which may be applicable to disaster planning, response and management systems in the United States.
- Disasters generally exacerbate social injustices; by highlighting these injustices and analyzing more equitable approaches, scholarly attention to disaster-related social injustices can contribute to a more just regime of disaster management.
- Traditional compensation systems are often unprepared to handle post-disaster compensations; scholars ought to consider ways to restructure these systems such that they can serve disaster victims, as well as possible alternate compensation systems.
- Intricate constitutional questions regarding the division of responsibility within the federal government, as well as its division among federal and state governments, characterize the issue of disaster prevention and response.

### **III. Recommendations for Action**

The Workshop participants generated several dynamic ideas regarding actions in the near future, as well as the long term, to facilitate the development and growth of disaster law. These ideas may be divided into four categories: community building, teaching, research, and public policy.

Participants agreed that *community building* must entail large-scale gatherings, such as a major annual conference and an annual lecture series. A natural container for the expanding disaster law community may be a Disaster Law Institute, housed at a law school and responsible for coordinating an increasing number of disaster-related activities.

Participants also agreed that a strong disaster law community presence on the internet is imperative for engaging participants in this emerging field. Potential web resources include a disaster law clearinghouse, which will index all of the online resources pertaining to the field, provide notification regarding updates to interested scholars and practitioners, and catalog syllabi and other teaching resources; a listserv, so that all interested parties can receive updates immediately, without referring to a separate website; and the use of the wiki system of collaborative document drafting.

Approaches to *teaching* disaster law are myriad. Disaster law issues may be especially amenable to clinical teaching, given the extreme variability of these issues as they manifest within different disaster contexts. As discussed earlier, participants also identified two possibilities for introducing disaster law into the lecture-based curriculum: either as stand-alone courses, or as modules for introduction into first-year<sup>28</sup> and other relevant courses.<sup>29</sup>

Within the emerging field of disaster law, *research* opportunities abound—only a few of which are highlighted in this paper. Beyond the general issue areas identified

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<sup>28</sup> Natural places to introduce such modules would be (1) consideration of emergency executive powers and federalism issues in Constitutional Law, (2) consideration of disaster liability and compensation issues in Torts, (3) consideration of the impossibility and frustration-of-purpose doctrines in Contracts, and (4) consideration of takings issues raised by disaster mitigation policies in Property.

<sup>29</sup> Cf. Rebecca Tushnet, Georgetown IP Teaching Resource Database, *available at* <http://www.tushnet.com/law/law.html>.

here, scholars might investigate the links between public health and disaster law; effective prevention and response systems with respect to terrorist and other entirely human-induced events; evaluation of the general trajectory of communities' recovery from disasters and of the performance of insurance/ compensation systems in practice; technical information useful to legal "first responders" after a disaster; and innumerable other questions. Participants encouraged the dedication of an annual issue of *Issues in Legal Scholarship* to new research in disaster law.

Disaster law research may, in turn, exert a formative influence on *public policy* regarding disasters. For example, the American Bar Association's Litigation Section recently published a set of eleven principles intended to guide state and federal governments in upholding the rule of law while responding to disasters; each principle is coupled with practical suggestions for implementation.<sup>30</sup> Scholars might model future disaster law research initiatives on the ABA's combined theoretical/ practical approach, in order to make bodies of knowledge accessible and useful to policy-makers and practitioners. Partnership with members of the policy development arena may facilitate this dual research/ praxis approach.<sup>31</sup> Ultimately, in order to be relevant and meaningful, disaster-related scholarship ought to offer policy recommendations for policy-makers at all levels, including international, national, state and local governments.

**In sum:**

- Recommended actions include large-scale gatherings, increased internet presence, increased teaching and research of disaster law issues, and law reform.

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<sup>30</sup> American Bar Association Section of Litigation Report to the House of Delegates Recommendation [regarding Major Disasters] (Aug. 2007), available at <http://www.abanet.org/leadership/2007/annual/docs/hundredthirteen.doc>.

<sup>31</sup> Suggested policy partners include the Aspen Institute, the Brookings Institution, the Center for American Progress, and the Cato Institute. Within the law, suggested partners include the American Law Institute, the American Bar Association, and the Rand Corporation.

#### **IV. Conclusion**

Disasters, both climate-related and human-induced, are an increasingly common feature of 21st century life; appropriate legal guidance can ensure that disasters are anticipated and contained in a comprehensive and equitable manner. Disaster law is a complex, multi-faceted, and rapidly expanding body of thought, one that addresses the dire need for a systematic, thoughtful approach to managing the chaos of disasters. The field is young but vital, and the June 2007 Workshop summarized in this paper represents a major step forward for the burgeoning disaster law community. Workshop participants offered important insights into a wide range of disaster-related issues, thereby developing a coherent intellectual map of a sprawling legal landscape that will guide the near- and long-term future of disaster law scholarship and dialogue. Over time and with continued, regular meetings such as this one, scholars will further refine and implement their ideas regarding the wide variety of avenues for research within the field, and will continue to influence disaster prevention, response and management policy for the better.

## APPENDIX A

### **Workshop on Disaster Law and the Legal Academy: Curriculum, Research and Law Reform**

**June 25, 2007**

#### Participants

Ernest Abbott

*Disaster Relief Law Specialist. FEMA Law Associates, PLLC.*

David D. Caron

*C. William Maxeiner Distinguished Professor of Law. U.C. Berkeley Law School.*

Diane T. Chin

*Associate Director, Thelton E. Henderson Center for Social Justice. U.C. Berkeley Law School.*

Michele L. Dauber

*Associate Professor of Law and Bernard D. Bergreen Faculty Scholar. Stanford Law School.*

Christopher Edley, Jr.

*Dean and Professor of Law. U.C. Berkeley Law School.*

Louise Epstein

*Assistant Dean, Advancement. U.C. Berkeley Law School.*

Daniel A. Farber

*Sho Sato Professor of Law; Faculty Director, Environmental Law Program. U.C. Berkeley Law School.*

Laurel Fletcher

*Clinical Professor of Law; Director, International Human Rights Law Clinic. U.C. Berkeley Law School.*

Richard M. Frank

*Lecturer in Residence; Executive Director, California Center for Environmental Law and Policy. U.C. Berkeley Law School.*

Emma Coleman Jordan

*Professor of Law. Georgetown Law School.*

Stephan Landsman

*Professor of Law; Robert A. Clifford Chair in Tort Law and Social Policy. DePaul University College of Law.*

Anne Joseph O'Connell

*Assistant Professor of Law. U.C. Berkeley Law School.*

Cymie R. Payne

*Lecturer in Residence; Associate Director, California Center for Environmental Law and Policy; Director, Global Commons Project. U.C. Berkeley Law School.*

Amnon Reichman

*Visiting Professor. U.C. Berkeley Law School.*

Joseph L. Sax

*James H. House and Hiram H. Hurd Professor of Environmental Regulation, Emeritus. U.C. Berkeley Law School.*

Jonathan Simon

*Associate Dean, Jurisprudence and Social Policy Program, and Professor of Law; Faculty Co-Chair, Berkeley Center for Criminal Justice. U.C. Berkeley Law School.*

Caitlin Sislin

*Interim Administrator, California Center for Environmental Law and Policy. U.C. Berkeley Law School.*

Stephen D. Sugarman

*Associate Dean; Roger J. Traynor Professor of Law. U.C. Berkeley Law School.*

## Workshop on Disaster Law and the Legal Academy: Curriculum, Research and Law Reform

### Agenda – June 25, 2007

*All activities are in Room 121, Boalt Hall unless otherwise noted.*

- 8:45-9:15      **Continental Breakfast**
- 9:00-9:15      **Prelude: A Guide to Accessing Workshop Resources with b-space**  
Caitlin Sislin, CCELP Interim Administrator
- \*\*\*
- 9:15-9:45      **Introductory session**  
Daniel Farber, Sho Sato Professor of Law; Director, Environmental Law  
Program
- 9:45-10:45     **Presentations and discussion**  
**Issues to discuss:**
- What is the scope of disaster law? Does it include anthropogenic events, diseases, medium-term events like drought?
  - What is the role of law schools in developing disaster law as an effective instrument?
  - How should disaster law be taught in the law school curriculum?
- 10:45-11:00    **Break**
- 11:00-12:15    **Presentations and discussion**
- What tools can be used to develop this area of law? What organizations? Funding?
  - How to develop a sustained law reform agenda
  - Developing support and institutional infrastructure
- 12:15-12:30    **Summary of Themes**  
Daniel Farber, Sho Sato Professor of Law; Director, Environmental Law  
Program
- \*\*\*
- 12:30-2:00     **Lunch** (Faculty Lounge)
- \*\*\*

2:00-3:30 **Break out** into subgroups. Subgroups will report back on (a) possible research agendas, (b) curricular initiatives, (c) law reform possibilities, (d) possible partners and supporters

<u>Group 1</u>	<u>Group 2</u>	<u>Group 3</u>	<u>Group 4</u>
<u>International</u>	<u>Social Justice</u> <u>Prevention/Response</u>	<u>Compensation/Insurance</u>	
Caron	Frampton	Dauber	Abbott
Fletcher	Jordan	Farber	Edley
Payne	Sislin	Landsman	Frank
Reichman	Simon	Sugarman	O'Connell
			Sax

Topics:

- Statement of need for work in this area;
- Agenda for Research;
- Curricular Issues
- Organizational and Funding Issues
- Next Steps

3:30-4:00 **Report back from the groups**

4:00-5:00 **Recommendations and Next Steps**

**Closing Remarks**

Daniel Farber, Sho Sato Professor of Law; Director, Environmental Law

Program

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7:00 **Dinner** (Adagia Restaurant)

**APPENDIX B****Selected Disaster Law Symposia and Conferences at Law Schools**U.C. Berkeley Law School

California Center for Environmental Law and Policy, and Center for Social Justice  
Conference: “Après le Déluge: Rebuilding a Sustainable City after Katrina.” (Jan. 2006)

Berkeley Journal of African-American Law and Policy, and Boalt Environmental Law  
Society

Symposium: “As the Flood Waters Recede: the Injustice Exposed by Hurricane  
Katrina” (Mar. 2006)

Cardozo Law School

Cardozo Journal of Law and Gender

Symposium: “Poverty and Family Health: Environmental Dangers and Progressive  
Solutions,” including a panel on “Lessons Learned from Hurricane Katrina” (Feb. 2007)

Loyola University Chicago School of Law

Loyola Race and Law Symposium: “Implications of Hurricane Katrina: Race, Class, and  
Our Government’s Response” (Mar. 2006)

Loyola University New Orleans College of Law

Center for Environmental Law and Land Use

Conference: “Katrina Consequences: What Has the Government Learned One Year  
Later?” (Aug. 2006)

Mississippi College School of Law

Mississippi College Law Review

Symposium: “Hurricane Katrina” (Aug. 2006)

New York University School of Law

Law Students for Human Rights

Symposium 2005-2006: “Displaced Persons”

Santa Clara School of Law

Santa Clara Journal of International Law

Symposium: “Disaster Relief and Prevention” (2003)

Tulane University

Tulane Law Review

Symposium: “Hurricane Katrina: Reshaping the Legal Landscape of the Gulf Coast”  
(Oct. 2006)

University of California, Los Angeles Law School

UCLA Environmental Law Center

Frankel Symposium: “Preventing and Responding to Catastrophe: The Role of Environmental Law and Policy” (Apr. 2006)

University of Georgia School of Law

Environmental Law Association

2006 Red Clay Conference: “Natural Disaster: Implications in a Post-Katrina World” (Mar. 2006)

University of Houston Law Center

Center for Children, Law and Policy

Conference: “Children and the Law After the Katrina Disaster: An Interdisciplinary Conference on Young Evacuees” (Apr. 2007)

University of Louisville, Brandeis School of Law

Forum: “Law School Diversity Forum on Katrina and the Cross-Current of Environmental Injustice” (Nov. 2005)

Washington and Lee University School of Law

Conference: “Race and Class in the 21st Century Through the Lens of Hurricane Katrina” (Apr. 2007)

**APPENDIX C**  
**THE STRUCTURE OF U.S. DISASTER LAW (BY CCELP)**





