

# DISASTER MYTHOLOGY AND THE LAW

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*Sociologists have identified a number of “myths”—widely shared misconceptions—about the ways people behave in the immediate aftermath of natural disasters. While these disaster myths have been the subject of intensive investigation by sociology scholars, they have been wholly neglected in legal scholarship. Yet these myths have important implications for disaster law and policy. This Article considers the legal implications of perhaps the most important disaster myth: that natural disasters produce widespread looting and violence. This Article examines a number of unfortunate legal consequences of this myth, including deployment of military troops in a law enforcement, rather than humanitarian, capacity; distortion of response priorities outlined in disaster plans; and imposition of restrictions on freedom of movement and other basic rights. This Article’s analysis suggests that the disaster myth of widespread looting and violence has engendered a legal and policy structure that frames natural disaster response too much as a law enforcement, rather than a humanitarian, problem. Ultimately, this Article concludes that the deleterious effects of the myth on our disaster laws can best be countered by constraining official discretion to overemphasize security risks in immediate-response decisions, rejecting calls to pass broad looting laws that can reflect and perpetuate the myth, and, perhaps, reforming the structure of federal disaster agencies by removing the Federal Emergency Management Agency from the Department of Homeland Security and reestablishing it as a cabinet-level agency.*

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## INTRODUCTION

More than five years have passed since Hurricane Katrina devastated the Gulf Coast, yet images from Katrina's aftermath continue to haunt the American mind. Many of the most shocking and disturbing images that remain with us today are not from photographs or news footage, but images constructed and seared in our collective consciousness by widespread and seemingly credible reports of chaos, anarchy, violence, and depravity enveloping New Orleans in Katrina's ruinous wake.

New Orleans was, we were told, a city descending into anarchy—a place, according to the New Orleans Police Superintendent, where “little babies [were] getting raped” in the Superdome, a shelter of last resort;<sup>1</sup> a place, as New Orleans Mayor Ray Nagin recounted to Oprah Winfrey, where hurricane survivors had descended into an “almost animalistic state” after days of seeing dead bodies and “watching hooligans killing people, raping people.”<sup>2</sup>

The mainstream press—including some of the most respected media outlets—built on official accounts of lawlessness to paint an unrelenting picture of bedlam and atrocities in New Orleans. According to a column in the *New York Times*, post-Katrina New Orleans was “a

<sup>1</sup> *Oprah Reports*, OPRAH.COM (Sept. 6, 2005), [http://www.oprah.com/slideshow/oprahshow/oprahshow1\\_ss\\_20050906/2](http://www.oprah.com/slideshow/oprahshow/oprahshow1_ss_20050906/2); see Joseph B. Treaster & Abby Goodnough, *Powerful Storm Threatens Havoc Along Gulf Coast*, N.Y. TIMES, Aug. 29, 2005, at A1, available at <http://www.nytimes.com/2005/08/29/national/29storm.html?scp=1&sq=powerful%20Storm%20Threatens%20Havoc%20Along%20Gulf%20Coast&st=cse> (noting that as many as ten thousand people were evacuating to the Superdome as a designated shelter of last resort).

<sup>2</sup> Brian Thevenot, *Myth-Making in New Orleans*, AM. JOURNALISM REV., Dec. 2005–Jan. 2006, at 30, 34 (internal quotation marks omitted).

snake pit of anarchy, death, looting, raping, marauding thugs, suffering innocents, a shattered infrastructure, a gutted police force, insufficient troop levels and criminally negligent government planning.”<sup>3</sup> The *Financial Times* of London likewise reported that, at the Convention Center, another shelter of last resort, “girls and boys were raped in the dark and had their throats cut and bodies were stuffed in the kitchens while looters and madmen exchanged fire with weapons they had looted.”<sup>4</sup> London’s *Evening Standard* took a more literary tack, alluding to *The Lord of the Flies* in its descriptions of New Orleans.<sup>5</sup> Fox News described “cops arriving on the scene, armed and ready to take on the armed thugs,” and “[t]hugs shooting at rescue crews.”<sup>6</sup> A Fox News correspondent also asserted “there are so many murders taking place” and “[t]here are rapes, other violent crimes taking place in New Orleans.”<sup>7</sup>

When the media was not describing New Orleans as the anarchic turf of marauding thugs, it characterized New Orleans as a war zone. The war being fought was not with nature—as one might assume—but between Katrina’s victims and their would-be rescuers.<sup>8</sup> The *Los Angeles Times*, for example, reported in its lead news story that “National Guard troops took positions on rooftops, scanning for snipers and armed mobs as seething crowds of refugees milled below, desperate to flee. Gunfire crackled in the distance.”<sup>9</sup> In an article titled *Troops Back from Iraq Find Another War Zone*, and subtitled *In New Orleans, ‘It’s Like Baghdad on a Bad Day,’* the *Washington Post* reported that “just the smell and feel of a war zone in the city put the soldiers on edge.”<sup>10</sup> CNN’s Wolf Blitzer said of the National Guard’s arrival in New Orleans, “eight convoys and troops are on the ground at last in a place being described as a lawless, deadly war zone.”<sup>11</sup>

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<sup>3</sup> Maureen Dowd, Op-Ed., *United States of Shame*, N.Y. TIMES, Sept. 3, 2005, at A21, available at <http://www.nytimes.com/2005/09/03/opinion/03dowd.html?scp=1&sq=maureen%20Dowd%20United%20States%20of%20Shame&st=cse>.

<sup>4</sup> Guy Dinmore, *City of Rape, Rumour and Recrimination*, FIN. TIMES, Sept. 5, 2005, at 7.

<sup>5</sup> See Robert Mendick, *Gang Rule and Rape in Hurricane Dome . . . It’s Like a Mad Max Movie*, EVENING STANDARD (London), Sept. 2, 2005, at 6 (“It was like something out of *Lord of the Flies*—one minute everything is calm and civil, the next it descends into chaos.”).

<sup>6</sup> Thevenot, *supra* note 2, at 33.

<sup>7</sup> *Id.*

<sup>8</sup> See Kathleen Tierney & Christine Bevc, *Disaster as War: Militarism and the Social Construction of Disaster in New Orleans*, in THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE 35, 41 (David L. Brunson et al. eds., 2007).

<sup>9</sup> Ellen Barry et al., *New Orleans Slides into Chaos; U.S. Scrambles to Send Troops*, L.A. TIMES, Sept. 2, 2005, at 1.

<sup>10</sup> Ann Scott Tyson, *Troops Back from Iraq Find Another War Zone: In New Orleans, ‘It’s Like Baghdad on a Bad Day,’* WASH. POST, Sept. 6, 2005, at A10.

<sup>11</sup> Jaime Omar Yassin, *Demonizing the Victims of Katrina*, EXTRA!, Nov.–Dec. 2005, <http://www.fair.org/index.php?page=2793>.

These images of anarchy and war were compelling in Katrina's immediate aftermath, and they endure even today. But they were not real. The reality on the ground was far different from the pictures painted in the press. Although the living conditions in the Superdome and Convention Center were appalling—and those who had taken refuge there suffered greatly for want of food, water, and decent sanitation—the reports of lawlessness and violence “were greatly exaggerated.”<sup>12</sup> Almost a month after Katrina made landfall, major news outlets retracted much of their previous reporting, admitting that the reports of violence and crime were largely unsubstantiated.<sup>13</sup>

Media mea culpas notwithstanding, why were public officials and the media so eager to report, and the public so quick to believe, tales of horrific violence and anarchy in post-Katrina New Orleans? While these reports did not conform to the truth, they did conform to an enduring myth about the behavior of individuals in the aftermath of natural disasters: that antisocial behaviors such as violence and looting are common human reactions to natural disasters.

Sociologists have long identified substantial disconnects between public perceptions of postdisaster human behavior and the empirical assessments of that behavior.<sup>14</sup> The narrative of postdisaster behavior that resonates in the media and with most people reads like a typical disaster movie script: disaster victims are plunged into a lawless, chaotic world of looting, violence, and human depravity, where they either “flee in panic”—scrambling over other victims in a heartless attempt to save themselves—or curl up in fetal position, paralyzed by fear and unable to muster the will to go on.<sup>15</sup> Victims are rescued not by their own wits and ingenuity but by a trusted, commanding hero who rises above base human nature and steps into the void to lead and save the helpless masses.<sup>16</sup>

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<sup>12</sup> See Donna Britt, *In Katrina's Wake, Inaccurate Rumors Sullied Victims*, WASH. POST, Sept. 30, 2005, at B1.

<sup>13</sup> See *id.*; Jim Dwyer & Christopher Drew, *Fear Exceeded Crime's Reality in New Orleans*, N.Y. TIMES, Sept. 29, 2005, at A1, available at <http://www.nytimes.com/2005/09/29/national/nationalspecial/29crime.html?scp=1&sq=fear%20Exceeded%20Crime%27s%20Reality&st=cse>; Susannah Rosenblatt & James Rainey, *Katrina Takes a Toll on Truth, News Accuracy*, L.A. TIMES, Sept. 27, 2005, at A16; Brian Thevenot & Gordon Russell, *Rape. Murder. Gunfights.*, TIMES-PICAYUNE (New Orleans), Sept. 26, 2005, at A1 [hereinafter *Thevenot & Russell, Rape. Murder. Gunfights.*].

<sup>14</sup> See generally E.L. Quarantelli, *Foreword* to HENRY W. FISCHER, III, *RESPONSE TO DISASTER: FACT VERSUS FICTION AND ITS PERPETUATION; THE SOCIOLOGY OF DISASTER*, at ix (3d ed. 2008) (describing findings disproving the commonly held belief that human beings in the face of disaster act in irrational, antisocial, or dysfunctional ways).

<sup>15</sup> See *id.*; REBECCA SOLNIT, *A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER* 120–26 (2009) (describing the plots of Hollywood movies featuring people panicking in the face of disaster).

<sup>16</sup> See SOLNIT, *supra* note 15, at 120–26.

The narrative of postdisaster human behavior found in sociological studies is both far less dramatic and far more encouraging: disaster survivors engage in overwhelmingly prosocial behavior and victims-turned-resourceful-first-responders rationally assess danger and work assiduously to save their neighbors and communities.<sup>17</sup> Given the prevalence of disaster mythology, it is disturbing—but hardly surprising—that the public narrative of post-Katrina New Orleans took a page from a disaster-movie script rather than a sociology textbook (other than the much bemoaned and conspicuous absence of a strong, authoritative hero who saved the day).<sup>18</sup>

While these “disaster myths” have been the subject of intensive investigation by sociology scholars, they have been wholly neglected in legal scholarship. Yet these myths have important implications for disaster law and policy. If sociologists are correct that many widely shared assumptions about postdisaster human behavior are myths with little basis in fact, and that these myths exert a powerful hold on the American mind, we might expect that existing laws reflect and perhaps even perpetuate these myths. Moreover, if both existing laws and the implementation of those laws are grounded in the myths rather than the reality of human behavior in disaster situations, then we might also expect that current disaster laws and policies are suboptimal, likely mismatched to the task of minimizing community and societal disruption and the concomitant human suffering. Even those laws that do not necessarily reflect disaster mythology may nonetheless allow responding officials the discretion to implement suboptimal response measures that do reflect that mythology. The myths and their consequences therefore are eminently relevant to the ongoing development of both the disaster laws on the books and the structures in place for implementing those laws in times of emergency.

This Article is the first to address the impact of disaster mythology on American disaster law.<sup>19</sup> Focusing on the disaster myth of widespread looting and violence, I suggest that this myth has engendered a legal and policy structure that frames natural disaster response too much as a law enforcement, rather than a humanitarian, problem.

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<sup>17</sup> See *infra* note 38 and accompanying text.

<sup>18</sup> See *supra* notes 2–7 and accompanying text.

<sup>19</sup> Because most of the sociological research to date has focused on natural disasters and because U.S. disaster law has emerged largely in response to natural disasters, this Article focuses primarily on natural disasters as well. The major federal disaster relief statute, the Robert T. Stafford Disaster Relief and Emergency Assistance Act, codified at 42 U.S.C. §§ 5121–5208, defines a “major disaster” as “any natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” 42 U.S.C. § 5122(2) (2006).

From calls to expand the role of the military in disaster law enforcement, to diversion of police from search and rescue missions to anti-looting patrols, to disaster-spurred restrictions on movement, to the passage of looting laws, we overemphasize law enforcement concerns and security risks at the expense of humanitarian efforts to provide needed aid to disaster survivors, to allow survivors themselves to help their neighbors and rebuild their lives, and to mitigate harms from future disasters.<sup>20</sup>

Our legal system of disaster response should counter the deleterious effects of the disaster myth by limiting the discretion of federal and state officials to elevate law enforcement over humanitarian concerns. First, we should reject calls to expand the role of the military—particularly the federal military—in disaster law enforcement. Second, to prevent exaggerated fears of violence and looting from interfering with federal disaster aid, the federal Stafford Act’s provisions on major disaster assistance should be amended to preclude the President from delaying or withholding federal aid, including military humanitarian aid, based on unsubstantiated reports of looting and violence. Third, state and local disaster laws and plans likewise should be amended to prohibit prioritization of law enforcement over other response missions, to clearly establish the priority of life saving over property protection, and to preclude delays in delivery of aid based on security concerns absent credible, reliable, verified evidence that such concerns are valid. Fourth, state disaster laws should also be amended to prevent invocation of inflated looting fears to justify restrictions on movement such as blockades, curfews, vague declarations of “martial law” that purport to suspend constitutional rights, and orders delaying evacuees’ return to their homes. Fifth, limited postdisaster resources should be focused on response and mitigation efforts, not on the passage of looting laws. Finally, to facilitate rooting out the disaster myth and the overemphasis on law enforcement it spurs, both the federal and state governments should be wary of submerging agencies charged with mitigating and responding to natural disasters in larger homeland security agencies focused primarily on terrorism. Housing natural disaster response agencies in bureaucracies charged primarily with responding to terrorism risks will likely make it more difficult to reorient natural disaster response away from law enforcement and toward humanitarian concerns.

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<sup>20</sup> See *infra* Part III.A. “Security” is a somewhat ambiguous term, which can be “sufficiently elastic” to cover everything from national defense to social services. See Mariano-Florentino Cuéllar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 588 (2009). This Article uses security in a narrower sense to refer primarily to protection from violence and crime.

Part I of this Article provides an overview of the important sociological literature on disaster myths. Part II takes up the disaster myth that is the focus of this Article—the myth of widespread looting and violence. Part II.A examines the substance of this myth as understood after Katrina, and Part II.B considers why the myth continues to be perpetuated. Part III analyzes the implications and consequences of this myth for disaster law. In particular, Part III.A considers how the myth shapes our use of the military in disaster response, distorts immediate-response priorities in disaster plans, and leads to restrictions on movement and other impositions on basic rights. The Article suggests ways in which official discretion can be legally constrained to counter some of these consequences of the myth. Part III.B examines the history and substance of looting laws in this country, concluding that most such laws both reflect and perpetuate disaster mythology. Finally, Part III.C suggests that the prevalence of the disaster myth may support institutional reform to remove the Federal Emergency Management Agency (FEMA) from the Department of Homeland Security (DHS). Throughout, this Article argues that a more nuanced understanding of typical human behavior in the aftermath of disasters is critical to the creation of legal and policy frameworks for disaster preparation and response that will be effective in mitigating both disasters and the resulting human suffering.

## I

### DISASTER MYTHOLOGY

In the United States, sociological research into the public response to disaster has its roots in the Cold War.<sup>21</sup> As the federal government was indoctrinating school children in the “duck and cover” method for surviving nuclear attack, it also was contemplating what a postapocalyptic society might look like.<sup>22</sup> Thus, with the threat of nuclear war looming large in the public consciousness, federally funded disaster researchers began to examine public response to past and current disasters—primarily natural ones—hoping to gain insight into how civilians might respond to nuclear attack.<sup>23</sup>

Over the next several decades, sociologists produced a body of research that identified some fundamental characteristics of post-disaster human behavior. They observed that, in the aftermath of natural disasters, most people engage in prosocial, helping behaviors; antisocial behavior is the exception, rather than the rule.<sup>24</sup> “[B]oth

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<sup>21</sup> See Kathleen Tierney et al., *Metaphors Matter: Disaster Myths, Media Frames, and Their Consequences in Hurricane Katrina*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 57–58 (2006).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

social cohesiveness and informal mechanisms of social control increase during disasters, resulting in a lower incidence of deviant behavior than during nondisaster times.”<sup>25</sup> The research suggested various explanations for these findings, including “emergent prosocial norms,” the tendency to suspend preexisting community conflicts to focus on the disaster, and “the emergence of ‘therapeutic communities’” in which disaster survivors come together to provide mutual support.<sup>26</sup>

Moreover, the research found that only a small minority of disaster survivors suffer a “shock reaction” that leaves them dazed, unable to think for themselves, and dependent on others for rescue and guidance.<sup>27</sup> Indeed, community residents who survive the initial hazard event are the true “first responders,” performing many critical life-saving tasks, including searching for, rescuing, and caring for other survivors.<sup>28</sup> The research also suggested that true panic—characterized by irrational flight behavior—is not a typical disaster response.<sup>29</sup>

As this body of research coalesced, sociologists began to recognize that many of these findings conflicted with widely held perceptions about postdisaster behavior. These commonly held misconceptions—or disaster myths—were first fully conceptualized and catalogued by two prominent sociologists, E.L. Quarantelli and Russell R. Dynes.<sup>30</sup> Among the most important of the disaster myths they identified were (1) the myth of antisocial behavior, such as looting and violence; (2) the myth of disaster-victim shock; and (3) the myth of widespread disaster-induced panic.<sup>31</sup>

This Article focuses on the first of these myths, the myth of antisocial behavior—specifically, the myth of widespread looting and violence. As Quarantelli and Dynes explained, “[a]ccording to . . . popular belief, antisocial behavior is widespread in the wake of a disaster—looters swarm into the unguarded, unoccupied homes; the police must be put on patrol—sometimes the military must be called in.”<sup>32</sup> This belief, they noted, was inconsistent with empirical find-

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<sup>25</sup> *Id.* at 58.

<sup>26</sup> *Id.*; see also FISCHER, *supra* note 14, at 71 (explaining that during disasters, “community . . . does not break down,” but “instead, an emergent norm process . . . occurs resulting in the adoption of those behavioral guides that subscribe to the belief, or value, that humans in trouble must be helped”).

<sup>27</sup> See E.L. Quarantelli & Russell R. Dynes, *When Disaster Strikes (It Isn't Much Like What You've Heard & Read About)*, 5 PSYCHOL. TODAY 67, 67–68 (1972).

<sup>28</sup> Tierney et al., *supra* note 21, at 75.

<sup>29</sup> Quarantelli & Dynes, *supra* note 27, at 58.

<sup>30</sup> See Tierney et al., *supra* note 21, at 58 (identifying Quarantelli and Dynes's February 1972 article as the first major discussion of common disaster myths).

<sup>31</sup> See Quarantelli & Dynes, *supra* note 27, at 67–69.

<sup>32</sup> *Id.* at 69.



ings.<sup>33</sup> Although looting, for example, is common during—and, indeed, arguably an integral component of—civil disturbances (such as riots), it is exceedingly rare in the aftermath of natural disasters.<sup>34</sup> Thus, Quarantelli and Dynes and subsequent scholars have distinguished sharply between riots and other civil disturbances (in which looting is not only likely, but is part of the mob's message) on the one hand and natural disasters (in which looting is exceptional) on the other.<sup>35</sup>

While sociologists have produced a compelling, coherent body of empirical evidence demonstrating that prosocial behavior, rather than antisocial, criminal behavior, is the predominant human response to natural disaster,<sup>36</sup> the empirical foundation of the sociological disaster research is not unassailable.<sup>37</sup> The need for continuing, systematic sociological research on disasters is pressing, as is the need for ongoing reassessment of our legal and policy structures based on that evolving research. Nonetheless, the current sociological consensus is now almost half a century old,<sup>38</sup> and the critical dialogue between disaster law and disaster sociology has not even begun. This Article begins that dialogue.

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<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> *Id.*; see also E.L. Quarantelli, *The Myth & the Realities: Keeping the Looting "Myth" in Perspective*, NAT. HAZARDS OBSERVER (Natural Hazards Center, Boulder, Colo.), March 2007, at 2, 3, available at <http://www.colorado.edu/hazards/o/archives/2007/mar07/index.html> [hereinafter Quarantelli, *Myth & Realities*].

<sup>36</sup> See sources cited *infra* note 38; see also Tierney et al., *supra* note 21 at 65 (noting that widespread postdisaster looting in the United States has been "vanishingly rare").

<sup>37</sup> Quarantelli acknowledges that the "empirical base" of disaster mythology research is not yet "as strong as would be desirable," and that much of "the early research was somewhat unsystematic and uneven in its coverage of most topics or questions." Quarantelli, *supra* note 14, at ix; see also FISCHER, *supra* note 14, at 189 ("[P]rior research . . . on [looting] may be skewed: based on small western populations experiencing more limited disasters in scale and scope."). Most research on postdisaster behavior demonstrating the absence of antisocial behavior such as looting has been in developed countries; studies have occasionally observed large-scale looting after natural disasters in the developing world. See Quarantelli, *Myth & Realities*, *supra* note 35, at 2.

<sup>38</sup> See, e.g., FISCHER, *supra* note 14, at 221–22 (noting that from "[m]ore than 40 years of research into the behavioral response to natural and technological disasters," "a consistent and clear understanding" has arisen that perceptions that individuals will flee in panic, suffer shock or psychological dependency, loot or behave in selfish ways "driven by base, depraved instincts" are "far more myth than real"); Paul V. Stock, *Katrina and Anarchy: A Content Analysis of a New Disaster Myth*, 27 SOC. SPECTRUM 705, 708 (2007) (noting the "unusual coherence" of the sociological literature demonstrating that disaster victims react in overwhelmingly prosocial ways).

## II

## THE MYTH OF LOOTING AND VIOLENCE

## A. The Content of the Disaster Myth

Sociological studies have demonstrated that the public narrative of disaster, particularly as conveyed by the media, focuses on unsubstantiated claims of antisocial behavior at the expense of reporting helping behaviors.<sup>39</sup> This gloomy public narrative played out with a vengeance during Hurricane Katrina. On Monday, August 29, 2005, Hurricane Katrina made landfall as a slow-moving Category 3 hurricane.<sup>40</sup> It left in its wake an unspeakable trail of devastation and suffering—some 1,500 fatalities, 80% of New Orleans under water, and destruction up and down the Gulf Coast.<sup>41</sup> Almost immediately, reports of looting—and, indeed, reports of extreme violence, including murder and rape—began to emerge from New Orleans.<sup>42</sup>

There can be little doubt that the disaster myth of widespread looting and violence influenced reporting about Katrina's impact. Sociologists have identified several distinct, but overlapping, narratives, rooted in disaster mythology, that public officials and the media used to portray post-Katrina New Orleans. In these narratives, looting—the prototypical antisocial behavior identified in the disaster myth—was inseparably connected with accounts of horrific violence.<sup>43</sup>

One of the most prominent narratives or “frames” the media employed in its Katrina reporting was anarchy.<sup>44</sup> While the reporting used “anarchy” in a variety of senses—to connote an absence of authority,<sup>45</sup> particularly federal authority in Katrina's immediate aftermath, to “report[ ] violence, chaos, and Armageddon, end-of-days hyperbole,”<sup>46</sup> and to refer to looting and associated property damage<sup>47</sup>—all of these conceptions perpetrated a view of New Orleans as a place where social norms had disintegrated and dangerous, uncontrolled lawlessness prevailed.<sup>48</sup>

<sup>39</sup> See Russell R. Dynes & Havidán Rodríguez, *Finding and Framing Katrina: The Social Construction of Disaster*, in *THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE*, *supra* note 8, at 23, 33.

<sup>40</sup> See RICHARD D. KNABB, JAMIE R. RHOME & DANIEL P. BROWN, NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 23-30 AUGUST 2005, at 3 (2005) [hereinafter *TROPICAL CYCLONE REPORT*], available at [http://www.nhc.noaa.gov/pdf/TCR-AL122005\\_Katrina.pdf](http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf).

<sup>41</sup> See *id.* at 9–11.

<sup>42</sup> See *supra* notes 1–11 and accompanying text.

<sup>43</sup> See, e.g., Tyson, *supra* note 10 (comparing the looting and violence in New Orleans in the days after Katrina to that in Baghdad during the war in Iraq).

<sup>44</sup> See Stock, *supra* note 38, at 719.

<sup>45</sup> *Id.* at 713.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See *id.* at 717.

The anarchy narrative was not limited to media stories based on unconfirmed sources, but was employed and perpetuated by New Orleans' highest public officials, including its chief of police and mayor, whose reports of terrible atrocities proved exaggerated at best. A *New York Times* article reported, for example, that “[c]haos and gunfire hampered efforts to evacuate the Superdome,” and quoted New Orleans Police Department Superintendent Edwin P. Compass’s assertion that “armed thugs have taken control of the secondary makeshift shelter at the convention center.”<sup>49</sup> The article also reported that “Superintendent Compass said that the thugs repelled eight squads of 11 officers each he had sent to secure the place and that rapes and assaults were occurring unimpeded in the neighboring streets as criminals ‘preyed upon’ passers-by, including stranded tourists.”<sup>50</sup>

Another of the narratives consistently employed in post-Katrina reporting was that of “war”<sup>51</sup> between Katrina’s victims and their would-be rescuers.<sup>52</sup> A few days after Katrina made landfall, news coverage shifted from describing “civil unrest” in New Orleans to “characteriz[ing] the events in New Orleans as the equivalent of war—and, more specifically, the urban insurgency the U.S. military currently faces in Iraq.”<sup>53</sup>

The *Today Show*’s Matt Lauer, apparently steeped in the war-zone narrative, asked U.S. Army Lieutenant General Russel Honoré—who had been careful throughout to underscore the humanitarian nature of the Army’s New Orleans deployment—“What are the rules of engagement for troops in New Orleans dealing with armed people?”<sup>54</sup> A somewhat perplexed Honoré responded that “we use the rule of engagement in foreign countries and in desperate situations. . . . In an operation like this, we have rules of self-defense.”<sup>55</sup> ABC News Online likewise reported that New Orleans was a “war zone” where a National Guardsman had been shot outside the Superdome and where a shot was fired “at a Chinook helicopter taking part” in evacuating refugees from the stadium.<sup>56</sup> ABC also reported that “[f]our days after the hurricane hit, New Orleans was still plagued by gun battles and rapes, with gangs of looters and carjackers roving the streets as bodies were left lying by the roadside.”<sup>57</sup>

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49 Joseph B. Treaster & Deborah Sontag, *Despair and Lawlessness Grip New Orleans as Thousands Remain Stranded in Squalor*, N.Y. TIMES, Sept. 2, 2005, at A1.

50 *Id.*

51 Tierney et al., *supra* note 21, at 63; Tierney & Bevc, *supra* note 8, at 41.

52 See Barry et al., *supra* note 9; Tierney & Bevc, *supra* note 8, at 41.

53 Tierney & Bevc, *supra* note 8, at 41.

54 Yassin, *supra* note 11.

55 *Id.*

56 *Troops Told ‘Shoot to Kill’ in New Orleans*, ABC NEWS ONLINE (Sept. 2, 2005) [hereinafter *Shoot to Kill*], <http://www.abc.net.au/news/newsitems/200509/s1451906.htm>.

57 *Id.*

These narratives, drawn from disaster mythology, created a distorted and inaccurate view of lawlessness in post-Katrina New Orleans. That early reporting described many violent and lawless incidents that never occurred is now beyond question. On September 26, 2006—four weeks to the day after Katrina made landfall—Brian Thevenot and Gordon Russell, two reporters who covered Katrina for the New Orleans-based *Times-Picayune*, questioned some of their own earlier reporting, which had suggested horrific violence in the Louisiana Superdome and Convention Center. Their self-critical postmortem of the early, post-Katrina reporting headlined: “For three anguished days the world’s headlines blared that the Superdome and Convention Center had descended into anarchy. But the truth is that while conditions were squalid for the thousands stuck there, much of the violence NEVER HAPPENED.”<sup>58</sup>

The article continued:

The picture that emerged was one of the impoverished masses of flood victims resorting to utter depravity, randomly attacking each other, as well as the police trying to protect them and the rescue workers trying to save them. Nagin told [Oprah] Winfrey the crowd has descended to an “almost animalistic state.”

Four weeks after the storm, few of the widely reported atrocities have been backed with evidence. The piles of bodies never materialized, and soldiers, police officers and rescue personnel on the front lines say that although anarchy reigned at times and people suffered unimaginable indignities, most of the worst crimes reported at the time never happened.<sup>59</sup>

Indeed, despite the scores reported to have died in the Convention Center and Superdome, only a few bodies ultimately were recovered from each site, and the condition of only one body suggested a violent death.<sup>60</sup>

In late September 2005, Police Superintendent Compass admitted to the *New York Times* that some of the most shocking statements he made turned out to be untrue.<sup>61</sup> Compass explained, “We have no official reports to document any murder. Not one official report of rape or sexual assault.”<sup>62</sup> Lieutenant David Benelli, who headed the New Orleans Police Department’s sex crimes unit, reported that he and his officers investigated every rumor of rape or atrocity and only

<sup>58</sup> Thevenot & Russell, *Rape. Murder. Gunfights.*, *supra* note 13.

<sup>59</sup> *Id.*

<sup>60</sup> See Brian Thevenot & Gordon Russell, *Reports of Anarchy at Superdome Overstated*, SEATTLE TIMES, Sept. 26, 2005, at A1 [hereinafter Thevenot & Russell, *Overstated*], available at <http://community.seattletimes.nwsourc.com/archive/?date=20050926&slug=katmyth> 26.

<sup>61</sup> Dwyer & Drew, *supra* note 13.

<sup>62</sup> *Id.*

made two arrests for attempted sexual assault, concluding that no other attacks occurred.<sup>63</sup> Orleans Parish District Attorney Eddie Jordan reported, as of September 26, 2005, that officials had confirmed only four murders in post-Katrina New Orleans, rather than the forty or fifty murders that reports led him to expect.<sup>64</sup> Four murders in a week may be a typical number for a city that, absent disaster, expected over two hundred homicides in 2005.<sup>65</sup>

The *Times-Picayune* was not alone in beating a retreat from its early Katrina reporting. The *New York Times*, the *Washington Post*, and the *Los Angeles Times* all ran stories documenting that much of the reported violence had not been substantiated.<sup>66</sup> The *New York Times* delivered a restrained indictment of earlier reporting:

A month later, a review of the available evidence now shows that some, though not all, of the most alarming stories that coursed through the city appear to be little more than figments of frightened imaginations, the product of chaotic circumstances that included no reliable communications, and perhaps the residue of the longstanding raw relations between some police officers and members of the public.<sup>67</sup>

The other papers were even less generous in their assessments of the early reporting.<sup>68</sup>

The truth had little chance of catching the myth, however. As the *New York Times* noted, the stories of atrocities by Katrina survivors had already traveled the world: “An international press eager to jump on American pathology played the unfounded reports for all they were worth, with hundreds of news outlets regurgitating tales of lawlessness.”<sup>69</sup> Indeed, the distorted accounts of widespread post-Katrina looting and violence are so deeply entrenched that they have recently been resurrected as a convenient foil to the calm, orderly, prosocial

<sup>63</sup> *Id.* Of course, rape is notoriously underreported even under the best of circumstances, and it is likely that some rapes went unreported in Katrina’s aftermath. See John Burnett, *More Stories Emerge of Rapes in Post-Katrina Chaos*, NPR (Dec. 21, 2005), <http://www.npr.org/templates/story/story.php?storyId=5063796>.

<sup>64</sup> Thevenot & Russell, *Overstated*, *supra* note 60.

<sup>65</sup> See *id.* Of course, given that much of New Orleans had been evacuated, these numbers may still represent a somewhat elevated murder rate in terms of the number of murders per citizen.

<sup>66</sup> See Britt, *supra* note 12; David Carr, *More Horrible Than Truth: News Reports*, N.Y. TIMES, Sept. 19, 2005, at C1, available at <http://www.nytimes.com/2005/09/19/business/media/19carr.html?scp=1&sq=%22David%20Carr%22%20&%20%22More%20Horrible%20than%20Truth%22&st=cse>; Dwyer & Drew, *supra* note 13; Rosenblatt & Rainey, *supra* note 13.

<sup>67</sup> Dwyer & Drew, *supra* note 13.

<sup>68</sup> See, e.g., Rosenblatt & Rainey, *supra* note 13 (concluding that “a frenzied media recycled and amplified many of the unverified reports” of violence and disorder produced by the “24-hour rumor mill”).

<sup>69</sup> Carr, *supra* note 66.

response of the Japanese people to the devastating March 11, 2011 earthquake and tsunami. Rather than asking whether the lack of looting in Japan in the face of such terrible tragedy should prompt us to reexamine preconceived notions about human response to disasters, commentators have sought instead to explain away the Japanese response as aberrant behavior, rooted in some unique aspect of Japanese culture or society.<sup>70</sup> As irrefutable proof that, at least in America, widespread antisocial behavior remains the rule rather than the exception, many continue to cite the exaggerated reports of utter lawlessness in post-Katrina New Orleans without acknowledging that most of that initial reporting has since been discredited.<sup>71</sup>

In some respects, the New Orleans experience after Katrina has presented a challenge to the sociological consensus that property crime is rare during disaster conditions, as some news outlets—even those that explicitly retracted other myth-based reports of violence in the city post-Katrina—stubbornly insisted that widespread looting had, in fact, occurred.<sup>72</sup> Nevertheless, stories like the *USA Today* arti-

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<sup>70</sup> See, e.g., Christopher Beam, *Stop, Thief! Thank You.*, SLATE (Mar. 16, 2011), <http://www.slate.com/id/2288514/> (arguing that the relative absence of looting in Japan is a function of a culture and legal system that reward honesty, a strong everyday police presence, and the influence of organized crime syndicates); Pichai Chuensuksawadi, Op-Ed., *Stoic Calm in the Face of Utter Calamity*, BANGKOK POST (Mar. 15, 2011, 12:00 AM), <http://www.bangkokpost.com/opinion/opinion/226703/stoic-calm-in-the-face-of-utter-calamity> (arguing that “a strong sense of community” rooted in “Japanese history and culture” likely explains the lack of looting); Elizabeth Stuart, *Discipline in the Face of Disaster: No Looting in Japan*, DESERET NEWS (Mar. 14, 2011, 4:17 PM), <http://www.deseretnews.com/article/700118414/Discipline-in-the-face-of-disaster-no-looting-in-Japan.html?pg=1> (reporting that the Japanese people are defying the normal “pattern” of looting after natural disasters because of their cultural emphasis on community and social order).

<sup>71</sup> See, e.g., Chuensuksawadi, *supra* note 70 (contrasting the Japanese reaction with the “chaos and anarchy,” including shootings and rampant car-jackings, in post-Katrina New Orleans); Stuart, *supra* note 70 (same).

<sup>72</sup> In the very article in which the *New York Times* concluded that much of the earlier reporting of violence was overblown, it continued to assert that “rather than assault” it was “crimes of opportunity”—in the form of looting—that were common in Katrina’s immediate aftermath. See Dwyer & Drew, *supra* note 13. Likewise, *Times-Picayune* reporter Thevenot stood by his reporting of looting, which he said was “definitely not a myth, I can confirm as an eyewitness.” Thevenot, *supra* note 2, at 32. This and other evidence have led some sociology scholars to speculate that at least some of what happened after Katrina was aberrational—that post-Katrina New Orleans was, perhaps, one of the rare “deviant cases” in which the natural disaster was so catastrophic and its sociological contours so similar to civil disturbances that substantial looting did indeed occur. See generally E.L. Quarantelli, *Draft of a Sociological Disaster Research Agenda for the Future: Theoretical, Methodological and Empirical Issues* 23 (Univ. of Del. Disaster Research Ctr., Preliminary Paper No. 228, 1994) (coining the term “deviant cases”). Prior to Katrina, the most commonly discussed exception to the “no widespread looting rule” was the extensive, socially sanctioned looting that engulfed St. Croix in the U.S. Virgin Islands during the aftermath of Hurricane Hugo in September 1989. See *id.* at 27. After conducting extensive fieldwork in St. Croix, Quarantelli acknowledged that the St. Croix looting was a deviant case that needed careful exploration. See *id.* The looting, though not as widespread as reported, was “major, done

cle, headlined *The Looters, They're Like Cockroaches*,<sup>73</sup> suggest that, like reports of survivor violence in shelters of last resort, reports of looting were overblown. In addition, reports of looting frequently failed to distinguish between what many consider “prosocial” looting—disaster survivors taking supplies necessary to sustain life and health—and “antisocial” looting—survivors taking unnecessary items, such as DVDs, TVs, and other electronic equipment.<sup>74</sup> Media reporting frequently conflated the two kinds of looting without much, if any, discussion of the potential ethical differences.<sup>75</sup>

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by groups, overtly undertaken, socially approved, and situational in nature”—all features that characterize the looting behavior of civil disturbances. *Id.*

Based on his fieldwork, Quarantelli and his colleagues described four factors that may have contributed to the looting in St. Croix:

First, the hurricane devastated the island, completely destroying the vast bulk of the built environment. Second, government institutions, including public safety agencies, were rendered almost entirely ineffective by the hurricane's severity, so the victims essentially had no expectation that their needs would be addressed by those institutions. Third, victims had no information on when they could expect help to arrive. . . . [Fourth,] the lawlessness that followed Hugo was . . . consistent with the high rates of predisaster crime on the island and also a consequence of preexisting social inequalities . . . .

Tierney et al., *supra* note 21, at 65. In his later writings, Quarantelli proposed that the St. Croix “atypical” mass looting might have occurred because Hurricane Hugo was “a major catastrophe rather than a lesser disaster,” in an area “with a concentration of disadvantaged persons exposed to everyday perceptions of major differences in lifestyles; a subculture tolerant of everyday minor stealing along with everyday organized youth gangs engaged in serious crime . . . ; and a local police force widely seen as corrupt and inefficient.” Quarantelli, *Myth & Realities*, *supra* note 35, at 2–3. Quarantelli and other sociologists have suggested that New Orleans may have replicated “on a smaller scale, what had happened in St. Croix.” *Id.* at 3; see FISCHER, *supra* note 14, at 68; see also Kelly Frailing & Dee Wood Harper, *Crime and Hurricanes in New Orleans*, in *THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE*, *supra* note 8, at 51, 52–53 (arguing that looting is more common after natural disasters than most sociologists admit and that looting rates were higher after Katrina than previous storms because of the deepening economic deprivation and high crime rates in New Orleans). Even in light of this possibility—which sociologists continue to debate—Katrina offers an excellent snapshot of the ongoing disaster-looting mythology. Most sociologists agree that the amount of true, antisocial looting that occurred was considerably less than reported. See *infra* note 76 and accompanying text. Furthermore, while sociologists have not yet fully identified and explained the factors that may have produced higher-than-expected looting rates after Katrina, most continue to agree that only the atypical natural disaster risks mass looting. See, e.g., Quarantelli, *Myth & Realities*, *supra* note 35, at 3 (concluding that “looting of any kind is rare in certain kinds of disasters in certain types of societies” and that the “occasional atypical instances of mass lootings . . . only emerge if a complex set of prior social conditions exist”).

<sup>73</sup> Patrick O'Driscoll, *The Looters, They're Like Cockroaches*, USA TODAY, Sept. 2, 2005, [http://www.usatoday.com/news/nation/2005-09-02-new-orleans-escape\\_x.htm](http://www.usatoday.com/news/nation/2005-09-02-new-orleans-escape_x.htm).

<sup>74</sup> See Quarantelli, *Myth & Realities*, *supra* note 35, at 3.

<sup>75</sup> The USA Today article, for example, painted New Orleans citizens who had taken shoes from department stores as among the most reprehensible of looters. See O'Driscoll, *supra* note 73. One can certainly imagine, however, how someone who had just lost all of their possessions in a hurricane might need some shoes to navigate New Orleans' treacherous streets.

Most sociologists agree that the media, driven by what conventional wisdom suggests will happen after a major disaster, overstated and overplayed the amount of actual antisocial looting that occurred in New Orleans.<sup>76</sup> Perhaps the most salient feature of post-Katrina looting is that, in the public narratives perpetuated by media reports and local officials, looting was almost invariably married to more serious violent crime. Those early reports of extreme violence, however, have been almost universally discredited.<sup>77</sup> While there is, of course, always the potential that looting will lead to violent confrontations with either police or property owners,<sup>78</sup> even in those few documented instances when natural disasters have spurred widespread looting, no significant pattern of increased street violence has been documented.<sup>79</sup> Thus, even in those rare cases where disaster looting has occurred, it has not been the harbinger of a complete breakdown in social order and societal norms.

All told, while there is little doubt that some looting and some violent incidents occurred in post-Katrina New Orleans,<sup>80</sup> and little doubt that disaster plans should consider and mitigate security risks, violence did not dominate the experience of most Katrina survivors in

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<sup>76</sup> See, e.g., FISCHER, *supra* note 14, at 189 (“The research team is convinced looting did occur [after Katrina]. It is also convinced that much of it was not looting as much as acquiring the means for survival.”); Tierney et al., *supra* note 21, at 64–66 (observing that although looting is rare following disasters, and despite the fact that no empirical data exists that supports the prevalence of looting in New Orleans, the media nevertheless reported rampant looting after Katrina); see also FISCHER, *supra*, at 66 (“[I]t may be argued that inadequate [disaster] preparation . . . coupled with a slow response to . . . the aftermath [of Katrina], literally caused [some of the] ‘looting’ which may be more accurately characterized as ‘appropriation of property to support life.’”). But see *id.* at 67, 189 (acknowledging that some “looting occurred for non-survival reasons”). A later article in the *New York Times* lends support to the conclusion that much reported looting might be characterized as requisitioning behavior. See Dwyer & Drew, *supra* note 13. The article reported that “[t]he jewelry and antique shops in the French Quarter were basically left untouched, though squatters moved into a few of the hotels. Only a small grocery store and drugstores at the edge of the quarter were hit by looters . . . .” *Id.*

<sup>77</sup> See, e.g., FISCHER, *supra* note 14, at 189 (“[T]he crime reports from New Orleans demonstrate that even in Katrina the overall crime rate was much lower than in normal time.”).

<sup>78</sup> See *State v. Falkins*, 9 So.3d 190, 190–91 (La. Ct. App. 2009) (discussing defendant’s conviction for attempted murder when he fired on a police officer responding to reports that the defendant and others were looting guns from a pawn shop).

<sup>79</sup> For example, even in St. Croix after Hurricane Hugo, where looting was described as widespread and “massive”—not unlike the looting more typical of civil disturbances— “[t]he looters used no physical force and, at worst, made only unfulfilled verbal threats.” Quarantelli, *Myth & Realities*, *supra* note 35, at 2.

<sup>80</sup> See Burnett, *supra* note 63 (acknowledging that some rapes did occur in the days following Katrina); see also DOUGLAS BRINKLEY, *THE GREAT DELUGE* 264–65 (2006) (recounting a firsthand account of rape); *Superdome Rape Reports*, WTVY (Oct. 6, 2005, 5:07 PM), <http://www.wtvynews4.com/news/headlines/1892302.html> (quoting a New Orleans sexual assault nurse recounting post-Katrina rapes).



New Orleans the way it dominated both the news reporting and official decision making.<sup>81</sup>

Paradoxically, much of the violence that actually occurred following Katrina was committed by individuals who subscribed to the myth that their neighbors and fellow citizens would degenerate into animals and who thus employed violent measures to protect themselves—or their property—against this perceived threat.<sup>82</sup> Indeed, it

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<sup>81</sup> See Timothy Brezina & Joanne M. Kaufman, *What Really Happened in New Orleans? Estimating the Threat of Violence During the Hurricane Katrina Disaster*, 25 JUST. Q. 701, 707, 712 (2008) (reporting statistical analysis of survey data demonstrating that only a minority of New Orleanian Katrina survivors reported being “threatened by violence” of any kind after Katrina and that the percentage reporting a threat (approximately 22%) was not significantly different for those who evacuated New Orleans before Katrina and those who weathered the storm in the city); *id.* at 715 (suggesting that the unexpected correlation between marriage and threats of violence observed in the study might indicate that some of the threatened violence was between intimate partners). Brezina and Kaufman did find that the “odds of being threatened by violence” were greater for those who spent time in the Superdome or Convention Center, but that the majority of those who took refuge in either the Superdome or Convention Center did not report threats of violence. See *id.* at 715–16. Moreover, the study only measured perceived threats of violence, not actual violent incidents. See *id.* at 707. The exaggerated reports and rumors of violence in the Superdome and Convention Center may have created a perception among those sheltering there that they were at risk of being victimized. Crowded conditions at both shelters might also lead to a single threat of violence affecting many individuals. See *id.* at 717.

<sup>82</sup> Reports of citizen vigilantism in Katrina’s aftermath have focused primarily on Algiers Point, a “white enclave” in predominantly black Algiers. See A.C. Thompson, *Post-Katrina, White Vigilantes Shot African-Americans with Impunity*, PROPUBLICA (Dec. 19, 2008, 12:30 PM), <http://www.propublica.org/article/post-katrina-white-vigilantes-shot-african-americans-with-impunity>. Algiers Point escaped Katrina’s flooding, so it became both an informal and official evacuation site. See *id.* “[C]onvinced that crime would arrive with the human exodus,” a white militia of between fifteen and thirty residents formed and patrolled the streets looking for anyone who “‘didn’t belong.’” *Id.* “They paint[ed] themselves as righteous defenders of property, a paramilitary formation protecting their neighborhood” from storm victims, whom one militia member described as “‘hoodlums from the Lower Ninth Ward and that part of the city.’” *Id.* One Algiers Point resident has been charged with federal hate crimes for shooting three black men evacuating New Orleans—men whom the shooter identified as looters. See Brendan McCarthy & A.C. Thompson, *Charges Filed in Katrina Shooting: 3 Black Men Hurt; Hate Crime Alleged*, TIMES-PICAYUNE (New Orleans), July 16, 2010, at A1. Some reports estimate that the militia may have shot as many as eleven people. See Thompson, *supra*. In addition to vigilante violence, “the federal government [is] investigating eight criminal cases involving accusations of police misconduct” related to post-Katrina police shootings of civilians. Trymaine Lee, *Inquiries Give Credence to Reports of Racial Violence After Katrina*, N.Y. TIMES, Aug. 27, 2010, at A9. A widely reported incident of police misconduct occurred when “[p]olice fired on civilians on the Danziger Bridge, thinking them looters, killing two.” Patrik Jonsson, *Post-Katrina ‘Vigilante’ Violence: Rumor or Fact?*, CHRISTIAN SCI. MONITOR, Sept. 2, 2009, available at <http://www.csmonitor.com/USA/Justice/2009/0902/p02s07-usju.html>. Four others were injured in the shooting, and one police officer has already pled guilty to federal charges related to the shooting and an attempted cover-up. See Laura Maggi & Brendan McCarthy, *Pleading Guilty, Ex-Cop Details Danziger Attacks; Hunter Says Officer Shot Fleeing Man in Back, Another Stomped on Body*, TIMES-PICAYUNE (New Orleans), April 8, 2010, at A1. The federal government is also investigating other allegations of police misconduct, including the death of Harry Glover, who was shot by an officer “guarding a building.” Brendan McCarthy, Laura Maggi & A.C. Thompson, *Algiers Police Shooting Report Altered, Sources Say*, PROPUB-

now appears that most of the post-Katrina violence was perpetrated by vigilantes and police.<sup>83</sup> Although rumors of such behavior surfaced shortly after Katrina, they were not reported in mainstream media until years after the disaster.<sup>84</sup> Most of the mainstream media coverage of police misconduct and vigilante violence—which was committed by individuals located arguably outside the disaster community in areas relatively unscathed by Katrina—occurred leading up to Katrina’s fifth-year anniversary.<sup>85</sup> Thus, it was the exaggerated reports of survivor violence and looting that influenced official decision making in the aftermath of Katrina; this Article will focus primarily on the effects of those early, exaggerated reports.<sup>86</sup>

The violence perpetrated by vigilantes and police in post-Katrina New Orleans was likely exacerbated by preexisting racial tensions and police corruption.<sup>87</sup> Yet the fact that the perpetrators clearly believed that the largely poor, black survivors of Katrina were all potential looters and rapists confirms the need for official action that counters perpetuation of the myth that natural disasters transform average citizens into criminals. The possibility of myth-motivated violence—violence arising as a result of, and in response to, belief in the myth of widespread looting and violence—should be studied in future disasters to refine the policy responses to the myth proposed in this Article.

## B. The Persistence and Perpetuation of the Disaster Myth

The myth of widespread looting and violence rears its head in many disasters.<sup>88</sup> Why does this disaster myth have such a hold on our

LICA (Mar. 13, 2010, 11:45 PM), <http://www.propublica.org/nola/story/algiers-police-shooting-report-altered-sources-say-313>. The shooting incident report, perhaps by way of justification, stated that “‘the entire City of New Orleans was plagued by looters at almost every section of the city.’” *Id.*

<sup>83</sup> See sources cited *supra* note 82.

<sup>84</sup> See, e.g., sources cited *supra* note 82.

<sup>85</sup> See, e.g., Lee, *supra* note 82 (reporting on post-Katrina racial violence nearly five years after the hurricane struck); McCarthy & Thompson, *supra* note 82 (recounting in a major New Orleans-based newspaper the violence by vigilantes and police that took place nearly five years earlier).

<sup>86</sup> See *infra* Part III for a discussion of how exaggerated media reports influenced official decision making in the aftermath of Katrina.

<sup>87</sup> Cf. Thompson, *supra* note 82 (describing reports of police insouciance in the face of racial violence).

<sup>88</sup> The disaster mythology apparently affected coverage of the January 2010 earthquake in Haiti. Compare Philip Sherwell & Patrick Sawyer, *Haiti Earthquake: Looting and Gun-Fights Break Out*, TELEGRAPH, Jan. 16, 2010, <http://www.telegraph.co.uk/news/world-news/centralamericaandthecaribbean/haiti/7005554/Haiti-earthquake-looting-and-gun-fights-break-out.html> (reporting growing “anger and fears of violence” as “machete-wielding earthquake survivor[s] . . . roamed through the ruins of Port-au-Prince”), with Soledad O’Brien & Rose Arce, *Desperation, But No Violence Seen in Haiti*, CNN.COM (Jan. 30, 2010), <http://edition.cnn.com/2010/WORLD/americas/01/28/haiti.notebook/> (reporting desperation, but calm, on the streets of Port-au-Prince).

psyche?<sup>2</sup> There may be some reasons that the disaster myth of looting and violence played out in New Orleans with such a vengeance. For example, many have suggested that racism and classism played an important role in Americans' willingness to believe the worst about post-Katrina New Orleans.<sup>89</sup> Perhaps some Americans were more inclined to believe reports that poor, black citizens of New Orleans had so quickly regressed to a violent state of nature than they would have been to accept reports of similar behavior by white, middle-class individuals.<sup>90</sup> Additionally, sky-high crime rates in pre-Katrina New Orleans may have made the stories of violence and looting more credible.<sup>91</sup> The storm also decimated communications systems, which made it difficult for reporters and public officials to verify stories as thoroughly as they might otherwise have done.<sup>92</sup> Moreover, the situation in New Orleans—in terms of human suffering—was truly horrific, and government response was notoriously slow, both of which may have made local public officials more likely to exaggerate the plight of New Orleans in order to prod the federal government into action.<sup>93</sup> But the disaster myths themselves—already firmly rooted in American consciousness by past media reporting of disasters and a popular culture of disaster movies that plays on inaccurate stereotypes of postdisaster human behavior—made the inaccurate reporting in New Orleans significantly more credible than it otherwise would have been.<sup>94</sup>

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<sup>89</sup> See, e.g., RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 39–49 (2008) (describing the racial slant in post-Katrina media coverage); Rebecca Solnit, *Four Years On, Katrina Remains Cursed By Rumour, Cliché, Lies, and Racism*, *GUARDIAN* (London), Aug. 26, 2009, (Comment & Debate), at 28 (noting racist attitudes reflected in the New Orleans aftermath).

<sup>90</sup> See FORD, *supra* note 89, at 42 (noting that black families are portrayed in the media as “looting,” whereas white families are merely “looking for food” (internal quotations marks omitted)).

<sup>91</sup> See Amanda Ripley, *Crime Returns to the Big Easy*, *TIME*, Mar. 21, 2006, <http://www.time.com/time/nation/article/0,8599,1175489,00.html> (reporting that the murder rate in New Orleans in 2004 was “about eight times” that of New York City).

<sup>92</sup> See FISCHER, *supra* note 14, at 187.

<sup>93</sup> See SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR & RESPONSE TO HURRICANE KATRINA, *A FAILURE OF INITIATIVE*, H.R. REP. NO. 109-377, at 195 (2006) [hereinafter *A FAILURE OF INITIATIVE*] (describing the federal response as “agonizingly disjointed and slow”).

<sup>94</sup> Disaster sociologist Henry Fischer has explained that laypeople believe disaster myths in part because we are “socialized from an early age by significant others and mass media (print, broadcast, and film) to believe in the depraved nature of behavioral response to disaster events,” because “our experience with civil disturbances where looting, for example does commonly occur, is thought to be applicable to disaster response” and because “so-called common sense seems to dictate that one would be panic stricken, and so-forth, in such events.” See FISCHER, *supra* note 14, at 71. Carl Smith, author of *Urban Disorder and the Shape of Belief*, argues that “[t]here is a timeless primordial appeal of the story of a city in chaos and people running loose” and that such narratives suggest “the fulfillment of some timely ideas and prejudices about the current social order.” Carr, *supra* note 66 (internal quotation marks omitted). Interestingly, many of the worst stories came

Perpetuation of disaster mythology may also reflect an “availability cascade”—defined by Timur Kuran and Cass Sunstein as “a self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.”<sup>95</sup> An availability cascade is caused by the interaction of the “availability heuristic”—a mental shortcut by which an individual judges the probability of an event by his or her ability to conjure up examples of that event—and the social mechanisms through which risk perceptions are propagated.<sup>96</sup> Disaster media reporting and portrayals of disasters in popular culture understandably focus on antisocial behavior in disasters’ aftermath.<sup>97</sup> In contrast, the calm, helping behaviors typically exhibited by disaster survivors are hardly the fodder of either attention-grabbing headlines or fast-paced entertainment.<sup>98</sup> Those portrayals of disaster increase the mental “availability” of violence and looting as disaster risks by proliferating examples of disaster-related violence and looting (even if those examples never, in fact, occurred).<sup>99</sup> This availability effect may be compounded by the documented tendency of humans to focus on risks that are man made (like looting and violence), rather than those posed by nature (like hurricanes and earthquakes).<sup>100</sup> Whether the more powerful emo-

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from evacuees themselves. Fischer notes that such myth making by survivors is not uncommon: “One may wonder how myths could possibly come from the mouths of ‘those who were there.’ Survivors may sometimes exaggerate, sometimes report what they believe occurred because they believe in the disaster mythology, sometimes misinterpret events, or sometimes be misinterpreted themselves.” FISCHER, *supra* note 14, at 77.

<sup>95</sup> Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683 (1999). Kuran and Sunstein’s work does not address disaster myths and is concerned primarily with the spread of overblown fears of environmental risks (like Love Canal) and health risks (like the pesticide Alar on apples). *See id.* at 691, 697–98.

<sup>96</sup> *See id.* at 685.

<sup>97</sup> *See* Jeffrey A. Dvorkin, *Crime Reporting: Too Much for Listeners?*, NPR (July 6, 2005), <http://www.npr.org/templates/story/story.php?storyId=4731833> (noting that the media amplifies its coverage of shocking news, such as crime, “because crime always attracts an audience”).

<sup>98</sup> *See* Andrew Greeley, Editorial, *Media Ignored Calm Amid the 9/11 Chaos*, CHI. SUN-TIMES, Sept. 6, 2002, at 47 (explaining that the media did not cover the evacuation of one million people from Lower Manhattan by watercraft on September 11, 2001, because it was a “calm and sensible and spontaneous action[ ] [that] did not fit the media image of panic”).

<sup>99</sup> Reports of looting and violence during civil unrest may also increase the availability of looting and violence as a disaster risk, since the public may view civil unrest and natural disasters as interchangeable. *Cf.* FISCHER, *supra* note 14, at 71 (“[O]ur experience with civil disturbances where looting, for example does commonly occur, is thought to be applicable to disaster response when, in fact, it is not.”).

<sup>100</sup> *See* Kuran & Sunstein, *supra* note 95, at 709 (noting that individuals are more attuned to “potentially catastrophic” risks that those “with natural origins or unidentifiable victims”); *see also* Jonathan S. Simon, *Wake of the Flood: Crime, Disaster, and the American Risk Imaginary after Katrina*, ISSUES IN LEGAL SCHOLARSHIP, 2007, art. 4 at 5–8, <http://www.bepress.com/ils/iss10/art4> (situating the emphasis on post-Katrina crime in the context of

tional response evoked by man-made risks reflects a cognitive error—as Sunstein and Kuran suggest—or a culturally mediated value judgment—as Dan Kahan suggests<sup>101</sup>—the result may be that the public (or at least certain segments of the public) is particularly receptive to the belief that violence and looting are serious disaster risks.<sup>102</sup>

The “availability errors” then spread through the confluence of two social mechanisms that create availability cascades: “informational cascades” and “reputational cascades.”<sup>103</sup> An informational cascade—also described as a “bandwagon or snowballing process”—occurs when individuals, who necessarily lack complete information about a particular matter, “base their own beliefs on the apparent beliefs of others.”<sup>104</sup> That is, an individual faced with imperfect information (and limited time, resources, and mental energy) accepts a particular belief “simply by virtue of its acceptance by others.”<sup>105</sup> Thus, hurricane survivors may be inclined to believe that looting is likely to occur simply because their neighbors post signs declaring that “Looters will be shot,”<sup>106</sup> reflecting the neighbors’ apparent belief that looting is a serious problem. A reputational cascade occurs when individuals choose to profess a particular belief in order to avoid social disapproval and ostracism (or, in the converse, to gain social approval).<sup>107</sup> Thus, one can imagine a public official, for example, who advocates increased National Guard patrols during a disaster even though she believes looting is not a serious problem, because she also believes that her constituents will penalize her for failing to do so.

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America’s new “risk imaginary,” which focuses on technological disasters and violent crime).

<sup>101</sup> See Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 741 (2008) (arguing that “emotional apprehensions of risk reflect persons’ expressive appraisals of putatively dangerous activities”). Kahan does not dispute that availability cascades occur, but notes that such cascades (“self-reinforcing risk perceptions”) will be moderated by cultural commitments that make certain groups more or less susceptible to accepting particular beliefs. See *id.* at 756–57 (“[I]nsofar as one of the primary sources of information people have about the relationship between their values and a putatively dangerous activity is what persons who share their commitments think about it, perceptions of danger naturally feed upon one another among persons who share cultural commitments.” (footnote omitted)).

<sup>102</sup> That natural disasters are not truly “natural” and always involve a human contribution is now a truism among disaster scholars. See, e.g., DANIEL A. FARBER ET AL., *DISASTER LAW AND POLICY* 3 (2d ed. 2010). However, the public, as a whole, is less cognizant of the human contribution to so-called natural disasters, and is likely to view such risks primarily as “natural” in origin. See *id.*

<sup>103</sup> See Kuran & Sunstein, *supra* note 95, at 685.

<sup>104</sup> *Id.* at 686.

<sup>105</sup> *Id.*

<sup>106</sup> See Tyler Green, Richard Misrach’s Post-Katrina Narrative, “Modern Art Notes” (Sept. 9, 2010, 12:46 PM), <http://blogs.artinfo.com/modernartnotes/2010/09/richard-misrachs-post-katrina-narrative/> (describing a spray-painted sign in New Orleans that read “[l]ooters will be shot”).

<sup>107</sup> Kuran & Sunstein, *supra* note 95, at 686.

These mechanisms may help explain how the disaster myth of looting and violence has such staying power. Yet, as Kuran and Sunstein have noted, while the “expressive equilibriums” reached by availability cascades can be enduring,<sup>108</sup> they can also be fragile.<sup>109</sup> The next part of this Article, Part III, lays bare the effects of the myth of looting and violence for our legal system of disaster response so that we can then evaluate the social consequences of disaster mythology on our laws and their implementation and consider whether corrective action is necessary, and—if so—what shape it should take.

### III

#### LEGAL CONSEQUENCES OF THE MYTH OF WIDESPREAD LOOTING AND VIOLENCE

Given that most sociologists maintain that widespread antisocial behavior post-natural disaster is the exception rather than the rule,<sup>110</sup> disaster mythology scholarship presents a series of important, and as yet unaddressed, questions for legal scholarship. Do our existing laws reflect the disaster mythology of widespread looting and violence? Is the implementation of existing laws affected by public officials’ belief in the mythology? And if the answer to one or both of these questions is yes, what harms are produced by these legal outgrowths of societal myth and how might they be remedied?

This Part evaluates the consequences of the myth of looting and violence for our system of legal response to disasters. Subpart A examines three contexts in which the disaster mythology of looting and violence substantially affects the development or implementation of legal disaster response and for which it may be advisable to legally constrain, in advance, the discretion of politically accountable decision makers in order to counter the effects of disaster mythology. First, disaster mythology may influence the scope and form of military involvement in disaster response by shaping official perceptions about whether the legal prerequisites for military intervention have been satisfied. More specifically, the mythology may make it more likely that the President will deploy federal troops in a law enforcement capacity by invoking the Insurrection Act,<sup>111</sup> and—in the absence of that invocation—less likely that the President will be willing to commit federal troops to humanitarian missions. Second, belief in exaggerated reports of looting and violence distorts implementation of response pri-

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<sup>108</sup> *Id.* at 743–44.

<sup>109</sup> *See id.* at 746 (explaining that “cascade-generated equilibria” are vulnerable because they “rest substantially on preference and knowledge falsification,” such that “even an inherently minor shock” may “alter public discourse” and unravel the equilibrium if that shock brings hidden doubts to the surface).

<sup>110</sup> *See supra* Part I.

<sup>111</sup> 10 U.S.C. §§ 331–335 (2006).

orities outlined in disaster plans. Third, exaggerated fears of looting and violence lead public officials to implement restrictions on freedom and freedom of movement, many of which are authorized in state disaster laws, that may be counterproductive to relief efforts, including delaying return of evacuees to their homes. Such fears may also encourage excessive use of force by police. Because reports perpetuating the myth of widespread looting and violence seem to peak during the immediate-response phase and then begin to recede,<sup>112</sup> Subpart A argues that amending disaster legislation and emergency-response plans during times of calm to limit official discretion to over-emphasize security risks in immediate-response decisions may help counter the deleterious effects of the myth.

Subpart B then focuses on specific disaster-response legislation that both reflects and perpetuates the mythology of disaster looting and violence. In particular, an exhaustive review of state looting laws illuminates how disaster mythology has spurred the adoption of many looting laws that, while perhaps serving a limited function after some catastrophic disasters, may also divert attention from more important legislative responses to disasters. Furthermore, such laws perpetuate the myth by suggesting that looting is frequently a major problem, and by equating all postdisaster looting (including appropriating behavior). Such laws may even encourage vigilantism and overly aggressive law enforcement by entrenching the primacy and inviolability of private property rights during disasters. This dilemma therefore suggests the wisdom of experimenting with public education campaigns to reduce pressure on officials to adopt looting laws or, at least, to encourage adoption of looting laws that affirmatively grapple with the distinction between antisocial and prosocial looting.

Finally, Subpart C brings an important new perspective to the hotly contested debate over the optimal organization of our disaster agencies by demonstrating how the prevalence of the disaster mythology of looting and violence may support institutional reform to remove FEMA from DHS. Subpart C also supplies new reasons for resisting ongoing calls to make the Department of Defense (DOD) the lead federal agency for some types of disaster response.<sup>113</sup>

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<sup>112</sup> Compare, for example, the timing of news reports cited in notes 9 and 10 with those cited in note 13.

<sup>113</sup> As the sociological examination of Katrina and future disaster results in a fuller understanding of typical postdisaster behavior, other legal recommendations may become apparent. For example, if future evidence bears out current speculation that Katrina resulted in higher-than-expected looting rates in part because of the catastrophic nature of Katrina's destruction, *see supra* note 72, it may make sense for federal, state, and local disaster laws to address catastrophic disasters as distinct phenomena. *Cf.* FISCHER, *supra* note 14, at 2 (suggesting the need for continued sociological research to differentiate "between everyday emergencies, major emergencies, 'regular' disasters, and catastrophic disasters,"

## A. Disaster Mythology in Disaster Response: The Role of Discretion

### 1. *The Military's Role in Disaster Response*

One of the most important implications of a public and official misconception that antisocial behavior and crime are common after disasters is that the scope and form of military involvement—particularly federal military involvement—in disasters is triggered and shaped by beliefs about the extent of violence and lawlessness in the disaster's aftermath. When federal officials view conditions on the ground through the lens of the looting-and-violence disaster myth—that we quickly degenerate into our worst selves when disaster strikes—they are significantly more likely to conclude that the existing legal prerequisites have been satisfied for federalizing the National Guard and for giving law enforcement powers to both the federalized Guard and federal regular troops. Conversely, the same mythology of looting and violence may make federal officials reluctant to commit federal troops for humanitarian missions—if political or other obstacles prevent invocation of the Insurrection Act—based on fears that, without law enforcement powers, federal troops may confront practical and legal problems when humanitarian relief collides with violence on the ground.

#### a. *Overview of the Military's Role in Disaster Response*

Military forces are a significant resource that can be called upon—either by a state governor or by the President—to respond to disasters. At the peak of deployment in the aftermath of Hurricane Katrina, for example, 50,116 National Guard personnel and 21,408 active duty federal troops provided disaster relief.<sup>114</sup> To call on this significant resource, a governor, in his or her role as commander in chief of the state militia, can command state National Guard units—activated to duty under “state active duty” status or federally compensated “Title 32 status”<sup>115</sup>—to provide humanitarian relief in any form

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because different problems may occur with different types of disasters (internal citations omitted)).

<sup>114</sup> See A FAILURE OF INITIATIVE, *supra* note 93, at 202 tbl.

<sup>115</sup> See Steve Bowman, Lawrence Kapp & Amy Belasco, CONG. RESEARCH SERV., RL 33095, HURRICANE KATRINA: DOD DISASTER RESPONSE 7–9 (2005) [hereinafter DOD DISASTER RESPONSE] (describing “state active duty” status and “Title 32 status”). National Guard troops called to “state active duty” status receive compensation from the state; however, National Guard units serving on Title 32 “full-time National Guard duty” under Title 32 of the U.S. Code are activated by the governor of a state with the permission of the secretary of the Army or Air Force and receive compensation from the federal government. See 32 U.S.C. §§ 328(a) (2006) (authorizing a governor to compel a member of the National Guard into “Active Guard and Reserve duty”); *id.* § 502(f) (regulating the federal duties a member of the National Guard may be required to perform); *id.* §§ 902–905 (authorizing the use of federal funds for federalized National Guard forces).



or to serve in a law enforcement capacity. Moreover, under the interstate Emergency Management Assistance Compact (EMAC), a governor also can request that National Guard units from other states be deployed to aid the affected state.<sup>116</sup> Tens of thousands of the National Guard troops who served in Mississippi and Louisiana after Hurricane Katrina hit were provided by other states pursuant to EMAC requests.<sup>117</sup>

Similarly, the major federal disaster statute, the Robert T. Stafford Disaster Relief and Emergency Assistance Act,<sup>118</sup> authorizes the President in a declared “major disaster” to call upon federal troops to provide disaster assistance, including, *inter alia*: debris removal; search and rescue; provision of emergency medical care, food, water, medicine, and shelter; clearance of roads; construction of temporary infrastructure (such as bridges); and demolition of unsafe structures.<sup>119</sup> The President, however, is limited both in his or her capacity to federalize National Guard troops (thereby placing them under the President’s own command) and in his or her ability to use either federalized National Guard troops or federal regulars in a law enforcement capacity. First, the President is authorized to call the state

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<sup>116</sup> See Pub. L. No. 104-321, 110 Stat. 3877, 3877 (1996) (codified at 42 U.S.C. §§ 5121–5208 (2006)) (“Mutual assistance in this compact may include the use of the states’ National Guard forces, either in accordance with the National Guard Mutual Assistance Compact or by mutual agreement between states.”); see also *What is EMAC?*, NAT’L EMERGENCY MGMT. ASS’N, <http://www.emacweb.org/?9> (last visited Apr. 5, 2011) (explaining that currently all states have enacted legislation to participate in EMAC).

<sup>117</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-854, EMERGENCY MANAGEMENT ASSISTANCE COMPACT: ENHANCING EMAC’S COLLABORATIVE AND ADMINISTRATIVE CAPACITY SHOULD IMPROVE NATIONAL DISASTER RESPONSE 3 (2007), available at <http://www.gao.gov/new.items/d07854.pdf> (“In response to the 2005 Gulf Coast hurricanes, the personnel deployed through EMAC [was] approximately 66,000 persons—about 46,500 National Guard and 19,500 state and local civilian responders . . .”). Ultimately, National Guard troops from fifty-four states, territories, and the District of Columbia responded. WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 43 (2006) [hereinafter *LESSONS LEARNED*].

<sup>118</sup> 42 U.S.C. §§ 5121–5208 (2006).

<sup>119</sup> See *id.* § 5170b(a)(3). The Department of Defense (DOD) is a federal agency that the President may call upon to provide humanitarian relief (both “[g]eneral [f]ederal assistance” and “[e]ssential assistance”) under the Stafford Act. See *id.* § 5170a (authorizing the President, in any major disaster, to call upon federal agencies to provide “[g]eneral [f]ederal assistance”); *id.* § 5170b (authorizing the President, in any major disaster, to call upon federal agencies to provide “[e]ssential assistance”); *id.* § 5122(8) (defining “[f]ederal agency” as “any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, including the United States Postal Service,” but not including “the American National Red Cross”). A major disaster is defined as “any natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance.” *Id.* § 5122(2). Moreover, the DOD is the agency that the President can call upon to perform emergency work for ten days in “the immediate aftermath of an incident which may ultimately qualify” as a major disaster but has not yet been declared as such. See *id.* § 5170b(c)(1).

National Guard into federal service (under Title 10 of the U.S. Code) only under certain, specified circumstances.<sup>120</sup> Second, the Posse Comitatus Act, an 1878 federal law rooted in Southern opposition to military reconstruction, prohibits the use of federal troops (including federalized National Guard troops) in a law enforcement capacity unless expressly authorized by Congress or the Constitution.<sup>121</sup>

In the aftermath of a natural disaster, the authorization—both for federalizing state National Guard units and for allowing those units and other federal troops to act as law enforcement officers—likely is to be found, if at all, in the Insurrection Act.<sup>122</sup> Section 331 of

<sup>120</sup> See, e.g., 10 U.S.C. § 332 (2006) (authorizing the President to federalize state National Guard forces under certain circumstances when it has become “impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings”).

<sup>121</sup> 18 U.S.C. § 1385 (2006) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”). Judicial concern about the possibility of looting and other civil unrest in the aftermath of natural disasters, however, contributed to the existing interpretation of the Posse Comitatus Act, which construes it somewhat narrowly to preclude only “direct active use of troops for the purpose of executing the laws” and, concomitantly, to allow for use of federal military supplies and equipment in domestic law enforcement without specific authorization under the Constitution or from Congress. See *United States v. Red Feather*, 392 F. Supp. 916, 923–24 (D.S.D. 1975) (emphasis omitted) (noting that the narrow construction was supported by the fact that “after any natural disaster in this country whether due to flood, heavy snowstorms, earthquake, tornado, or otherwise, there is always the possibility of looting and other acts of civil disorder” and that “[m]ost of this nation’s smaller governmental units simply cannot maintain an inventory of emergency vehicles and other equipment adequate to meet such a crisis”), *affd sub nom.*, *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976).

<sup>122</sup> 10 U.S.C. §§ 331–335 (2006). Other federal provisions authorize the federalization of the National Guard under certain circumstances, including 10 U.S.C. § 12406 (invasion, rebellion, inability to execute the laws), § 12301(a) (war or national emergency), § 12301(b) (at any time with the consent of a state governor), § 12301(d) (at any time with consent of a service member), § 12302 (during a declared national emergency), and § 12304 (in response to use or threatened use of a weapon or mass destruction or a terrorist attack). The most likely to be invoked in the aftermath of a natural disaster—particularly if the state’s governor is resisting federalization—is 10 U.S.C. § 12302, which requires only that the President declare a national emergency. Cf. DOD DISASTER RESPONSE, *supra* note 115, at 10 & n.29 (discussing the advantages and disadvantages of federal and state “activation statuses” during times of national emergency). Presumably the President could declare the requisite emergency under the National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2006), as President Obama did for the swine flu pandemic. See WHITE HOUSE, DECLARATION OF A NATIONAL EMERGENCY WITH RESPECT TO THE 2009 H1N1 INFLUENZA PANDEMIC IN THE UNITED STATES (2009). However, there is no historical precedent for invoking § 12302 to respond to natural disasters rather than for national security purposes. See Kevin Cieply, *Charting a New Role for Title 10 Reserve Forces: A Total Force Response to Natural Disasters*, 196 MIL. L. REV. 1, 28–30 (2008) (explaining that the President has never used 10 U.S.C. § 12302 for a “natural disaster response,” and that it is “more of a safety net than a workhorse for natural disasters”). In any event, these other provisions for federalizing the National Guard are likely to have limited practical relevance after a natural disaster if law-and-order concerns are present. In such situations, the President is unlikely to

the Insurrection Act authorizes the President, when requested by a state's legislature (or by its governor, if the legislature cannot be convened), to federalize National Guard troops from other states and to use those troops—as well as federal regular troops—to suppress “an insurrection[ ]” against that state's government.<sup>123</sup> Likewise, section 332 of the Act authorizes the President, without a state request, to federalize National Guard troops and to use those troops—as well as federal regular troops—to enforce state and federal laws “[w]henver the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.”<sup>124</sup>

Section 333 of the Act provides:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in any State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>125</sup>

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decouple federalization of National Guard troops from invocation of the Insurrection Act power to invest federalized National Guard troops with law enforcement authority because federalized National Guard troops (acting in a Title 10 capacity) are subject to Posse Comitatus Act restrictions. Federalizing the National Guard without invoking the Insurrection Act would thus deprive all responding soldiers of the ability to provide direct aid to local law enforcement. See *Department of Defense Authorization for Appropriations for Fiscal Year 2007: Hearings Before the S. Comm. on Armed Servs., Second Session on S. 2766*, 109th Cong. 321 (2006) [hereinafter *Hearings Before Armed Servs.*] (testimony of General Blum) (“For . . . major disaster events[,] . . . placing all available forces into a fully-federalized title 10 model would provide less overall response capability, as National Guard Forces formerly under control of the Governor(s) become subject to the same legal constraints as their Active-Duty Federal counterparts.”). In this respect, erroneous perceptions that violence is occurring in the aftermath of natural disasters may actually deter the President from federalizing the National Guard. Accordingly, I will proceed on the assumption that the Insurrection Act is by far the most likely source of authority for National Guard federalization in the aftermath of a natural disaster.

<sup>123</sup> 10 U.S.C. § 331.

<sup>124</sup> *Id.* § 332.

<sup>125</sup> *Id.* § 333. In contrast to sections 331 and 332, section 333 does not expressly authorize the President to “call into Federal service” the state militia, see *id.* §§ 331–332; how-

In the aftermath of Hurricane Katrina, a “fierce debate”<sup>126</sup> raged in the Bush administration about whether reports of looting and violence in New Orleans were a sufficient predicate for invoking the Insurrection Act to federalize Louisiana’s National Guard troops and to assign law enforcement responsibilities to both those troops and federal regular troops.<sup>127</sup> Despite repeated urging by federal authorities, Louisiana Governor Kathleen Babineaux Blanco refused to cede control of Louisiana National Guard units to President Bush.<sup>128</sup> Any attempt to federalize Louisiana’s National Guard would thus have had to occur without a request from (and over the objection of) Louisiana’s Governor. President Bush, therefore, would have had to invoke either Section 332 or Section 333 of the Insurrection Act.<sup>129</sup>

There was considerable uncertainty about the legality of treating the reported looting and violence in New Orleans as an “insurrection” or “domestic violence” under section 333 of the Insurrection Act. The Insurrection Act has been invoked only rarely; it was invoked most frequently (and most famously) in the 1950s and 1960s to deploy National Guard troops, over the objection of Southern governors, to enforce desegregation orders encountering massive resistance on the ground.<sup>130</sup> Nonetheless, historical precedent exists for invoking the Insurrection Act to allow federal troops to exercise law enforcement authority when a natural disaster has spurred looting and unrest. For example, in 1989, President George H.W. Bush invoked the Act to

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ever, it does authorize him to suppress the insurrection or domestic violence “by using the militia or the armed forces, or both.” *Id.* § 333.

<sup>126</sup> Susan B. Glasser & Michael Grunwald, *The Steady Buildup to a City’s Chaos: Confusion Reigns at Every Level of Government*, WASH. POST, Sept. 11, 2005, at A1.

<sup>127</sup> *Id.*

<sup>128</sup> See FARBER ET AL., *supra* note 102, at 117.

<sup>129</sup> Cf. Robert Burns, *U.S. Looks at Role for Military; Some Want to Change Law to Permit Using Soldiers in Disasters*, CHI. SUN-TIMES, Sept. 18, 2005, at 15 (reporting Department of Defense spokesman Lawrence Di Rita’s assertion that Bush could have invoked the Insurrection Act to give active-duty troops law enforcement authority to respond to looting); John Yoo, Op-Ed., *Trigger Power*, L.A. TIMES, Oct. 2, 2005, at M5 (arguing that President Bush could have invoked the Insurrection Act after Katrina because order appeared to have broken down to the point where “federal laws—those protecting mail, telecommunications or interstate commerce and travel, for instance [ ] [were] not enforced”).

<sup>130</sup> See, e.g., Exec. Order No. 11,053, 27 Fed. Reg. 9693 (Oct. 2, 1962) (authorizing the Secretary of Defense, pursuant to 10 U.S.C. §§ 332–334, to call into active military service the Army National Guard and the Air National Guard of Mississippi “to remove all obstructions of justice in the State of Mississippi”); Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957) (authorizing and directing the Secretary of Defense, pursuant to 10 U.S.C. §§ 332–334, to order into active military service members of the National Guard in order to remove the “obstruction of justice in . . . Arkansas with respect to . . . enrollment and attendance at public schools”). President George H.W. Bush also invoked the Insurrection Act, at the request of California’s governor, to send federal troops to quell rioting in Los Angeles in the aftermath of the Rodney King verdicts. See Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 1, 1992).

send federal troops to the U.S. Virgin Islands to “restore law and order” in the aftermath of Hurricane Hugo.<sup>131</sup>

Even before Katrina made landfall, the looting-and-violence myth influenced planning for the military’s role in the anticipated federal response. Before Katrina struck, fears that the hurricane might provoke civil unrest spurred discussion among senior Bush Administration officials about the possibility of invoking the Insurrection Act. According to a Senate report, on August 28, one day before Katrina made landfall as a Category 3 hurricane,<sup>132</sup> David Addington, Counsel to the Vice President, e-mailed William Haynes, the DOD General Counsel, to suggest that “[g]iven the potential massive size of the problem there could be civil unrest during the aftermath . . . you might want to have an [Insurrection Act] proclamation . . . in the can in case it is needed.”<sup>133</sup>

After Katrina hit and exaggerated reports of lawlessness in New Orleans began to emerge, pressure to invoke the Insurrection Act mounted and the debate intensified. FEMA Director Michael Brown later asserted that, by August 30, he had requested that active-duty federal military troops be deployed to respond to reports of civil disorder in New Orleans.<sup>134</sup> Brown advocated that the President invoke the Insurrection Act and federalize the National Guard “[b]ecause at that time, we’re looking at these stories of shootings and looting and everything else going on, and I’m fearful that’s spiraling out of control, and I want active-duty troops that are ready, willing and able to kill in that area, because we can’t do search and rescue with that kind of stuff going on.”<sup>135</sup>

<sup>131</sup> Exec. Order No. 12,690, 54 Fed. Reg. 39,153 (Sept. 20, 1989).

<sup>132</sup> See TROPICAL CYCLONE REPORT, *supra* note 40, at 6.

<sup>133</sup> S. COMM. ON HOMELAND SEC. AND GOV’T AFFAIRS, HURRICAN KATRINA: A NATION STILL UNPREPARED, No. 109-322, ch. 26, at 508 (2006) [hereinafter A NATION STILL UNPREPARED] (omissions and alterations in original) (quoting e-mail from David S. Addington to William J. Haynes (Aug. 28, 2005, 8:41 PM)). Specifically, Addington recommended that Haynes prepare a “Proclamation to Disperse” under 10 U.S.C. § 334, and “executive orders for 10 U.S.C. [§] 332, ‘Use of [the] militia and armed forces to enforce Federal authority,’ and 10 U.S.C. § 334, ‘Interference with State and Federal Law.’” A NATION STILL UNPREPARED, *supra*, at 542 n.440.

<sup>134</sup> See *Hurricane Katrina: The Roles of U.S. Department of Homeland Security and Federal Emergency Management Agency Leadership: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 56 (2006) [hereinafter *Hearing on Homeland Security’s Role*] (testimony of Michael Brown).

<sup>135</sup> A NATION STILL UNPREPARED, *supra* note 133, at 515 (quoting Interview by S. Comm. on Homeland Sec. and Governmental Affairs Staff with Michael Brown, former Director, FEMA, 114 (Feb. 23, 2006)). Michael Brown also reported that he proposed to Governor Blanco that the President invoke the Insurrection Act, federalize the entire Katrina response, and have the Army take over. See *Hurricane Katrina: The Defense Department’s Role in the Response: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. app. at 197 (2006) [hereinafter *Hearing on Defense Department’s Role*]. Additionally, he reported having conversations about this possibility with senior administration

Based on the exaggerated reports of violence and looting, lawyers for the U.S. Department of Justice decided it would be permissible to invoke the Insurrection Act.<sup>136</sup> However, political considerations weighed against the Act's invocation. President Bush's advisors feared the political repercussions of federalizing National Guard troops over the objection of Louisiana Governor Blanco:

Can you imagine how it would have been perceived if a president of the United States of one party had pre-emptively taken from the female governor of another party the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?<sup>137</sup>

Nonetheless, continuing reports of violence and other lawlessness inspired Bush Administration officials to search for more creative ways to exert additional federal control over the Katrina response. For example, Paul McHale, Assistant Secretary of Defense for Homeland Defense, testified that recommendations for achieving unity of command by employing a "dual hatted" command structure in which one general would command all the troops (National Guard and federal active duty) while reporting to both President Bush and Governor Blanco were grounded in concerns that civil order was deteriorating in New Orleans:

During that week . . . , at that very point in time, anyone who was watching TV saw that the situation of civil disorder was bad and getting worse in New Orleans. There was a concern with regard to how

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officials, but, on the advice of DHS counsel, refused to discuss any conversations with the President or Vice President on the grounds that such communications were protected by executive privilege. *Hearing on Defense Department's Role*, *supra*, app. at 196–97. Some other Bush administration officials apparently agreed with Brown's assessment. On August 31, following media reports of violence and civil unrest in New Orleans, the Joint Director of Military Support, General Terry Scherling, told General Richard Rowe that "she planned to advise 'senior leadership'" that the President could deploy armed forces for law enforcement purposes by invoking the Insurrection Act either pursuant to a state request or at the President's unilateral direction. A NATION STILL UNPREPARED, *supra* note 133, at 508.

<sup>136</sup> See Eric Lipton, Eric Schmitt & Thom Shanker, *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1, available at [http://www.nytimes.com/2005/09/09/national/nationalspecial/09military.html?\\_r=1&sc=1&sq=Political%20Issues%20Snarled%20Plans%20for%20Troop%20Aid&st=cse](http://www.nytimes.com/2005/09/09/national/nationalspecial/09military.html?_r=1&sc=1&sq=Political%20Issues%20Snarled%20Plans%20for%20Troop%20Aid&st=cse) ("Justice Department lawyers, who were receiving harrowing reports from the area, considered whether active-duty military units could be brought into relief operations even if state authorities gave their consent—or even if they refused . . . [and] concluded that the federal government had authority to move in even over the objection of local officials.").

<sup>137</sup> *Id.* (quoting an unidentified senior administration official). These political objections to invocation of the Insurrection Act are premised largely on the notion that if the President invoked the Act he would be doing so to federalize Louisiana National Guard units over Governor Blanco's objection. President Bush could, however, have invoked the Insurrection Act for the sole purpose of conferring law enforcement authority on federal troops, leaving National Guard units under state control.

we might achieve unity of effort, and therefore we thought about ways in which we might achieve unity of command.

Having used the dual-hatted approach . . . successfully [previously] . . . we certainly looked at that as an option.<sup>138</sup>

b. *The Military's Humanitarian Response to Katrina*

Spurred by disaster mythology, exaggerated reports of looting and violence in Katrina's aftermath also affected President Bush's exercise of his Stafford Act authority to use federal troops to provide humanitarian aid. Indeed, the myth apparently delayed President Bush's deployment of federal troops to perform humanitarian missions (including distributing food and water) to aid Katrina survivors. President Bush was authorized to send federal regular troops to New Orleans at any point to perform any or all of the relief functions enumerated in the Stafford Act, including using federal troops to distribute critical supplies and to conduct search and rescue operations, without having to invoke the Insurrection Act. As none of these relief activities involve law enforcement, they are not constrained in the first instance by the Posse Comitatus Act,<sup>139</sup> and—in any event—they are expressly authorized activities that the DOD may perform under the Stafford Act.<sup>140</sup>

Nevertheless, concern about looting and violence reportedly delayed the Bush Administration's commitment of federal troops to New Orleans to perform these humanitarian relief functions. Military officials feared that, until order was restored, any federal troops "sent into the chaos of New Orleans" in the days immediately after Katrina hit would inevitably have "confront[ed] law-and-order challenges" that would require them to respond in a law enforcement capacity.<sup>141</sup>

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<sup>138</sup> *Hearing on Defense Department's Role*, *supra* note 135, at 22 (testimony of Paul McHale). "Unity of effort" refers to troops working toward the same goal, while "unity of command" refers to troops answering to the same commander. LESSONS LEARNED, *supra* note 117, at 13.

<sup>139</sup> See *supra* note 121 and accompanying text.

<sup>140</sup> See *supra* note 119 and accompanying text.

<sup>141</sup> See Lipton et al., *supra* note 136. Of course, it is quite possible that the government was using reports of violence as an excuse to delay deploying federal troops in a humanitarian capacity. Cf. Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster*, 29 N. ILL. U. L. REV. 117, 146–47 (2008) (arguing that the Posse Comitatus Act posed no real obstacle to the military's provision of humanitarian aid and was simply a convenient scapegoat for the government's slow response). According to media reports, Defense Secretary Donald Rumsfeld strongly opposed deployment of any federal regular troops to New Orleans and ordered their deployment only under direct order from President Bush. See Stephanie Grace, Editorial, *Defiant Rumsfeld Left City to Suffer*, TIMES-PICAYUNE (New Orleans), May 21, 2009 (Metro), at 7. This excuse would not have been credible, however, without the reports triggered by, and credited because of, the disaster myth.

Many active duty federal ground forces, including the 82nd Airborne and 1st Cavalry, were not deployed until September 3 and did not arrive in New Orleans until September 5, some six days after Katrina hit.<sup>142</sup>

In his testimony to the Senate, former FEMA director Michael Brown explained that although by Friday, September 2 he was “screaming” for active-duty Army forces to be deployed to New Orleans to provide logistical support,<sup>143</sup> he recognized that, in light of reports that violence had engulfed New Orleans, employing Army active duty troops even to perform wholly humanitarian and logistical missions raised significant legal and practical concerns. The situation was “messy,” Brown explained, because even if law enforcement duties were assigned exclusively to the National Guard, “the Army is not going to put down their weapons just because they are handing out MREs [Meals Ready to Eat];” thus, the Army might confront *Posse Comitatus* challenges if troops encountered violence on the streets: “[if] a firefight starts, the Army is going to defend themselves, as rightfully they should.”<sup>144</sup>

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<sup>142</sup> DOD DISASTER RESPONSE, *supra* note 115, at 13. U.S. military commanders vigorously dispute the contention that this six-day lag before federal troops arrived on the scene was an inappropriate delay. They explain that the federal units most useful in immediate response (including those with helicopters) were already on the scene and that depending on National Guard troops in the first instance was an appropriate strategy. *See, e.g., Hearing on Defense Department's Role, supra* note 135, at 40 (testimony of Admiral Timothy Keating) (“I’m perceiving that there’s a theme that we were slow to respond and it wasn’t until Friday/Saturday/Sunday that DOD Title 10 guys and girls got there. Patently inaccurate.”); *id.* at 19 (testimony of Assistant Secretary Paul McHale) (“For domestic missions, it makes a great deal of sense to rely primarily on the National Guard, their capabilities and speed of response, and then to augment our Title 10 forces in support of the Guard as required.”). There is some confusion about whether the additional Title 10 forces committed on September 3, 2005, were deployed because of continuing reports of civil unrest or because of the need for a more far-ranging humanitarian response. *Compare Hearing on Defense Department's Role, supra* note 135, app. at 162 (Assistant Secretary McHale’s answer to Sen. Susan Collins) (noting that the decision on September 3 to deploy 7,200 additional Title 10 personnel was “based principally on repeated reports of civil disturbance in New Orleans”), *with id.* at 38–39 (testimony of Assistant Secretary McHale) (explaining that by September 3, the security situation in New Orleans was coming under control because large numbers of National Guard troops were on the ground and that, while there was continuing need for a massive military humanitarian mission, it appeared that federal light infantry was no longer needed to quell civil unrest).

<sup>143</sup> *Hearing on Homeland Security's Role, supra* note 134, at 34–35 (testimony of Michael Brown).

<sup>144</sup> *Id.* at 35. Despite Brown’s concerns, *Posse Comitatus* Act restrictions would presumably not prevent federal soldiers from defending themselves. It seems unlikely that self-defense would qualify as execution of the law within the meaning of the Act. *See* 18 U.S.C. § 1385 (2006) (prohibiting the use of federal troops “as a posse comitatus or otherwise to execute the laws” without express authorization by the Constitution or statute).



c. *The Myth Provokes a Legislative Response: Amending the Insurrection Act*

One of the most striking post-Katrina consequences of the disaster myth of looting and violence was the push to amend the Insurrection Act to allow the President to invoke the Insurrection Act more easily in the aftermath of a natural disaster. Because of concerns that the limitations imposed by the Posse Comitatus Act unduly interfered with the President's ability to use the federal military to quell perceived unrest in New Orleans and to provide adequate humanitarian aid in the face of that unrest, Congress—at the urging of President Bush—amended the Insurrection Act in October 2006 to clarify (or potentially expand) the President's authority to invoke the Act in response to natural disasters.<sup>145</sup> Due to political opposition from state governors, the 2006 Amendments were short-lived; they were quickly repealed the following year and the Act was returned to its prior form, title and all.<sup>146</sup>

The Amendments' passage, however, provides valuable insight into the effect the disaster mythology of looting and violence has on the perception of the appropriate role of the military. On September 14, 2005, only two weeks after Katrina made landfall, Senator John Warner—Chairman of the Senate Armed Services Committee—recommended that Defense Secretary Donald Rumsfeld “conduct a thorough review of the entire legal framework governing a President's power to use the regular armed forces to restore public order in . . . situations involving a large-scale, protracted emergency like [Katrina].”<sup>147</sup> Senator Warner noted that during Katrina, “the maintenance of order” was beyond the capacity of state and local authorities, and he specifically urged that Rumsfeld review Posse Comitatus Act restrictions on federal military involvement in law enforcement.<sup>148</sup> The following day, President Bush—addressing the nation from New Orleans—proclaimed that Katrina made clear that natural catastrophes of a similar scale require “a broader role for the Armed Forces, the institution of our government most capable of massive logistical operations on a moment's notice.”<sup>149</sup>

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<sup>145</sup> See John Warner National Defense Authorization Act of 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2404–05 (2006).

<sup>146</sup> See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 325, 325–26.

<sup>147</sup> Letter from Sen. John Warner to Donald Rumsfeld, U.S. Sec'y of Def. (Sept. 14, 2005) (on file with author).

<sup>148</sup> *Id.*

<sup>149</sup> President George W. Bush, Address to the Nation on Hurricane Katrina Recovery from New Orleans, Louisiana (Sept. 15, 2005) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/09/20050915-8.html>) [hereinafter Bush Address to the Nation].

During the Senate hearings on Katrina, Senator Warner—who was a chief proponent of the 2006 Amendments—closely questioned Katrina’s military commanders about the impact that Posse Comitatus Act restrictions had on the effectiveness of the military’s Katrina response.<sup>150</sup> In response to this questioning, military commanders who were on the ground in New Orleans repeatedly testified that the Posse Comitatus Act restrictions did not have a detrimental effect on the Katrina response and that existing statutory exceptions to its prohibitions were sufficient. For example, General Landreneau, Adjutant General of the Louisiana National Guard, replied that the National Guard could handle the necessary law enforcement tasks and that neither he, nor General Honoré, nor any other active commander he had spoken with witnessed any problems in the aftermath of Katrina caused by limiting active federal forces to non-law enforcement missions.<sup>151</sup> Indeed, General Honoré specifically referenced the fact that exaggerated media reports of violence and civil unrest were likely to create a false sense of the need to invest federal military responders with law enforcement authority:

I think what we need to continue to work on in that regard is a common understanding of [existing authority to use federal troops in a law enforcement capacity], and decision points and triggers that when you’re dealing with a storm is a lot different. And sometimes the news reports are going to tell you things that would give the impression that you need to pull that tool out of the box. And a lot of those reports gave rise to that during this storm.

But most of them, as we’ve looked back at it and talked to people, were not accurate. While there were trying times inside the City of New Orleans as far as law enforcement, it in no way met the threshold of executing or using that option.<sup>152</sup>

The power of the myth was such that even this testimony did not dissuade proponents of amending the Insurrection Act. They adhered to their preconceived view that if federal active duty forces could have been endowed with law enforcement authority “they might have been able to curtail some of the looting, which is a very tragic aspect of these natural disasters.”<sup>153</sup> Though the legislative history of the Amendments is sparse, it is evident that the Amendments’ sup-

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<sup>150</sup> See, e.g., *Hearing on Defense Department’s Role*, *supra* note 135, at 59 (Sen. Warner questioning General Bennett Landreneau about whether Posse Comitatus Act restrictions had hindered the federal military’s ability to respond to Katrina).

<sup>151</sup> *Id.* at 59 (testimony of General Landreneau).

<sup>152</sup> *Hearing on Defense Department’s Role*, *supra* note 135, at 59–60 (General Russel Honoré); see also *Hearings Before Armed Serus.*, *supra* note 122, at 321 (testimony of Assistant Secretary Thomas Hall) (“[T]he Department does not envision requesting legislative relief for existing Posse Comitatus restrictions on the domestic use of Federal troops.”).

<sup>153</sup> *Hearing on Defense Department’s Role*, *supra* note 135, at 42 (statement of Sen. Warner).

porters believed that an expansion, or at least a clarification,<sup>154</sup> of the President's authority to use the military to respond to lawlessness following a natural disaster was imperative. The Senate Report notes that updating the law was necessary because, although the Insurrection Act "grant[s] the President broad powers to use the armed forces in situations of public disorder, the antique terminology and the lack of explicit reference to such situations as natural disasters or terrorist attacks may have contributed to a reluctance to use the armed forces" after Katrina.<sup>155</sup>

Ultimately, Section 1076 of the John Warner National Defense Authorization Act for Fiscal Year 2007<sup>156</sup> retitled the Insurrection Act "Enforcement of the Laws to Restore Public Order" and amended the Act to specify that "domestic violence" resulting from a "natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident" triggers the President's authority under 10 U.S.C. § 333, so long as the other threshold conditions are met.<sup>157</sup> Those threshold conditions were identical to those under the prior version of section 333: that the domestic violence "so hinders the execution of" state or federal law "that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law" and that state authorities "are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection" or that the domestic violence "opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."<sup>158</sup>

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<sup>154</sup> The Senate Report on the Amendments, for example, describes them as "clarify[ing] and updat[ing]" the Insurrection Act. See S. REP. NO. 109-254, at 384 (2006); see also 152 CONG. REC. S10,806 (daily ed. Sept. 29, 2006) (statement of Sen. Kennedy) ("While the amendment does not grant the President any new powers, it fills an important gap in clarifying the President's authority to respond to these new kinds of emergencies.").

<sup>155</sup> S. REP. NO. 109-254, at 384.

<sup>156</sup> Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2405 (2006).

<sup>157</sup> See *id.* A close reading of the 2006 Amendments suggests that they merely clarified that the President had the ability to invoke section 333 in response to a natural disaster, rather than altering the conditions under which that power can be invoked. See Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe*, 26 MISS. C. L. REV. 107, 108 (2006). Prior to the Amendments, the Insurrection Act made no mention of the possible sources of "domestic violence" (or other conditions, such as "insurrection") that could trigger the President's power. The Insurrection Act focused instead on particular consequences of those enumerated civil disturbances that would justify federal military involvement in law enforcement. Those prerequisite consequences—denial of constitutional rights or obstruction of federal law—were unchanged by the Amendments, which merely specified that those consequences could occur as a result of domestic violence that resulted from a natural disaster. The retitling of the Act and of section 333 itself to "Major public emergencies; interference with State and Federal law," Pub. L. 109-364, 120 Stat. 2083, 2404 (2006), might have lessened some of the political impediments to invoking the Insurrection Act.

<sup>158</sup> 10 U.S.C. § 333.

These post-Katrina clarifications were presumably motivated by belief in the disaster myth that violence and civil unrest are likely consequences of natural disasters and that the President needs clear authority to invest federal troops with law enforcement authority to respond to natural-disaster-triggered civil disorder.<sup>159</sup> The Amendments' detractors, including Senator Patrick Leahy (who led the successful charge to repeal the Amendments), never quarreled with this basic (and largely misguided) assumption. Rather, they criticized the Amendments as a Bush Administration power play, designed to make it easier both for the President to wrest control over the National Guard from governors during disasters<sup>160</sup> and for the President to "declare martial law."<sup>161</sup> The seeds of the Amendments' reversal were sown in its passage, with little public debate, over the objection of all fifty of the nation's governors, and not in any suggestion that they were founded on false premises about postdisaster behavior.<sup>162</sup>

d. *The Myth's Effect on the Military's Disaster Role: Helpful or Harmful?*

The experience of Hurricane Katrina and the subsequent passage and repeal of the Insurrection Act Amendments demonstrate that the perception that violence and looting are common in the aftermath of disasters has an important, if not determinative, influence on the way in which we utilize our military in the aftermath of natural disasters. Viewing conditions on the ground through the lens of this disaster myth, federal officials are more likely to conclude that the Insurrection Act's prerequisites for federalizing the National Guard and invest-

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<sup>159</sup> A number of legal academics also have cited reports of lawlessness following Katrina to justify a stronger role for the federal military in the aftermath of natural disasters. See, e.g., Greenberger, *supra* note 157, at 116 (arguing that the Amendments to the Insurrection Act properly clarified the President's ability to commit federal troops to put down lawlessness after disasters like Katrina).

<sup>160</sup> Senator Leahy argued that the White House pushed for the Amendments because it was "infuriated" by Governor Blanco's refusal to cede control of National Guard troops and therefore wanted "automatic triggers—natural disasters, terrorist attacks, or a disease epidemic—to avoid having to consult with the Governors." 152 CONG. REC. S10,810 (daily ed. Sept. 29, 2006) (statement of Sen. Leahy).

<sup>161</sup> *Id.* at S10,809 (statement of Sen. Leahy) (criticizing the amendment of the Insurrection Act for "giv[ing] the President more authority to declare martial law"; "making it easier to usurp the Governors [sic] control and making it more likely that the President will take control of the Guard and the active military operating in the States"; and increasing the ability of the President to use "the military for law enforcement[.], [which] goes against one of the founding tenets of our democracy").

<sup>162</sup> See Letter from Governor Janet Napolitano et al. to Bill Frist, Senate Majority Leader, et al. (Aug. 31, 2006), <http://www.nga.org/portal/site/nga/menuitem.cb6e7818b334088d18a278110501010a0/?vgnnextoid=0a05e362c5f5d010VgnVCM1000001a01010aRCRD> (expressing concern over the Amendments' expansion of federal power and urging the federal government to work with state governors to ensure that any changes to the law did not "hinder [governors'] ability to respond to those in need").

ing both the federalized Guard and federal regular troops with law enforcement powers are satisfied. On the other hand, if the President decides (for political or legal reasons) not to invoke the Insurrection Act, the mythology of looting and violence may deter federal officials from deploying federal troops to carry out disaster humanitarian missions because of fears that troops deployed in a humanitarian capacity will confront law-and-order dilemmas.<sup>163</sup>

Whether one views these consequences as problematic depends, of course, on one's view of the proper role for the federal and state militaries in disaster response. My own view is that the mythology has a perverse effect on our use of the federal military during natural disasters—pushing us toward using federal troops as disaster police, rather than in their less intrusive role as humanitarian responders. The Posse Comitatus Act, in combination with the Insurrection Act, rightly restricts the President's use of federal military as domestic law enforcers to the most extreme of circumstances—circumstances that natural disasters (viewed without the distortion of disaster mythology) are unlikely to produce. Given that the amount of violence and crime in the aftermath of natural disasters is likely to be far less than public officials and media generally predict and report, National Guard troops under the control of state governors will usually be more than sufficient (and are better equipped) to deal with security issues.

Yet the Posse Comitatus Act restrictions may heighten the impact of the disaster myth of violence and looting by deterring the President from deploying troops in a humanitarian capacity.<sup>164</sup> This result, too, is unfortunate. There is much truth, at least as things stand today, in President Bush's claim that the military is "the institution of our government most capable of massive logistical operations on a moment's notice."<sup>165</sup> The military has significant resources that are invaluable to disaster response, including immense surge capacity, mobile hospitals, helicopters and other equipment useful in search and rescue, and water purification and other survival equipment.<sup>166</sup> Commitment of

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<sup>163</sup> See *supra* note 141 and accompanying text.

<sup>164</sup> See *supra* note 121 and accompanying text.

<sup>165</sup> See Bush Address to the Nation, *supra* note 149.

<sup>166</sup> See A FAILURE OF INITIATIVE, *supra* note 93, at 201 ("[T]he military is able to provide essential, life saving services more quickly and more comprehensively than any other entity when local and state response capabilities are overwhelmed, including the ability to provide helicopter and boat rescue, shelter, food, water, and medical support."); Eric Lipton & Eric Schmitt, *Emergency Responders: Navy Ships and Maritime Rescue Teams Are Sent to Region*, N.Y. TIMES, Aug. 31, 2005, at A14, available at <http://query.nytimes.com/gst/fullpage.html?res=9C03E2D61631F932A0575BC0A9639C8B63&scp=1&sq=Emergency%20Responders:%20Navy%20Ships&st=cse> (reporting the arrival of Navy ships carrying food, fuel, medical and building supplies, and hovercraft for rescues, as well as the efforts of Coast Guard helicopters plucking people from the flood waters in New Orleans).

these resources should not be delayed by unfounded fears that law and order has completely disintegrated after a disaster.

Nonetheless, turning disaster response over to the military—and, particularly, the federal military—has significant costs.<sup>167</sup> In an ideal world with unlimited money and personnel, the U.S. would develop a robust system of civil disaster response, with the federal military playing a very limited role.<sup>168</sup> There are significant potential downsides to militarizing natural-disaster response, including risking confrontations with citizens that are unnecessarily violent or insufficiently mindful of individual rights,<sup>169</sup> diverting federal troops from their primary

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<sup>167</sup> Perhaps even more disconcerting than the deployment of federal troops as disaster law enforcement is the deployment of private contractors like Blackwater—notorious for its mistreatment of Iraqi civilians—as domestic disaster police. See Dina Temple-Raston, *Blackwater Eyes Domestic Contracts in U.S.*, NPR (Sept. 28, 2007), <http://www.npr.org/templates/story/story.php?storyId=14707922> (recounting how private contractor Blackwater had employees providing security in New Orleans thirty-six hours after the levy broke and that the company obtained a \$73 million contract to provide security to FEMA employees during the recovery process). This trend deserves further exploration and potentially a congressional response that either limits the use of privately contracted security in domestic disasters or at least ensures the accountability of those security forces.

<sup>168</sup> After Katrina, there was a heightened need to rely on federal military response due to the overseas deployment of many units of the National Guard, our traditional military disaster responders. These overseas deployments have significantly depleted both National Guard manpower and equipment that would otherwise be available for state disaster response. See DOD DISASTER RESPONSE, *supra* note 115, at 15 (reporting that DOD's practice of having National Guard units leave their equipment in Iraq for use by subsequent units resulted in units responding to Katrina without "adequate numbers of tactical radios or High Mobility Multi-Wheeled Vehicles (HMMWVs) adapted for high water operations"). Nearly one-third of Mississippi's and Louisiana's National Guard troops were deployed overseas when Katrina struck. See Stephen J. Hedges, *Guard Units Stretched Thin*, CHI. TRIB., Sept. 17, 2005, at 1 (reporting that when Katrina struck "about 6,000 Louisiana and Mississippi National Guard troops were deployed in Iraq," leaving only "12,500 Guard members available in the two states for hurricane relief"); see also *Hurricane Katrina: The Role of the Governors in Managing the Catastrophe: Hearing before the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 25 (2006) (statement of Louisiana Governor Kathleen Babineaux Blanco) (complaining that six thousand of Louisiana's eleven thousand National Guard troops were deployed overseas and thus unavailable for Katrina response). The need to mobilize National Guard units from nearby states created at least some delays in National Guard response, see Hedges, *supra*, and also meant that responding units lacked knowledge of, and close connection to, the community they were serving.

<sup>169</sup> See Michael T. Cunningham, *The Military's Involvement in Law Enforcement: The Threat Is Not What You Think*, 26 SEATTLE U. L. REV. 699, 715–16 (2003) ("Soldiers are highly trained to use force in the furtherance of the mission . . . [and] to respond with force when facing an adversary because the adversary is likely to do the same. . . . Military personnel have different approaches to tactical situations than what is required in a law enforcement situation."); Christopher H. Lytton, *America's Borders and Civil Liberties in a Post-September 11th World*, 12 J. TRANSNAT'L L. & POL'Y 197, 204 (2003) ("Soldiers are taught to violently and effectively destroy the enemy and their training does not include sensitivity to constitutional limitations on search, seizure, and the use of reasonable force.") (citing John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 SW. J. L. & TRADE AM. 453, 454 (1998)); Dan Bennett, Comment, *The Domestic Role of the Military in America: Why Modifying or Repealing the Posse Comitatus Act Would Be a Mistake*, 10 LEWIS & CLARK L. REV. 935, 944–45 (2006) ("[T]here is no reason to assume that the military is

defense mission,<sup>170</sup> and limiting information flow during disasters.<sup>171</sup> Some of these risks—particularly of violent confrontations with citizens, may be heightened when the military takes on a law enforcement, rather than a solely humanitarian, role.

Federal active-duty troops are trained primarily for combat missions and deployed to combat zones, not humanitarian relief efforts. Even those in the Bush Administration who advocated deploying federal troops to New Orleans with authority to quell reported lawlessness realized the risk that troops trained to shoot and kill might have unnecessarily violent confrontations with citizens. As FEMA Director Michael Brown put it, “I really was concerned about active duty troops going in, because, you know, some kid fires even a BB gun at them, they’re going to take them out.”<sup>172</sup>

Of course, some who believed that civil unrest had completely swallowed New Orleans also believed that combat experience was an asset for Katrina responders and celebrated the possibility that there would be experienced troops on the ground willing and able to shoot looters. In an outrageous public display, Louisiana Governor Blanco proclaimed of the responding troops:

These troops are fresh back from Iraq, well trained, experienced, battle-tested and under my orders to restore order in the streets. They have M-16s and they are locked and loaded. These troops know how to shoot and kill and they are more than willing to do so if necessary and I expect they will.<sup>173</sup>

For others, however, the repeated footage of General Honoré reprimanding soldiers “who were training their M-16s on haggard-looking civilian men, women, and children” recalled “a scene from a developing country run by aberrant gangs” and epitomized the reasons the Posse Comitatus Act was passed.<sup>174</sup>

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often, or even ever, suited to [the] tasks of domestic law enforcement. As Lawrence Korb, the former Assistant Secretary of Defense put it, the armed forces are ‘trained to vaporize, not *Mirandize*.’”).

<sup>170</sup> See Cunningham, *supra* note 169, at 702.

<sup>171</sup> The military’s commitment to compartmentalizing information—that is, providing only that information to troops on the ground necessary for completion of narrowly defined duties—is likely to limit the amount of information to which disaster survivors have access. Cf. Dennis M. Murphy & Carol Kerr, *Strategic Communication in Domestic Disasters: The Military and the Media in an Intergovernmental Environment*, 08-06 CENTER FOR STRATEGIC LEADERSHIP, U.S. ARMY WAR C. 3 (2006) (noting that improving the military’s domestic disaster response requires decentralization of communications).

<sup>172</sup> *Hearing on Defense Department’s Role*, *supra* note 135, app. at 195 (Interview with Michael D. Brown by Sen. Comm. on Homeland Sec. and Governmental Affairs).

<sup>173</sup> *Shoot to Kill*, *supra* note 56.

<sup>174</sup> See Dougherty, *supra* note 141, at 146 (“The General said: ‘Point your weapons to the ground, this is not Iraq.’ . . . Scenes like this were precisely why the PCA was passed: to enforce civilian authority over the military in order to maintain a democratic form of government.”).

The clarity of hindsight, combined with an understanding that early reports of survivor violence were tragically inflated, confirms the wisdom of continuing to adhere to existing Posse Comitatus Act restrictions and rejecting expansive interpretations of (or amendments to) the Insurrection Act that would give the President wider discretion to commit federal troops in a law enforcement capacity. Despite its ignominious origins in “[r]econstruction bitterness and racial hatred,”<sup>175</sup> the Posse Comitatus Act strikes a compromise for the domestic use of federal troops in disasters that remains useful today. That compromise is eroded when the decision whether to invoke the Insurrection Act is clouded by erroneous perceptions about the amount of violence and disorder actually taking place. To some extent, the belief that post-Katrina New Orleans was a “war zone”<sup>176</sup> became a self-fulfilling prophecy; most of New Orleans’s remaining citizens were surely not combatants, but New Orleans was, at times, policed by both National Guard and federal troops as though it were Baghdad.<sup>177</sup>

Of course, the Posse Comitatus Act restricts only the law enforcement activities of federal regular troops and National Guard troops called into federal service.<sup>178</sup> If those troops are not assigned law enforcement functions, law enforcement functions likely will be assigned instead to National Guard units under state control (assuming, of course, that all National Guard units have not been federalized). In the past, we could say with some degree of confidence that National Guard troops were more capable of fulfilling these functions because they received more training in crowd control and nonlethal response measures and because they were less likely to be immersed in a combat mentality.<sup>179</sup>

Today, however, the differences between federal regular troops and National Guard troops have become increasingly blurred, as National Guard units have become a primary source of manpower for

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<sup>175</sup> Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 88, 90 (2003) (describing the “racist origins” of the Posse Comitatus Act).

<sup>176</sup> See, e.g., *Shoot to Kill*, *supra* note 56.

<sup>177</sup> See Tierney & Bevc, *supra* note 8, at 41 (“[M]ilitary deployments following Katrina were so large that New Orleans did begin to resemble a war zone.”).

<sup>178</sup> See *supra* note 119 and accompanying text.

<sup>179</sup> See Cunningham, *supra* note 169, at 715–16 (explaining how combat training and experience condition soldiers to use force readily when threatened). Although combat-tested troops might be more likely to possess a combat mentality that subordinates civil rights and nonlethal measures to security and quick response, combat experience in Iraq and Afghanistan might nonetheless give troops some advantages in policing an area following a disaster. Both of the military’s current conflicts involve primarily urban warfare, which requires troops to distinguish (in a split second) between innocent civilians and enemy combatants. This urban warfare is arguably good training for domestic policing duties.



the ongoing conflicts in Iraq and Afghanistan.<sup>180</sup> By some estimates, fully half of the Guard troops responding to Katrina had “already served at least a single one-year tour in Iraq.”<sup>181</sup> Indeed, when Governor Blanco celebrated the arrival of combat-tested troops ready to shoot to kill, she was speaking about the arrival of Arkansas National Guard units “fresh back from Iraq.”<sup>182</sup> Conversely, reports suggest that the military is training at least a small contingent of regular troops in nonlethal force and crowd control for domestic missions.<sup>183</sup>

Nonetheless, there are still good reasons for using National Guard troops, rather than federal troops, to bolster local law enforcement. Despite overseas deployments, National Guard training continues to be distinct from the training received by army regulars.<sup>184</sup> Moreover, as “citizen soldiers,” National Guardsmen are perhaps more likely to be able to step outside of combat mode and assume something closer to their everyday, professional personas when conducting disaster response, particularly given that many National Guardsmen are firefighters, doctors, paramedics, and even law enforcement officers in their day-to-day lives.<sup>185</sup> National Guard units are also far more likely to be called upon in responding to small disasters, giving them experience in disaster response that their federal counterparts may lack.<sup>186</sup> National Guard units also participate in disaster training exercises with local law enforcement, allowing greater coordination during actual disasters and providing opportunities to train Guardsmen in appropriate law enforcement techniques<sup>187</sup> and

<sup>180</sup> Hedges, *supra* note 168 (explaining that while, historically, National Guard units deployed overseas have played primarily a logistical and support role to federal troops engaged in combat, the National Guard’s combat role in Iraq has expanded considerably).

<sup>181</sup> *Id.*

<sup>182</sup> *Shoot to Kill*, *supra* note 56.

<sup>183</sup> See, e.g., Tyler Hlavac, *It’s the Option Between Doing Nothing and Deadly Force*, UNITED STATES MARINE CORPS (Mar. 5, 2011), <http://www.usmc.mil/unit/marforres/Pages/2011/2011.03/nonlethal.aspx> (“Non-lethal weapons training is regarded as one of the many specialties of the American armed forces. Traditionally, only military policemen had specialized in this skill set, but now non-lethal weapons are becoming more prominent in the infantry field.”).

<sup>184</sup> See NATIONAL GUARD POSTURE STATEMENT 2010, NAT’L GUARD BUREAU 26–27 (2009), available at [http://www.ng.mil/1l/Congress\\_Reports/2010%20National%20Guard%20Posture%20Statement.pdf](http://www.ng.mil/1l/Congress_Reports/2010%20National%20Guard%20Posture%20Statement.pdf) (signaling a focus on training to provide “quick and effective support of local and state response forces”).

<sup>185</sup> See Editorial, *The Man-Made Disaster*, N.Y. TIMES, Sept. 2, 2005, at A22, available at <http://www.nytimes.com/2005/09/02/opinion/02fri1.html?scp=1&sq=%22The%20Man> (observing that of the National Guard personnel responding to Katrina, “many of these part-time soldiers had to leave behind their full-time jobs in police and fire departments or their jobs as paramedics”).

<sup>186</sup> See *The National Guard and Disaster Preparedness*, NAT’L GUARD, <http://www.ng.mil/features/disasterprep/default.aspx> (last visited Mar. 19, 2011) (cataloging some of the many natural disasters to which Guard units have responded).

<sup>187</sup> Les Melnyk, *The Army National Guard: Why So Special?*, SOLDIERS, Aug. 2006, at 7, 12 (reporting that the National Guard headquarters in every state “has been transformed to

even, perhaps, to educate them about the dangers of crediting potentially inflated reports of natural disaster-triggered violence.

In addition, at least local National Guard units, and perhaps those from surrounding states, are more likely to have geographic and community ties to the disaster survivors, which may make them less likely to view survivors as adversarial combatants.<sup>188</sup> Nonfederalized National Guard troops under the control of the state governor are also accountable to the people of that state, which may be more effective in deterring excessive use of force than a more diffuse accountability to the President and the nation as a whole.<sup>189</sup> Nevertheless, governors commanding National Guard units should be cognizant that exaggerated reports of violence and looting, spurred by the disaster mythology, may make them too inclined to assign state-commanded National Guard troops law enforcement missions, at the expense of humanitarian missions, such as search and rescue and the clearing of roads.

The effect of disaster mythology on our use of the military to respond to disasters cannot be fully countered by resisting calls to expand the President's discretion to deploy federal troops as disaster police. The Stafford Act's provisions on major disaster assistance should also be amended to provide that the President should not delay or withhold federal aid, including military humanitarian aid, based on unsubstantiated reports of looting and violence.<sup>190</sup> While such a restriction would be difficult or impossible to enforce, it could nonetheless serve as a valuable reminder to the President that reports of looting and violence after natural disasters tend to be exaggerated and that such reports should be discounted when deciding whether to implement security measures that delay humanitarian aid.

Better state and local planning to ensure the availability and continuity of local police forces during disasters may also help counteract pressures to turn law enforcement tasks over to the military (whether state or federal). Bolstering local police forces both normalizes response to disaster and ensures that resources will be available to re-

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provide a joint-forces command-and-control capability in the event of an emergency" and that "[t]hese state [joint operation centers] regularly conduct exercises to test their reactions to a variety of incidents and attacks, from hurricanes to terrorist use of a WMD").

<sup>188</sup> Cf. SOLNIT, *supra* note 15, at 130–31 (arguing that local police responding to the 1906 San Francisco earthquake “conducted themselves far more reasonably” than federal military troops, “perhaps because they were rooted in the communities they served”).

<sup>189</sup> Cf. Melnyk, *supra* note 187, at 11 (“Posse comitatus, the rapid response and local accountability that come from state control, and long experience in supporting civil authorities explain why the Guard alone is used in the vast majority of homeland-defense, homeland-security and military-aid-to-civil-authority missions.”).

<sup>190</sup> This provision could be added as a separate section of the Stafford Act. Alternatively, Congress could amend those sections of the Act that authorize general federal assistance, 42 U.S.C. § 5170a (2006), and essential assistance, § 5170b. See *supra* note 119.

spond to any disaster looting that does occur and to normal criminality following a disaster. Such planning could include greater familiarity with EMAC provisions that allow other states to contribute law enforcement personnel to relief efforts, procedures for streamlining such EMAC requests, and formalization—in intrastate mutual aid agreements—of local understandings allowing other in-state forces to contribute personnel to disaster-stricken areas.<sup>191</sup>

The conclusion that we should not expand the role of the military—particularly the federal military—in disaster law enforcement may need to be reconsidered if future disasters demonstrate that the police brutality witnessed post-Katrina was not the aberrant behavior of a troubled, corrupt police force but a harbinger of a growing problem. Existing legal authority under the Insurrection Act might be sufficient to allow the President to confer law enforcement responsibilities on the federal military in the face of significant police misconduct.<sup>192</sup> It seems likely, however, that a timely influx of state-controlled National Guard, EMAC reinforcement police from other jurisdictions, or even federal military present in a humanitarian capacity would be sufficient to deter police misconduct in future disasters. In any event, the possibility of excessive force by local police would need to be weighed against the potential for excessive force by military with combat, rather than civilian, training.

## 2. *Distortion of Response Priorities in Disaster Plans*

Disaster mythology influences not only the disaster laws we put on the books, but also how those laws are actually implemented during and after disasters. Belief in the disaster myth that violence, looting, and other antisocial behaviors are common in the aftermath of disasters has concrete, detrimental effects on the prioritization and implementation of immediate-response measures called for in federal, state, and local disaster plans. Exaggerated reports of looting and violence in New Orleans, for example, hampered response efforts at every level of government, resulting in delays in search and rescue, provision of medical care, restoration of critical infrastructure, and delivery of desperately needed food, water, and sanitary supplies. These delays made it difficult for every level of government to comply with applicable disaster plans. Indeed, the federal government's arguable failure to comply with the response priorities outlined in the National Re-

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<sup>191</sup> See, e.g., Jeff Rojek & Michael R. Smith, *Law Enforcement Lessons Learned from Hurricane Katrina*, 24 REV. POL'Y RES. 589, 596–98 (2007).

<sup>192</sup> It is at least possible that widespread police misconduct and civilian vigilantism would constitute an “insurrection” or “domestic violence” and otherwise satisfy the prerequisites of the Insurrection Act, even without amendment, which would allow the President to confer law enforcement duties on federal troops. See *supra* Section III.A.1(a) (discussing the Insurrection Act's provisions).

sponse Plan<sup>193</sup> and the Catastrophic Incident Annex<sup>194</sup> (including provision of food, water, and medical care at shelters of last resort) was the subject of a lawsuit brought by the estates of three Katrina victims who died at the Convention Center or the Cloverleaf<sup>195</sup> while awaiting medical care and evacuation.<sup>196</sup>

As the *New York Times* explained, “rumor of crime, as much as the reality of the public disorder, often played a powerful role in the emergency response.”<sup>197</sup> For example, paramedics reported a ten-hour delay before they were allowed to enter Slidell—located across Lake Pontchartrain from New Orleans—to give medical aid because of “a state trooper’s report that a mob of armed, marauding people had commandeered boats.”<sup>198</sup> The alleged marauders, it later appeared, were two men escaping from their flooded neighborhood.<sup>199</sup> Similarly, ambulances of one company “were locked down” based on a false report that a Covington firehouse had been “looted by armed robbers.”<sup>200</sup> In addition, when a SWAT team and a National Guard contingent responded to a St. Bernard Parish deputy sheriff’s claim that he was under attack by a sniper, the sniper fire “turned out to be the relief valve on a gas tank that popped open every few minutes.”<sup>201</sup>

The White House’s report on Katrina summarized the effect of lawlessness, and perceived lawlessness, on relief efforts:

Security problems in the Gulf Coast, both actual and perceived, obstructed the speed and efficiency of the Federal response and in some cases temporarily halted relief efforts. Security concerns suspended search and rescue missions, delayed the restoration of communications infrastructure, and impeded medical support missions. On August 31, most of the New Orleans police force was redirected

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<sup>193</sup> See Dep’t of Homeland Sec., National Response Plan 53 (2004) (defining “[r]esponse” as “[a]ctivities that address the short-term, direct effects of an incident. These activities include immediate actions to preserve life, property, and the environment; meet basic human needs; and maintain the social, economic, and political structure of the affected community.”). The National Response Plan is now the National Response Framework. See DEP’T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK, at i (2008).

<sup>194</sup> FEMA, DEP’T OF HOMELAND SEC., CATASTROPHIC INCIDENT ANNEX 38 (2008).

<sup>195</sup> The New Orleans Cloverleaf was the “interchange of Interstate 10 and Causeway Boulevard” where helicopters deposited some evacuees and where other evacuees gathered awaiting transport out of the city. *Freeman v. United States*, 556 F.3d 326, 329 (5th Cir. 2009).

<sup>196</sup> See *id.* at 336–38 (dismissing the suit as barred by the Stafford Act’s discretionary function exception, which immunizes the United States from any liability “based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government” (citing 42 U.S.C. § 5148 (2006))).

<sup>197</sup> Dwyer & Drew, *supra* note 13.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

from search and rescue missions to respond to the looting, detracting from the priority mission of saving lives.<sup>202</sup>

The diversion of 1,500 New Orleans police from search and rescue missions to antilooting patrol<sup>203</sup> may have exacerbated Katrina's death toll, which eventually reached at least 828 in New Orleans alone.<sup>204</sup> Indeed, police deployed to flooded areas to patrol for looting arguably were risking their own safety to protect property interests from exaggerated threats, as mounting floodwaters threatened to disable police cars and hamper police retreat from devastated neighborhoods.<sup>205</sup>

Sending police out in force to patrol for looting in the aftermath of natural disasters also may hinder citizen search and rescue and owners' attempts to salvage their own property, as an overtaxed police force may sometimes encounter difficulties in distinguishing between looting and legitimate activities undertaken to rescue survivors and to protect and preserve property.<sup>206</sup> Legitimate owners who are on the scene risk being caught up in police looting sweeps, particularly if documentation that could otherwise establish ownership has been lost or destroyed in the disaster. Indeed, there are a number of lawsuits based on false accusations of looting during disasters.<sup>207</sup> Additionally, evacuees who want to send friends or family members who did not evacuate to check on the evacuees' property may be deterred from

<sup>202</sup> LESSONS LEARNED, *supra* note 117, at 40 (footnotes omitted).

<sup>203</sup> *New Orleans Mayor Orders Looting Crackdown*, MSNBC.COM (Sept. 1, 2005), <http://www.msnbc.msn.com/id/9063708/> ("Mayor Ray Nagin ordered 1,500 police officers to leave their search-and-rescue mission Wednesday night and return to the streets of the beleaguered city to stop looting that has turned increasingly hostile.").

<sup>204</sup> Nicholas Riccardi, Doug Smith & David Zucchini, *Katrina Killed Across Class Lines*, L.A. TIMES, Dec. 18, 2005, at A1.

<sup>205</sup> *Cf.* Hines v. Dep't of Police, 974 So. 2d 87, 93–94 (La. Ct. App. 2007) (describing deployment of New Orleans police officers amid rising floodwaters and other dangerous conditions to respond to reports of looting, which contributed to police officer's decision to abandon his post).

<sup>206</sup> *See* SOLNIT, *supra* note 15, at 138 (explaining that, after the 1985 Mexico City earthquake, "police prevented families from trying to dig loved ones out of the rubble, in the name of preventing looting or because the ruins were unsafe"); *cf. id.* at 39 (describing instances after the 1906 San Francisco earthquake, in which soldiers shot suspected looters who actually had the owner's permission to take the goods in question); *id.* (describing, in the aftermath of the 1906 San Francisco earthquake, a soldier killing a suspected looter who turned out to be "trying to free someone trapped in th[e] rubble").

<sup>207</sup> *See* Phelan v. City of Coral Gables, 415 So. 2d 1292, 1293–94 (Fla. Dist. Ct. App. 1982) (false arrest suit based on erroneous conclusion that a ship salvager was looting in the aftermath of Hurricane David); Zeitoun v. City of New Orleans, 9 So. 3d 1025, 1028–29 (La. Ct. App. 2009) (claim against city for false arrest for looting in the aftermath of Katrina); Shillington v. K-Mart Corp., 402 S.E.2d 155, 159 (N.C. Ct. App. 1991) (tort suit based on false accusation of looting in the aftermath of a tornado); *cf.* People v. Barnes, 406 N.E.2d 1071, 1072 (N.Y. 1980) (noting that while a blackout "may be said to create an unexpected windfall for the criminal element, it is, without doubt, equally conducive to unfounded accusations of criminal conduct, for it would readily appear that innocent persons out in the night could be the victim [sic] of unfortunate circumstance").

requesting help (or have difficulty finding willing helpers) because such helpers would risk arrest for looting if they cannot produce documentation of ownership or authorization to salvage the property.

Exaggerated reports of violence also delayed the delivery of food and other provisions to New Orleans residents pursuant to established federal and state disaster plans. The flow of critical supplies into the city of New Orleans slowed because of rumors that order had broken down within the city limits. William Lokey, the Federal Coordinating Officer (FCO) for Louisiana, explained that he was “hearing all the things about loss of control and law and order” and was worried about sending FEMA truck drivers with food and water into that situation.<sup>208</sup> He concluded that he could not send drivers into New Orleans without “appropriate protection.”<sup>209</sup> At one point, he reported, “local officials” or the “National Guard” were holding up delivery trucks until the city could be secured.<sup>210</sup>

Even after shipments of food and other supplies reached Louisiana, the reports of violence slowed delivery of those supplies to hurricane survivors. Rather than deliver supplies to locations such as the Superdome and Convention Center as quickly as they became available, responders waited until military escorts could arrive to accompany the deliveries.<sup>211</sup> For example, after amassing supplies of MREs and other food to deliver to the Convention Center, the National Guard assembled an armed escort of one thousand soldiers and two hundred fifty police officers.<sup>212</sup> National Guard Lieutenant Colonel Jacques Thibodeaux had been told to expect “lawlessness, no food and water, desperation.”<sup>213</sup> Indeed, the caravan was “expecting a war zone,” reported Mark Smith, spokesman for the Louisiana Governor’s Office of Homeland Security and Emergency Preparedness.<sup>214</sup> The caravan was greeted instead by cheering crowds, the Convention Center was secured within thirty minutes, and a search of all nineteen thousand people produced only thirteen weapons.<sup>215</sup>

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<sup>208</sup> A NATION STILL UNPREPARED, *supra* note 133, at 393 n.127 (citing Interview with William Lokey, Federal Coordinating Officer for La. (Jan. 20, 2006)).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* The exaggerated reports of violence also compromised private nonprofit entities’ efforts to respond to critical needs in Louisiana. For example, Brian Greene, the head of the Second Harvest Food Bank, which served Louisiana, stated that reports about violence in Louisiana made truck drivers afraid to drive too close to Baton Rouge to deliver their cargo of food and water from other regional food banks. See Katy Reckdahl, *The Myths of New Orleans*, TUCSON WEEKLY, Aug. 24, 2006, <http://www.tucsonweekly.com/tucson/the-myths-of-new-orleans/Content?oid=1085005>.

<sup>211</sup> Reckdahl, *supra* note 210.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (internal quotation marks omitted).

<sup>214</sup> *Id.*

<sup>215</sup> See *id.*

Reports of violence in the Superdome and other shelters of last resort delayed even the military's response. FEMA Director Michael Brown testified that concerns that troops would confront violence and looting while delivering the supplies delayed provision of lighting and sanitary supplies (including portable toilets) to the Superdome:

[T]he U.S. Army, the National Guard, were having difficulty getting those supplies into the Superdome. You need to understand that there are media reports of shooting, there are media reports of looting and everything else going on. And if the Army moves in there, the Army kills people. And so they had to be very careful about moving those things in there.<sup>216</sup>

If sociologists are correct in their tentative conclusions that widespread looting is more likely when disaster survivors have no hope that aid is coming and feel the Government has abandoned them,<sup>217</sup> then delaying aid based on unverified security concerns may create a vicious cycle by increasing the risk that real, sustained looting will occur.

To avoid unnecessary delays in disaster relief, states and localities should consider amending their emergency-response plans to forbid diversion of resources from search and rescue and other critical functions to antilooting (or civil unrest) patrol absent credible, reliable, verified evidence that such behavior is both occurring and endangering lives. Disaster plans should also be amended to clearly establish the priority of life saving over property protection. Similarly, emergency-response plans should provide that no government actor should delay delivery of food, water, or other critical emergency supplies based on security concerns unless there is credible, reliable, verified evidence that the security concerns are valid. Both FEMA vendor contracts and state vendor contracts could also be revised to impose penalties on vendors who refuse to transport supplies into disaster zones without express government authorization for their refusal, which should be granted only when security concerns are verified.

Limiting the discretion of public officials implementing response plans (and private actors contracted to provide material and services critical to that response) to delay aid based on security concerns will

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<sup>216</sup> *Hearing on Homeland Security's Role*, *supra* note 134, at 21 (testimony of Michael Brown). Exaggerated reports and fears of violence and looting have hampered emergency response in the aftermath of disasters other than Katrina, as well. For example, after the January 2010 Haiti earthquake, U.S. officials initially ruled out the possibility of airdropping food and water based on fears that the drops would cause riots on the ground. Phil Stewart & Tabassum Zakaria, *U.S. Couldn't Move Any Faster on Haiti Aid: Gates*, REUTERS, Jan. 15, 2010, available at <http://www.reuters.com/article/idUSTRE60E49820100115>. The U.S. insistence on security escorts for aid leaving the airport also delayed distribution of life-saving supplies. See Charles Forelle et al., *Aid to Haiti Speeds Up, But Delays Mar Effort*, WALL ST. J., Jan. 19, 2010, at A1.

<sup>217</sup> See *supra* note 72.

help counter the effect that the disaster myth of widespread looting and violence has had on effective emergency response. Emergency managers and public officials should also be made aware that exaggerating claims of looting and violence in order to hasten federal (and other outside) aid will often backfire and result in significant delays. By removing the incentive to cry wolf about the security situation on the ground, such education may help to counter official perpetuation of the myth of looting and violence.

### 3. *Restrictions on Freedom*

In the aftermath of natural disasters, public officials who subscribe to the myth that disaster victims quickly devolve into their worst selves often try to control the affected population by imposing restrictions on their basic freedoms, including freedom of movement. One of the most shocking examples of such restrictions in the aftermath of Katrina was the decision by suburban police in Gretna, Louisiana to blockade one of the primary escape routes from New Orleans, the Crescent City Connection Bridge, to prevent survivors from evacuating the city on foot and taking refuge in adjacent communities.<sup>218</sup> Survivors had been told that buses awaited them on the other side of the bridge.<sup>219</sup> One evacuee, a San Francisco paramedic visiting New Orleans, reported that Gretna policemen blocked their way, fired shots over their heads, and declared, "We're not going to have another Superdome down here."<sup>220</sup> Gretna's police force apparently was acting in response both to reports of violence in the Superdome and to an arson incident at a Gretna mall, near the border of New Orleans, which "authorities blame[d] [on] hooligans from New Orleans," despite the fact that the police made no arrests.<sup>221</sup>

New Orleans City Council Member Jacqueline Clarkson later protested that the possible actions of a few New Orleanians should "not have been misinterpreted [to mean] that all 20,000 people [in the Superdome] were coming to loot and raid and rob."<sup>222</sup> Gretna residents apparently disagreed. The Gretna City Council unanimously approved the police decision, and Gretna's citizens demonstrated their support by posting "thank you" and "God bless Chief Lawson" signs.<sup>223</sup> One Gretna resident explained that Gretna residents were

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<sup>218</sup> See *Morning Edition: Evacuees Were Turned Away at Gretna, La.* (NPR news radio broadcast Sept. 20, 2005), <http://www.npr.org/templates/story/story.php?storyId=4855611> (follow "Listen" hyperlink).

<sup>219</sup> See *id.*

<sup>220</sup> *Id.* (internal quotation marks omitted).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*



“ecstatic” upon learning of the bridge closing: “They were looting and they were shooting, and we didn’t want that over here.”<sup>224</sup>

In addition to these restrictions on movement, both New Orleans Mayor Ray Nagin and Jefferson Parish President Aaron Broussard reportedly purported to declare martial law in their jurisdictions.<sup>225</sup> A declaration of martial law has no particular meaning under Louisiana law: Louisiana’s emergency-management laws do not mention martial law, much less confer power on local officials to declare it.<sup>226</sup> It is unclear exactly what Nagin and Broussard thought their declarations meant, but Nagin apparently told police to “do ‘whatever it takes’” to restore law and order and said that “[m]artial [l]aw means that officers don’t have to worry about civil rights and Miranda rights in stopping the looters.”<sup>227</sup> Such declarations may well have encouraged police to view Katrina survivors as potential looters and emboldened them in their use of excessive—even deadly—force in confronting those survivors they encountered on the streets.<sup>228</sup>

While the mix of entrenched racial division and police corruption may account for much of the egregious police misconduct that occurred following Katrina, the prevalence of the myth that natural disasters breed widespread looting and violence suggests that state and local officials confronting other disasters may also be predisposed to vague declarations of “martial law” that prioritize the exaggerated needs of law enforcement over individual rights. Although many state disaster laws do authorize governors during a state of disaster to sus-

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<sup>224</sup> *Id.* Gretna’s refusal to allow evacuees to cross the Crescent City Bridge spurred several lawsuits. See Paul Purpura, *Two Katrina Bridge Blockade Suits Set to Be Tried in 2010*, NOLA.COM (Nov. 8, 2009), [http://www.nola.com/crime/index.ssf/2009/11/post\\_62.html](http://www.nola.com/crime/index.ssf/2009/11/post_62.html).

<sup>225</sup> Allen Powell II, *St. John Becomes Staging Point*, TIMES-PICAYUNE (New Orleans), Aug. 30, 2005, [http://www.nola.com/katrina/index.ssf/2005/08/st\\_john\\_becomes\\_staging\\_point.html](http://www.nola.com/katrina/index.ssf/2005/08/st_john_becomes_staging_point.html). Because reports of officials imposing martial law are a common manifestation of the disaster myth of looting and antisocial behavior, one should view such reports skeptically. See FISCHER, *supra* note 14, at 51. Elsewhere, Nagin was quoted as saying that he had “called” for the imposition of martial law. See *CNN Breaking News: State of Emergency: President Bush Heads to Hurricane Zone Today* (CNN television broadcast Sept. 2, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/02/bn.01.html>).

<sup>226</sup> A Westlaw search of Louisiana’s Constitution and statutes yields no results for “martial law.” Louisiana law does grant the governor the power to order the militia into active service to respond to natural disasters and also authorizes the governor to confer on responding members of the Louisiana Guard and military police the “powers and authority of peace officers.” LA. REV. STAT. § 29:7.A,B (2007). However, nothing in the relevant provisions suggests that the governor or any other official has the power to suspend constitutional rights or to circumvent normal criminal justice or judicial procedures. Indeed, the Louisiana statute specifically states that all actions taken pursuant to its provisions should be “in accordance with the laws and constitutions of Louisiana and the United States.” *Id.* § 29:7.B.

<sup>227</sup> SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR & RESPONSE TO HURRICANE KATRINA, SUPPLEMENTARY REPORT, at 51 (2006), *reprinted in* A FAILURE OF INITIATIVE, *supra* note 93, app. 8, at 486.

<sup>228</sup> See discussion of police misconduct *supra* note 82.

pend state substantive or procedural rules that might interfere with disaster relief,<sup>229</sup> no state emergency or disaster law explicitly autho-

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<sup>229</sup> See, e.g., ALA. CODE § 31-9-13 (LexisNexis 1998) (providing that “[a]ll existing laws, ordinances, rules and regulations or parts thereof inconsistent with the provisions of this [emergency management] chapter or of any order, rule or regulation issued under the authority of this chapter, shall be suspended during the period of time and to the extent that such inconsistency exists”); ALASKA STAT. § 26.23.020(g)(1) (2008) (granting the governor power to “suspend the provisions of any regulatory statute prescribing procedures for the conduct of state business, or the orders or regulations of any state agency, if compliance with the provisions of the statute, order, or regulation would prevent, or substantially impede or delay, action necessary to cope with the disaster emergency”); ARIZ. REV. STAT. ANN. § 26-307.B (2000) (providing that “[e]xisting laws, ordinances, orders, rules and regulations in conflict with this chapter or orders, rules or regulations issued under authority of this chapter are suspended during the time and to the extent that they conflict”); ARK. CODE ANN. § 12-75-108(b)(2)(A) (2003 & Supp. 2009) (granting the local chief executive the power to suspend local ordinances or regulations for up to thirty days during a local disaster emergency, if strict compliance would hinder disaster response); CAL. GOV’T CODE § 8571 (West 2005) (giving the governor power during a state of emergency to “suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency . . . where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency”); CONN. GEN. STAT. ANN. § 28-9 (West 2009) (granting the governor broad power to modify or suspend any state statute during a “civil preparedness emergency”); DEL. CODE ANN. tit. 20, § 3121(b) (2005) (providing that “[a]ll existing, laws, ordinances, rules and regulations inconsistent with this chapter shall be suspended during the period of time of the emergency or disaster and to the extent that such conflict exists”); GA. CODE ANN. § 38-3-28(b) (1995) (providing that “[a]ll laws, ordinances, rules, and regulations inconsistent with [the state’s emergency management law] or [with orders, rules, or regulations issued under the authority of the law] shall be suspended during the period of time and to the extent that the conflict exists”); 20 ILL. COMP. STAT. ANN. 3305/7(a)(1) (West 2008) (granting the governor, during a declared disaster, power “[t]o suspend the provisions of any regulatory statute prescribing procedures for conduct of State business, or the orders, rules and regulations of any State agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder or delay necessary action . . . in coping with the disaster”); KY. REV. STAT. ANN. § 39A.180(2) (West 2006) (providing that “[a]ll written orders and administrative regulations promulgated by the Governor . . . shall have the full force of law” and that “[a]ll existing laws, ordinances, and administrative regulations . . . shall be suspended during the period of time and to the extent that the conflict exists”); LA. REV. STAT. ANN. § 724D.(1) (2007 & Supp. 2010) (authorizing the governor to “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency”); ME. REV. STAT. ANN. tit. 37-B, § 742.1.C.(1) (1964 & Supp. 2010) (giving the governor power after filing an emergency proclamation to “[s]uspend the enforcement of any statute prescribing the procedures for conduct of state business, or the orders or rules of any state agency, if strict compliance with the provisions of the statute, order or rule would in any way prevent, hinder or delay necessary action in coping with the emergency”); MD. CODE ANN., PUB. SAFETY § 14-107(d)(1)(i) (LexisNexis 2003) (authorizing the governor after declaring a state of emergency to “suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision”); MICH. COMP. LAWS ANN. § 30.405(1)(a) (West 2004 & Supp. 2010) (allowing the governor in a declaration of disaster to “[s]uspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency”); MINN. STAT. ANN. § 12.32 (West 2005 &

rizes a declaration of “martial law” or otherwise authorizes the suspension federal constitutional protections during emergencies.

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Supp. 2010) (providing that emergency orders promulgated by the governor have “the full force and effect of law” and that any inconsistent rule or order is suspended during the emergency); Miss. CODE ANN. § 33-15-31(b) (2010) (giving all of the governor’s emergency rules “full force and effect of law” and noting that all inconsistent “laws, ordinances, rules and regulations” are suspended during the emergency); MO. ANN. STAT. § 44.100.1.(3) (h) (Supp. 2010) (authorizing the governor to “[w]aive or suspend the operation of any statutory requirement or administrative rule prescribing procedures for conducting state business, where strict compliance with such requirements and rules would prevent, hinder, or delay necessary action by the department of health and senior services to respond to a declared emergency or increased health threat to the population”); NEB. REV. STAT. ANN. § 81-829.40(6)(a) (LexisNexis 2005) (giving the governor power to “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the disaster, emergency, or civil defense emergency”); N.Y. EXEC. LAW § 24.1.g (McKinney 2010) (allowing the governor to provide for “the suspension within any part or all of its territorial limits of any of its local laws, ordinances or regulations, or parts thereof subject to federal and state constitutional, statutory and regulatory limitations, which may prevent, hinder, or delay necessary action in coping with a disaster or recovery therefrom”); N.D. CENT. CODE § 37-17.1-05.6.a (2004 & Supp. 2009) (giving the governor power to “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency”); OR. REV. STAT. § 401.168(2) (2009) (providing that the governor shall have power to “suspend provisions of any order or rule of any state agency, if the Governor determines and declares that strict compliance with the provisions of the order or rule would in any way prevent, hinder or delay mitigation of the effects of the emergency”); R.I. GEN. LAWS § 30-15-9(e)(1) (1994 & Supp. 2010) (giving the governor power to “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency”); S.C. CODE ANN. § 25-1-440(a)(3) (2007 & Supp. 2009) (authorizing the governor to “suspend provisions of existing regulations prescribing procedures for conduct of state business if strict compliance with the provisions thereof would in any way prevent, hinder, or delay necessary action in coping with the emergency”); TENN. CODE ANN. § 58-2-107(e)(1) (2002 & Supp. 2010) (allowing the governor to “[s]uspend the provisions of any law, order, rule or regulation prescribing the procedures for conduct of state business or the orders or rules or regulations of any state agency, if strict compliance with the provisions of any such law, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency”); TEX. GOV’T CODE ANN. § 418.016(a) (West 2005 & Supp. 2010) (allowing the governor to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster”); W. VA. CODE ANN. § 15-5-6(g) (LexisNexis 2009) (giving the governor the power “[t]o suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules or regulations of any state agency, if strict compliance therewith would in any way prevent, hinder or delay necessary action in coping with the emergency”); WIS. STAT. ANN. § 323.12(4)(d) (West 2010) (providing that during a state of emergency the governor may “[s]uspend the provisions of any administrative rule if the strict compliance with that rule would prevent, hinder, or delay necessary actions to respond to disaster”).

Louisiana's post-Katrina experience demonstrates, however, that the mere absence of express authorization for declarations of "martial law" in state disaster laws may not be sufficient to prevent official attempts to curtail federal constitutional rights.<sup>230</sup> One possible solution is for states to consider amending their disaster laws to state explicitly that the governor and local officials have no power to suspend federal constitutional guarantees in the aftermath of natural disasters. This explicit legislative statement, incorporated into state and local disaster plans and planning, might help make clear to local law enforcement (who might otherwise exaggerate security concerns in an attempt to set the stage for a declaration of martial law purporting to suspend normal constitutional protections) that no such declaration will be forthcoming. Removing this incentive for local law enforcement to perpetuate the myth might help counter the prevalence of exaggerated reports of lawlessness in future disasters.

Such a prohibition might hamstring law enforcement if—contrary to most sociologists' assumptions—widespread looting and violence were to occur during some future natural disaster. Nonetheless, it is hard to imagine circumstances that would justify local officials' suspension of federal constitutional guarantees, even if officials arguably have the power to impinge on those guarantees during emergencies. State legislatures could also amend their disaster laws to specifically forbid declarations of "martial law" in the aftermath of natural disasters; however, an express prohibition on "martial law" per se would be more problematic because the term "martial law" lacks any clear, determinate legal meaning.<sup>231</sup> In any event, state legislatures should think carefully about how best to constrain local discretion so that law enforcement authorities do not believe they have a "blank check" in disaster's aftermath.

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<sup>230</sup> Indeed, existing (if somewhat cryptic and controversial) Supreme Court precedent might be read to suggest that a state governor need not have explicit legislative authorization to invoke emergency measures that impinge on federal constitutional guarantees if the governor has legislative authority to deal with the emergency and his actions do not contravene that authority. See Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 680 (2009) (describing *Moyer v. Peabody*, 212 U.S. 78 (1909), as upholding a governor's authorization of preventative detentions to put down an insurrection "so long as the governor had the authority under the state constitution to put down the insurrection and his actions were consistent with that authority").

<sup>231</sup> As Daniel Farber has explained, "*Martial law* is not a term with any fixed legal meaning," but it does "clearly contemplate[ ] . . . the replacement of the normal legal regime with military directives and enforcement." DANIEL FARBER, *LINCOLN'S CONSTITUTION* 147 (2003). Martial law can thus take many different (and more or less legitimate) forms, including authorizing the military to act as law enforcement, trying civilians in military courts, and replacing civilian leaders with military officials. See *id.* at 147–48. An explicit prohibition on "martial law," then, might be read to prohibit military participation in law enforcement of the kind otherwise authorized by Louisiana statute. See *supra* note 226.

Although most restrictions on freedom and freedom of movement in the aftermath of disasters tend to be less dramatic than the blockading of escape routes or declarations of martial law, they nonetheless can have important consequences for disaster survivors. The disaster laws of many states specifically give the state governor the power to order evacuation;<sup>232</sup> some also explicitly grant the governor

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<sup>232</sup> See, e.g., ALA. CODE § 31-9-6(4), 31-9-8(a)(4) (LexisNexis 1998 & Supp. 2010); ARK. CODE ANN. § 12-75-114(e)(5) (2003 & Supp. 2009) (granting the governor the power to “[d]irect and compel the evacuation” of people from affected areas “if the Governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery”); CAL. GOV’T CODE § 8589.5(b)(2)(H)-(I) (West Supp. 2010) (providing that the California Emergency Management Agency may require emergency “procedures for the lifting of the evacuation and reentry of the area”); COLO. REV. STAT. ANN. § 24-32-2104(7)(e) (West 2008) (empowering the governor to “[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery”); DEL. CODE ANN. tit. 20, § 3116(b)(3) (2005) (granting the governor the power during an emergency or disaster to “[d]irect and compel the evacuation” of affected areas); D.C. CODE ANN. § 7-2304(b)(3) (LexisNexis 2008) (authorizing the mayor in an emergency to implement measures “designed to protect persons and property in the District of Columbia,” including “evacuation of persons in the District of Columbia”); FLA. STAT. ANN. § 252.36(5)(e) (West 2009) (granting the governor power during a state of emergency to “[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within the state if she or he deems this action necessary for the preservation of life or other emergency mitigation, response, or recovery”); GA. CODE ANN. § 38-3-24 (1995) (authorizing the governor to “formulate and execute plans and regulations for the control of traffic in order to provide for the rapid and safe movement of evacuation over public highways and streets of people, troops, or vehicles and of materials for national defense or for use in any defense industry”); GA. CODE ANN. § 38-3-51(d)(5) (1995 & Supp. 2010) (granting the governor the emergency power to “[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within the state if he deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery”); IDAHO CODE ANN. § 46-1008(5)(e) (Supp. 2010) (granting the governor power in a disaster to “[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within the state if he deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery”); 20 ILL. COMP. STAT. ANN. 3305/7(a)(6) (West 2008) (granting the governor during a declared disaster the power “[t]o recommend the evacuation of all or part of the population from any stricken or threatened area within the State if the Governor deems this action necessary”); IND. CODE ANN. § 10-14-3-12(d)(5) (LexisNexis 2003 & Supp. 2010) (authorizing the governor during a declared disaster to “[a]ssist in the evacuation of all or part of the population from any stricken or threatened area in Indiana if the governor considers this action necessary for the preservation of life or other disaster mitigation, response, or recovery.”); IOWA CODE ANN. § 29C.6.13 (West 2010) (authorizing the governor during a declared disaster emergency to “[d]irect the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery”); KAN. STAT. ANN. § 48-925(c)(5) (2005 & Supp. 2009) (authorizing the governor during a declared state of disaster emergency to “direct and compel the evacuation of all or part of the population from any area of the state stricken or threatened by a disaster, if the governor deems this action necessary for the preservation of life or other disaster mitigation, response or recovery”); OKLA. STAT. ANN. tit. 63, § 683.8.D.7.e. (West 2004) (giving the governor power to direct and control “the evacuation and reception of the civil population”); OKLA. STAT. ANN. tit. 63, § 683.9(3) (West 2004 & Supp. 2010) (authorizing the governor to “provide for the evacuation of all

the power to control egress out of and ingress into the disaster area, effectively authorizing establishment of a perimeter.<sup>233</sup> Of course, there are good reasons unrelated to the potential for looting or violence to control evacuee return to damaged homes and businesses. Officials might reasonably delay return for residents until major safety concerns, such as downed power lines, nonfunctioning traffic signals, toxic chemical spills, and lack of available medical care, can be addressed.<sup>234</sup> Likewise, authorities may need to delay return to avoid long lines of cars trying to access the area, which otherwise might delay emergency vehicles needed for search and rescue and for provi-

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or part of the population from any stricken or threatened area or areas within this state and to take such steps as are necessary for the receipt and care of such evacuees"); S.C. CODE ANN. § 25-1-440(7) (Supp. 2009) (giving the governor power to "direct and compel evacuation of all or part of the populace from any stricken or threatened area if this action is considered necessary for the preservation of life or other emergency mitigation, response, or recovery; to prescribe routes, modes of transportation, and destination in connection with evacuation"); TENN. CODE ANN. §§ 58-2-107(e)(5)–(6) (2002 & Supp. 2010) (providing the governor power to "[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other emergency mitigation, response, or recovery and to "[p]rescribe routes, modes of transportation, and destinations in connection with evacuation"); TEX. GOV'T CODE ANN. § 418.185(b) (West Supp. 2010) (authorizing the county judge or mayor "who orders the evacuation of an area stricken or threatened by a disaster" to "compel persons who remain in the evacuated area to leave and authorize the use of reasonable force to remove persons from the area").

<sup>233</sup> ALASKA STAT. § 26.23.020(g)(5) (2008) (authorizing the governor to "direct and compel the relocation" of people from affected areas); *id.* § 26.23.020(g)(7) (2008) ("[T]he governor may . . . control ingress to and egress from a disaster area . . ."); ARK. CODE ANN. § 12-75-114(e)(7) (2003 & Supp. 2009) ("[T]he Governor may . . . [c]ontrol ingress and egress to and from a disaster area . . ."); COLO. REV. STAT. ANN. § 24-32-2104(7)(g) (West 2010) ("[T]he governor may . . . [c]ontrol ingress to and egress from a disaster area . . ."); DEL. CODE ANN. tit. 20, § 3116(b)(5) (2005) ("During an emergency or disaster, the Governor may . . . [c]ontrol ingress and egress to and from a disaster area . . ."); FLA. STAT. ANN. § 252.36(5)(g) (West 2009) ("[The Governor] may . . . [c]ontrol ingress and egress to and from an emergency area . . ."); GA. CODE ANN. § 38-3-51(d)(7) (1995 & Supp. 2010); IDAHO CODE ANN. § 46-1008(5)(g) (2003 & Supp. 2010); 20 ILL. COMP. STAT. ANN. 3305/7 § 7(a)(8) (West 2008); IND. CODE ANN. § 10-14-3-12(d)(7) (LexisNexis 2003 & Supp. 2010); IOWA CODE ANN. § 29C.6.15 (West 2010); KAN. STAT. ANN. § 48-925(c)(7) (2005 & Supp. 2009); OKLA. STAT. ANN. tit. 63, § 683.8.7.c. (West 2004) (giving the governor power to direct and control "the conduct of civilians and the movement of and cessation of movement of pedestrians and vehicular traffic during, prior and subsequent to natural and man-made disasters and emergencies"); R.I. GEN. LAWS § 30-15-9(e)(7) (1994 & Supp. 2010); S.C. CODE ANN. § 25-1-440(7) (2007 & Supp. 2009); TENN. CODE ANN. § 58-2-107(e)(7) (2002 & Supp. 2010); W. VA. CODE ANN. § 15-5-6(f) (LexisNexis 2009).

<sup>234</sup> See, e.g., William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 978–80 (2007) (describing Katrina's destruction of medical facilities); Marla Cone, *Floodwaters a Soup of Pathogens, EPA Finds*, L.A. TIMES, Sept. 8, 2005, at A18 (describing bacteria, lead, and other contaminants concentrated in floodwaters); Juliet Eilperin, *Flooded Toxic Waste Sites Are Potential Health Threat*, WASH. POST, Sept. 10, 2005, at A15 (reporting the risks of potential contamination from Superfund sites affected by Katrina).

sion of emergency health care to survivors.<sup>235</sup> Authorities might also delay permanent return until they can restore basic utilities, including water, sewage, and power.<sup>236</sup>

Delaying return to prevent looting and other crime, however, is usually both unnecessary and counterproductive. Yet belief in the disaster myth of looting and violence may lead state or local officials to delay reentry based on security concerns, including fears that they have inadequate manpower to secure the area against expected looting. After Katrina, for example, the Louisiana State Police set up roadblocks preventing residents from accessing certain areas, both for safety reasons and to prevent looting.<sup>237</sup> Three years later, New Orleans Police Superintendent Warren Riley cited the “potential for looting” in neighborhoods still without power in the aftermath of Hurricane Gustav as a reason for delaying reentry of New Orleans residents to their homes (beyond the date set for reentry in surrounding parishes).<sup>238</sup> Indeed, many state and local disaster plans specifically cite looting as a reason for continuing to secure the area after a disaster and as a factor to be considered in determining the timing of evacuee reentry.<sup>239</sup>

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<sup>235</sup> See P.J. Heller, *Ike Damage ‘Worse Than Katrina,’* DISASTER NEWS NETWORK (Sept. 17, 2008), <http://www.disasternews.net/news/article.php?articleid=3769>.

<sup>236</sup> Cf. William P. Quigley, *Obstacle to Opportunity: Housing That Working and Poor People Can Afford in New Orleans Since Katrina*, 42 WAKE FOREST L. REV. 393, 394–95 (2007) (cataloguing the difficulties of restoring drinking water, sewer, and other utilities to New Orleans residents).

<sup>237</sup> Powell, *supra* note 225.

<sup>238</sup> Brendan McCarthy, *Katrina Lessons Help Police Handle Hurricane Gustav*, NOLA.COM, Sept. 8, 2005, [http://www.nola.com/hurricane/index.ssf/2008/09/katrina\\_lessons\\_help\\_police\\_ha.html](http://www.nola.com/hurricane/index.ssf/2008/09/katrina_lessons_help_police_ha.html) (quoting New Orleans Police Superintendent Warren Riley as justifying the delay of residents’ reentry to New Orleans beyond the date for reentry in surrounding parishes in the aftermath of Hurricane Gustav because “[w]e are still without power and resources in some sections of the city” and “[a]n empty house in a dark city clearly has a great potential for looting”).

<sup>239</sup> See, e.g., AMELIA CNTY., VA., EMERGENCY OPERATIONS PLAN app. at 1 (2007) (Functional Annex Z: Traffic Control/Security), *available at* [http://www.hamnerlibrary.org/county\\_docs/emergency\\_plan/EOP-AnnexZ.doc](http://www.hamnerlibrary.org/county_docs/emergency_plan/EOP-AnnexZ.doc) (“The high risk areas evacuated will be very vulnerable to theft and looting during the evacuation and reentry phases of emergency operations.”); *id.* at 2 (“Access to the evacuated areas must be controlled to prevent or minimize theft or looting prior to, during, or following evacuation, and particularly during the reentry phase.”); BROWARD CNTY. FLA., HURRICANE SAFETY GUIDE 4 (on file with author) (“Be Patient. Access to affected areas will be controlled to prevent looting and injuries.”); CHATHAM (GEORGIA) EMERGENCY MGMT. AGENCY, EMERGENCY OPERATIONS PLAN app. at 22 (2009) (Incident Annex A: Hurricane Incident Management), *available at* <http://www.chathamemergency.org/Documents/EOP%20Incident%20Annex%20A%20Hurricane%20Incident%20Management%20REV0709.pdf> (“Pre-Storm Re-Entry: Reentry restrictions may become a necessity before a storm makes landfall. In order to minimize casualties and prevent looting, during the evacuation phase it will be prudent to deny access to at-risk areas being evacuated.”); HERNANDO CNTY. EMERGENCY MGMT., HERNANDO COUNTY HURRICANE HANDBOOK 28 (2008), *available at* <http://www.hernandosherriff.org/em/publications/pdf/Hurricane%20Handbook.pdf>. (“Controlled Area - It is standard policy in the State of Florida that once an evacuation has been announced, no-one will be

The consequences of these misguided plans may be serious. Delaying return of evacuees imposes significant costs on both individuals and their communities. Evacuees must continue to live in crowded public shelters or pay for other living arrangements in the interim; slower community recovery means losses to local businesses and employees. In addition, fear that their return will be delayed may deter some people in the path of storms (or other dangers) from evacuating in the first place.<sup>240</sup>

Moreover, the longer evacuees are unable to return home the more likely it is that there will be nothing left to salvage.<sup>241</sup> Mold quickly overruns flooded properties in humid climates and can destroy even personal property that flooding does not damage di-

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allowed into the evacuated areas until authorized by the Sheriff. This policy is meant to reduce the possibility of looting while the area is unoccupied, and to control a possible influx of unauthorized and/or unlicensed clean-up or repair contractors once the evacuated area is reopened.”); Horry CNTY., S.C., RE-ENTRY PLAN app. at 8 (2008) (Annex 7-3) [hereinafter Horry, S.C. PLAN], available at [www.horrycounty.org/depts/humanserv/epd/EMP/re-entry.pdf](http://www.horrycounty.org/depts/humanserv/epd/EMP/re-entry.pdf) (“Roadblocks are also an efficient way of preventing looting and other acts of lawlessness.”); *id.* at 3–4 (noting that security operations during reentry should focus on “[r]estricting entry into damaged areas,” “[p]reventing looting in damaged areas,” “[a]dvising citizens of risk,” and “[p]roviding security for recovery workers, VIPs, critical facilities, etc.”); COMMONWEALTH OF VA. EMERGENCY OPERATIONS PLAN, 5 HURRICANE RESPONSE PLAN app. at 137 (2010) (Annex C: “Emergency Relief and Reentry”) [hereinafter VA. PLAN], available at [http://www.vaemergency.com/library/plans/hurrplan/10\\_hurricane\\_response/Annex%20C%20Emergency%20Relief%20&%20Re%20Entry%20version%20July%202010.pdf](http://www.vaemergency.com/library/plans/hurrplan/10_hurricane_response/Annex%20C%20Emergency%20Relief%20&%20Re%20Entry%20version%20July%202010.pdf) (explaining that the use of roadblocks to seal entry points into devastated areas is an “important part of the reentry process,” both to “prevent mass entry of the civilian population,” which might “clog [needed] rescue routes for [those] . . . [needing] medical [care],” and to “help curtail acts of unlawfulness such as looting.”); PEMBROKE PINES FLA. POLICE DEP’T, HURRICANE INFORMATION, <http://www.ppinet.com/police/hurricane-info.html> (last visited Mar. 20, 2011) (advising residents wishing to return after a hurricane to be patient because “[a]ccess to affected areas will be controlled to prevent looting and injuries”).

<sup>240</sup> See Nicole Dash & Betty Hearn Morrow, *Return Delays and Evacuation Order Compliance: The Case of Hurricane Georges and the Florida Keys*, 2 ENVTL. HAZARDS 119, 127 (2001) (finding that “possible reentry delays” are one factor “involved in non-compliance” with mandatory evacuation orders, “particularly for those who have seen media reports of past delays,” while noting that potential return delays will not deter “most people [from evacuating] who believe they are in personal danger from an approaching storm”). Concern about return delays was higher among those who refused to comply with mandatory evacuation orders than those who actually experienced the delays. *Id.* at 124 (“About two-thirds (64%) of the Monroe non-evacuees were very concerned about the [return] delays experienced by evacuees compared to only about a third (35%) of those who actually endured the delays.”); see also *id.* at 123–24 (relating empirical findings that the most common reasons for evacuee concern about return delays were “(1) wanting to know if their homes had been damaged, and (2) the desire to protect them from further damage”).

<sup>241</sup> This concern, however, was less relevant after Katrina itself, as the “bowl-like shape” of the city and ring-levee system prevented water from draining after the initial flooding, virtually ensuring that most residents in severely flooded areas would find little to salvage. See Brian Handwerk, *New Orleans Levees Not Built for Worst Case Events*, NAT’L GEOGRAPHIC (Sept. 2, 2005), [http://news.nationalgeographic.com/news/2005/09/0902\\_050902\\_katrina\\_levees.html](http://news.nationalgeographic.com/news/2005/09/0902_050902_katrina_levees.html).



rectly.<sup>242</sup> Mold that has penetrated dry wall is very difficult to remediate, as tearing out the dry wall releases massive quantities of mold spores into the home.<sup>243</sup> Additionally, some experts suggest that once mold has penetrated the wood frame of a home, it is nearly impossible to eradicate completely and the house should be demolished.<sup>244</sup>

Preliminary data from Katrina also suggests that delaying evacuee reentry may in fact increase the toxic exposure evacuees face when they do return. Samples of sediment deposited in homes by Katrina contain high levels of many dangerous pollutants, including arsenic, lead, cadmium, vanadium, and organic compounds like DEET.<sup>245</sup> While many of these toxins are originally confined to the mud and sediment in homes (and thus are largely avoidable if one does not touch the mud), when houses sit vacant for several weeks, mold spores begin to take up some of these chemicals, particularly phthalates, Fluoranthene, and pesticides like Chlordane and Dieldrin, and spread them throughout the home and into the air.<sup>246</sup> Evacuees returning to homes that have sat for some time are thus more likely to be exposed to these compounds.<sup>247</sup>

For natural disasters other than floods, delaying evacuee return likewise results in increased property damage. Earthquakes, fires, and other natural disasters all can cause structural damage, leaving both the structures and the property inside exposed to the elements until evacuees can return.

Because delaying return of evacuees based on unfounded looting fears risks more devastating damage to property and may increase health risks associated with return and repair, affected cities—particularly those that experience frequent flooding or hurricanes—should explore ways to facilitate and streamline evacuee return at the earliest time when it is safe to do so, rather than imposing additional delays until sufficient manpower is available to police for looting.

To help ensure that local decision makers do not delay evacuee return due to myth-influenced fears of looting, state and local governments should amend their emergency plans to eliminate the potential for looting as one of the enumerated criteria for determining the tim-

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<sup>242</sup> See, e.g., *Health Concerns Associated with Mold in Water-Damaged Homes After Hurricanes Katrina and Rita—New Orleans Area, Louisiana, October 2005*, 55 CENTER FOR DISEASE CONTROL, MORBIDITY & MORTALITY WKLY. REP. 41–44 (2006), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5502a6.htm>.

<sup>243</sup> See Amy Hodson Thompson, *Cogito Conversation: Nick Ashley, Studying Contaminated Homes After a Hurricane*, COGITO.ORG (Mar. 25, 2009), <http://www.cogito.org/interviews/InterviewsDetail.aspx?ContentID=17654>.

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

ing of evacuee return. To more fully counter the detrimental effects of the myth, legislators could amend statutory grants of power controlling evacuation and ingress and egress from the disaster area, as well as the concomitant emergency-response plans, to prohibit the relevant decision maker from considering the potential for looting when deciding when to allow evacuees to return. Either approach would serve an educational purpose by focusing the decision maker's mind on the rejection of the disaster myth. Moreover, even though decision makers could attempt to subvert the statutory objective by articulating other permissible motivations (such as other public safety concerns) to disguise the true "looting" motivation for return delays, the restriction would still have the salutary effect of discouraging officials from publicly relying on and likely exaggerating the likelihood of looting as a basis for their decision making. Channeling the public discourse away from the possibility of looting will help counter the perpetuation of the disaster myth itself and will decrease the "availability" of looting as a disaster risk.

Curfews are another restriction on movement that officials often impose after natural disasters based on their belief in the looting and violence myth. Many state emergency-management laws authorize the governor, local officials, or both to impose a curfew during a state of emergency or state of disaster without much, if any, legal constraint.<sup>248</sup> Indeed, officials often impose curfews, which prevent residents from being outside or traveling after a certain hour, in anticipation of a disaster, such as when a hurricane is predicted to

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<sup>248</sup> See, e.g., ALA. CODE § 31-9-10(b)(5)b (LexisNexis Supp. 2010) (granting local authorities power "[t]o impose a public safety curfew for its inhabitants"); ARIZ. REV. STAT. ANN. § 26-311.B.1 (2000) (granting local authorities power to impose curfews during an emergency or local emergency "to preserve the peace and order" of the locality); CAL. GOV'T CODE § 8634 (West 2005) (authorizing local officials during a local emergency to "promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety"); DEL. CODE ANN. tit., 20 § 3116(b)(8) (2005) (granting the governor the power during an emergency or disaster to "[e]stablish curfews"); D.C. CODE ANN. § 7-2304(b)(7) (2009) (authorizing the mayor, in an emergency to control business hours and institute a curfew when "any public emergency requires" him or her to do so); IOWA CODE ANN. §§ 29C.2.4, 29C.3.4 (West 2010) (authorizing the governor to declare a state of public disorder emergency, in case of, for example, insurrection, rioting, looting, and persistent civil disobedience, and granting the governor public-disorder-emergency powers to impose curfews and prohibit certain public gatherings); KY. REV. STAT. ANN. § 39A.100(1)(g) (West 2006 & Supp. 2010) (granting the governor power during a declared state of emergency "[t]o declare curfews and establish their limits"); *id.* § 39A.100(2)(b), (c) (granting mayors and other local chief executive officers power, subject to the governor's orders, to exclude people from the scene of the emergency and declare curfews); S.C. CODE ANN. § 25-1-440(a)(9) (Supp. 2009) (giving the governor power to "authorize, by executive order, a party to exceed the terms of a curfew").

strike,<sup>249</sup> and those curfews may last throughout the declared emergency or disaster. Public officials,<sup>250</sup> as well as state and local disaster plans,<sup>251</sup> often cite the potential for looting as one reason for imposing a curfew.

As with delaying evacuee return, there may be valid safety reasons for local officials to impose curfews in disaster areas, including difficulty in navigating debris-strewn streets in the dark.<sup>252</sup> However, limiting disaster survivors' opportunities to interact with their neighbors and communities may have detrimental effects. For example, isolating survivors deprives them of important support systems needed to mitigate short- and long-term impacts on mental health.<sup>253</sup> Because other means of communication may be limited (particularly if phone lines and cell towers are down), gathering with neighbors after the day's clean-up work is done may be the only potential interaction that survivors have. In addition, imposing curfews may increase the possibility of theft, as empty streets may be more inviting to would-be thieves.<sup>254</sup> Accordingly, localities should amend their laws to prohibit

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<sup>249</sup> See Dane Schiller, Kevin Moran & Mike Tolson, *Flooding Rampant as Powerful Ike Continues Approach: Rescues Reported on Bolivar Peninsula; Harris Officials Plead for Evacuations*, HOUS. CHRON. (Sept. 12, 2008), available at <http://www.chron.com/disp/story.mpl/front/5995957.html> (describing curfews imposed in Galveston and Harris Counties as Hurricane Ike approached in September 2008).

<sup>250</sup> See, e.g., *id.* ("Houston Police Chief Harold Hurtt and Harris County Sheriff Tommy Thomas said they would be strictly enforcing [Hurricane Ike] curfews to protect evacuees' homes.")

<sup>251</sup> See, e.g., VA. PLAN, *supra* note 239, app. at 137 (Annex C: "Emergency Relief and Reentry") ("Localities may initiate curfews as a crime prevention measure depending on the intensity of the disaster and the level of damage sustained. The decision to implement a curfew and the duration of such rests with the local governing body."); Horry, S.C. PLAN, *supra* note 239, app. at 9 (Annex 7-3) ("Depending on the intensity of the disaster and the level of damage caused, the County and municipalities may institute curfews and other crime prevention and anti-looting measures.")

<sup>252</sup> See John Shovelan, *Week-Long Curfew in Ike-Devastated Houston*, ABC NEWS (Austl. Broad. Corp.) (Sept. 15, 2008), <http://www.abc.net.au/news/stories/2008/09/15/2364188.htm> (describing the dangers of downed power-lines and debris-filled streets that prompted the weeklong curfew decision).

<sup>253</sup> Cf. SOLNIT, *supra* note 15, at 5 (recounting descriptions of a San Francisco neighborhood's reaction to the 1989 Loma Prieta earthquake that focused on individuals from all backgrounds gathering together in "candlelit bars that became community centers"); Richard Morin & Lisa Rein, *Some of the Uprooted Won't Go Home Again*, WASH. POST, Sept. 16, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/15/AR2005091502010.html> (reporting that eight in ten Katrina evacuees in Texas were missing the "vital support networks of relatives and friends" that aided many other storm refugees).

<sup>254</sup> See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 31-35 (1961) (explaining that "thinning out a city" by limiting the number of people on the streets weakens the "intricate, almost unconscious, network of voluntary controls and standards" that keep people from committing crime); see also Brian Christens & Paul W. Speer, *Predicting Violent Crime Using Urban and Suburban Densities*, 14 BEHAV. & SOC. ISSUES 113, 124-26 (2005) (finding empirical support for the theories of Jane Jacobs that higher population densities deter crime).

the imposition of a postdisaster curfew based on an unsubstantiated fear of looting.

## B. Reflecting and Perpetuating the Myth: The Passage of Looting Laws

Belief in the disaster myth of looting and violence may spur legislation that serves little purpose, distracts from other disaster legislative priorities, and perpetuates the mythology itself. The most prominent examples of such legislation are looting laws.<sup>255</sup>

Widespread adherence to disaster mythology has caused many states, including some of the nation's most disaster prone, to pass laws that address looting during and after natural disasters. These laws are premised on the belief that looting will be prevalent during natural disasters, just as it is during civil disturbances. Eight states (California, Delaware, Hawaii, Illinois, Louisiana, Mississippi, North Carolina, and South Carolina) currently have laws that create a distinct offense criminalizing looting by civilians in the wake of natural disasters.<sup>256</sup> The essence of the crime of looting, as defined in these statutes, is committing burglary or theft in circumstances in which normal security measures are absent because of disaster conditions.<sup>257</sup> Another six

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<sup>255</sup> Another possible example of legislation that reflects and perpetuates the disaster mythology of antisocial behavior is price-gouging legislation. Most disaster sociologists believe that price gouging in the aftermath of natural disasters is relatively rare and that when it does exist, it is usually the work of outsiders who converge on the affected area after a disaster occurs. See FISCHER, *supra* note 14, at 51. Testing this claim is difficult as there is no agreed-upon definition of price gouging. See Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 Ky. L.J. 535, 536 n.7 (2005). Yet, many states have enacted price-gouging laws, often in response to particular natural disasters. See *id.* at 541-42.

<sup>256</sup> See CAL. PENAL CODE § 463 (West 2010); DEL. CODE ANN. tit. 20, § 3128 (2005); HAW. REV. STAT. ANN. § 708-817 to -818 (2007); 720 ILL. COMP. STAT. ANN. 5/25-4 (West 2010); LA. REV. STAT. ANN. § 14:62.5 (2007 & Supp. 2011); MISS. CODE ANN. § 97-17-65 (2006); N.C. GEN. STAT. § 14-288.6 (2009); S.C. CODE ANN. § 16-7-10 (2003 & Supp. 2009). Twenty-seven states and Guam also have looting prohibitions that apply to National Guard troops. See Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1141 (2007). Tennessee used to have a looting statute, TENN. CODE ANN. § 39-6-324, but it repealed the law in 1989 "as part of a larger statutory revision." See Green, *supra*, at 1140 n.34.

<sup>257</sup> See Green, *supra* note 256, at 1142. Delaware defines looting slightly differently, as it does not specifically require the absence of normal security measures but focuses instead on damage to or destruction of property rather than theft per se. DEL. CODE ANN. tit. 20, § 3128 (2007) (providing in a section entitled, in part, "Destruction of property, looting or injury of persons during state of emergency," that "[d]uring a state of emergency, whoever maliciously destroys or damages any real or personal property or maliciously injures another shall be guilty of a felony"). It also couples the prohibition on damaging property during a state of emergency with an emergency-specific prohibition on injuring people. See *id.* § 3128(a).

states (Iowa, Minnesota, Oregon, Pennsylvania, Texas, and Wisconsin) have a penalty enhancement for theft that occurs during a disaster.<sup>258</sup>

In three states—California, Louisiana, and Hawaii—contemporaneous natural disasters appear to have prompted laws creating distinct crimes for civil looting. The oldest of these three laws, the California looting statute, came about in response to the magnitude 6.9 Loma Prieta earthquake, which rocked the San Francisco Bay Area on October 18, 1989.<sup>259</sup> In the immediate aftermath of the quake in a special legislative session called to address the emergency, California Assem-

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<sup>258</sup> See IOWA CODE ANN. § 714.2.1 (West 2003) (defining as a class “C” felony, equivalent to theft in excess of \$10,000 in value, “theft of property . . . from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle”); MINN. STAT. ANN. § 609.52(3)(3)(d)(iii) (2009) (providing enhanced penalty for theft of property or services of not more than \$1,000 when “the property is taken from a burning, abandoned, or vacant building or upon its removal therefrom, or from an area of destruction caused by civil disaster, riot, bombing, or the proximity of battle”); OR. REV. STAT. § 164.055 (2009) (defining as first-degree theft among other things “theft committed during a riot, fire, explosion, catastrophe or other emergency in an area affected by the riot, fire, explosion, catastrophe or other emergency”); 18 PA. CONS. STAT. ANN. § 3903(a)(1), (b) (West Supp. 2010) (providing that certain types of theft, including those that would otherwise be misdemeanors, are second-degree felonies if “committed during a manmade disaster, a natural disaster or a war-caused disaster”); TEX. PENAL CODE ANN. § 12.50 (West 2003 & Supp. 2009) (providing enhanced penalties for assault, robbery, burglary, and theft when committed during a “state of disaster” declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 (2006), or by the governor or “the presiding officer of the governing body of a political subdivision” under the state’s emergency management law); WIS. STAT. ANN. §§ 943.20(3)(bm), 943.20(3)(d)(3), 943.20(3)(d)(4) (West 2005) (making theft “from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle” or theft of property that was removed from a building because of “physical disaster, riot, bombing or the proximity of battle” a Class “H” felony, which corresponds to stealing property worth between \$5,000 and \$10,000 dollars). It is not entirely clear that the Minnesota provision covers natural disasters because the Minnesota Code does not specifically define “civil disaster” and the phrase often refers to disasters caused by hostile enemy action. See MINN. STAT. ANN. § 609.52(3)(3)(d)(iii) (pairing “civil disaster” with “bombing” and “proximity of battle” as causes of property destruction). However, in 1953 the Minnesota Legislature expanded the code’s definition of “civil defense” to include response to “fire, flood, earthquake, or other natural causes,” 1953 Minn. Sess. Law Serv. 1052 (West), so it likely intended “civil disaster” to include natural disasters, as well. In addition to Hawaii’s two distinct looting offenses (called “burglary of a dwelling during a civil defense emergency or disaster relief period,” HAW. REV. STAT. ANN. § 708–817 (LexisNexis 2007) and “burglary of a building during a civil defense emergency or disaster relief period,” *id.* § 708–818, Hawaii law also contains a sentencing enhancement for both theft (of property or services worth more than \$300) and robbery that takes place “during the time of a civil defense emergency proclaimed by the governor pursuant to chapter 128, within the area covered by the civil defense emergency or during the period of disaster relief under chapter 127.” *Id.* § 708–830.5 (theft); *id.* § 708–840 (robbery). The Pennsylvania statute includes sentencing enhancements for simple theft, receipt of stolen property, unauthorized use of motor vehicles, and retail theft perpetrated during a manmade, natural or war-caused disaster. See 18 PA. CONS. STAT. ANN. § 3903(a)(1) (West Supp. 2010).

<sup>259</sup> See *Assembly OKs Bill on Looting After Disasters*, S.F. CHRON., Feb. 2, 1990, available at Westlaw, 1990 WLNR 2176801.

blymen Bill Filante introduced a bill to create a new crime of “looting” under the California Penal Code.<sup>260</sup>

Although Assemblyman Filante acknowledged that no significant looting had occurred in the Bay Area in the aftermath of the Loma Prieta earthquake,<sup>261</sup> he nevertheless asserted that “[t]he potential for looting during a sudden disaster is great.”<sup>262</sup> In making his case to the press, Assemblyman Filante stated that the bill’s “biggest virtue is [that] it’s a deterrent, a preventative . . . . We’ve had aftershocks and I’m just scared.”<sup>263</sup> The California District Attorneys Association, which supported the bill, likewise agreed that the Bay Area had been lucky to avoid looting after Loma Prieta and should not count on being so fortunate in the future: “While we understand that little looting or crime attributable to the earthquake occurred in the bay area during the recent emergency, the potential for this type of activity is great.”<sup>264</sup>

The Louisiana statute has a more sparse legislative history, but the timing of its passage in 1993 suggests that it was prompted by Hurricane Andrew in 1992, which was one of only three Category 5 hurricanes to make landfall in the United States during the twentieth century. In the Louisiana House Committee on Administration of Criminal Justice, Representative Donald Ray Kennard, who presented the bill, asserted that “after Hurricane Andrew, looters rented U-Haul trucks to rob Louisiana homes and businesses.”<sup>265</sup>

Reports of looting and crime, including those after Hurricane Katrina, also motivated Hawaii’s 2006 looting law.<sup>266</sup> The bill that created the offense asserted that “[t]hroughout history, victims of emergencies or disasters have often become victimized a second time by opportunists who engage in civil unrest, looting, and other crimes. Most recently, the world had a front-row seat to wide spread criminal activity and looting following Hurricane Katrina.”<sup>267</sup> The bill further

<sup>260</sup> See *id.* (“[T]he bill originated in the special session called last November in the wake of the quake . . .”).

<sup>261</sup> Letter from Assemblyman Bill Filante to Governor George Deukmejian (Aug. 31, 1990) (on file with author) [hereinafter Filante Letter] (noting that it was “fortunate[ ]” that looting did not occur after the quake).

<sup>262</sup> *Id.*

<sup>263</sup> Rebecca LaVally, *Filante’s Looting Bill Put on Hold*, MARIN INDEP. J., Nov. 5, 1989, at B5.

<sup>264</sup> Letter to Assemblyman Bill Filante from Kathryn Canlis, Exec. Dir., Cal. Dist. Attorneys Ass’n (Apr. 27, 1990) (on file with author).

<sup>265</sup> H. COMM. ON ADMIN. OF CRIMINAL JUSTICE, MINUTES OF MEETING: 1993 REGULAR SESSION, APRIL 23, 1993, at 14 (La. 1993). Louisiana’s looting law was amended shortly before Katrina, in 2005, to increase penalties for looting by imposing a three-year minimum sentence for looting during a declared state of emergency. See 2005 La. Sess. Law Serv. 208 § 1 (West) (amending LA. REV. STAT. § 14:62.5(c) (2007)).

<sup>266</sup> HAW. REV. STAT. ANN. § 708-817 to 18 (LexisNexis 2007).

<sup>267</sup> Act 116, sec. 1, 2006 Haw. Sess. Laws 330.

stated that “if strong measures to control law and order are not in place before a disaster or emergency, civil unrest and looting and other crimes are likely to increase after a disaster or emergency.”<sup>268</sup>

The other five extant statutes that define looting as a separate offense—those of Delaware, Illinois, Mississippi, North Carolina, and South Carolina—were apparently enacted in response to race riots in the late 1960s.<sup>269</sup> Despite the obvious focus on civil disturbances, each of these five looting laws covers natural disasters and makes no distinction between looting during natural disasters and looting during civil unrest.<sup>270</sup> Although the effect of disaster mythology on these statutes is perhaps less obvious, the marriage of civil unrest and natural disaster in each of these statutes—and, indeed, the very inclusion of natural disasters in looting statutes passed apparently in response to civil unrest alone—suggests that the legislators largely equated natural disasters with civil unrest in terms of their likelihood to produce looting. This failure to distinguish between natural disasters and civil disturbances is a manifestation of disaster mythology.

The legislative motivations for passing most of the six looting-enhancement statutes, which impose a penalty enhancement for theft during disaster rather than create a distinct offense, are less clear.<sup>271</sup>

<sup>268</sup> *Id.*

<sup>269</sup> See Green, *supra* note 256, at 1140 n.34. For example, Delaware’s statute was passed on August 4, 1967, during a summer in which race riots swept Detroit, Newark, and numerous other American cities. See JIM CALLAN, *AMERICA IN THE 1960S*, at 80 (2006). Likewise, the South Carolina statute was passed on May 22, 1968, less than two months after the assassination of Martin Luther King, Jr. sparked riots in more than sixty American cities. See *The Martin Luther King Assassination*, MUSEUM BROADCAST COMM., <http://www.museum.tv/archives/etv/K/htmlK/kingmartin/kingmartin.htm> (last visited Apr. 6, 2011).

<sup>270</sup> See DEL. CODE ANN. tit. 20, § 3102(1)–(2), (8) (2005) (criminalizing destruction or damage to property during a state of “emergency,” which includes both natural and man-made occurrences that “require [ ] efforts and capabilities to save lives or protect property, public health and safety”); 720 ILL. STAT. ANN. 5/25-4(a) (West 2010) (prohibiting entering the premises of another and obtaining property when “normal security of property is not present by virtue of a hurricane, fire, or vis major of any kind or by virtue of a riot, mob, or other human agency”); MISS. CODE ANN. § 97-17-65(1) (2006) (defining looting as knowing entry “without authority of law” of a home or dwelling under the same circumstances in the Illinois law); N.C. GEN. STAT. ANN. § 14-288.6(a) (West 2009) (prohibiting entry of a premises “when the usual security of property is not effective due to the occurrence or aftermath of riot, insurrection, invasion, storm, fire, explosion, flood, collapse, or other disaster or calamity”); S.C. CODE ANN. § 16-7-10(2)(a)–(c) (2003 & Supp. 2009) (prohibiting entry of another’s property “without lawful authority and with criminal intent,” damaging property, or taking possession of another’s property during a “state of emergency” proclaimed by the governor).

<sup>271</sup> A number of the enhancement statutes originated as separate offenses for larceny from a building that was on fire and were expanded later to include broader societal disasters. For example, the Wisconsin looting penalty enhancement statute, WIS. STAT. ANN. § 943.20(3)(a)(3)–(4), began in 1943 as a separate offense for stealing from a building that was on fire or a surrounding building. WIS. STAT. § 343.16 (1943). In 1949, the Wisconsin Legislature retitled the offense “looting” and expanded the offense to include stealing during “conditions arising by reason of war, conflagration, flood, blizzard, catastrophe,

Nevertheless, the most recent of the looting-enhancement statutes, passed by Texas in 2009, was clearly motivated by reports of looting in abandoned and evacuated areas in the wake of Hurricane Ike.<sup>272</sup> Proponents contended that the enhancements would “deter potential criminal behavior during a hurricane or other disaster” and would “provide peace of mind to residents and business owners” who might otherwise fail to “evacuate during hurricanes out of fear that their homes or businesses will be broken into or looted.”<sup>273</sup> Likewise, the trigger for the Pennsylvania penalty-enhancement statute, introduced in 1989 and passed in 1990,<sup>274</sup> may have been Hurricane Hugo.<sup>275</sup>

Even in states that have not enacted looting statutes, calls to implement looting laws are common in the aftermath of natural disasters. In 2005, for example, Florida’s legislature passed a bill that would have created the crime of looting.<sup>276</sup> News sources reported that the bill was “prompted by Florida’s record-setting 2004 hurricane season.”<sup>277</sup> Supporters of the bill noted that, in the aftermath of the

disaster, riot or civil commotion.” Ch. 234, sec. 2, 1949 Wis. Sess. Laws 215. In 1953, the looting offense became a penalty enhancement for stealing, ch. 623 § 343.20(3)(d), 1953 Wis. Sess. Laws 671, which was later retitled theft, ch. 696, § 943.20(3)(d)(3), 1955 Wis. Sess. Laws 992 (codified as amended at Wis. STAT. ANN. § 943.20(3)(d)(3)–(4) (2005 & Supp. 2010)). The Iowa and Minnesota looting enhancement statutes also evolved from larceny-during-fire offenses. See IOWA CODE § 709.6 (1977) (criminalizing “stealing from any building on fire” or “stealing any property removed in consequence of an alarm caused by fire”); MINN. STAT. § 622.19 (1945) (defining the offense of “larceny at fires”); ch. 1245, § 1402, 1976 Iowa Acts 564 (defining first-degree theft to include theft “from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle, or the theft of property which has been removed from a building because of a physical disaster, riot, bombing, or the proximity of battle”); ch. 753, § 609.52(3)(c), 1963 Minn. Laws 1218 (providing sentencing enhancement for theft of property “taken from a burning building or upon its removal therefrom, or from an area of destruction caused by civil disaster, riot, bombing, or the proximity of battle”). None of these statutes have legislative history explaining the rationale either for the original offense or for the transformation into the theft penalty enhancement.

<sup>272</sup> RES. CTR., SB 359 BILL ANALYSIS (Tex. 2009) (“After Hurricane Ike, local officials brought to light the problem of looting in abandoned or evacuated areas.”).

<sup>273</sup> H. RES. ORG., SB 359 H. BILL ANALYSIS (Tex. 2009); see also *id.* (“Curfews are not enough to deter burglary or theft after a hurricane, because many looters and burglars are discovered after set curfew times.”).

<sup>274</sup> 1990 Pa. Laws 154.

<sup>275</sup> There is no legislative history accompanying the Act, but Pennsylvania suffered some damage in 1989 from Hurricane Hugo (which produced the widely publicized looting in St. Croix). See Michael de Courcy Hinds, *Insurance Adjusters Finding Astronomical Property Loss*, N.Y. TIMES, Sept. 24, 1989, at 44 (reporting insurance claims from Hurricane Hugo, including claims from Pennsylvania). Nineteen eighty-nine was also the one-hundred-year anniversary of the 1889 collapse of the South Fork Dam near Johnstown, Pennsylvania, one of the most deadly “natural” disasters to ever strike the United States. See Peter Mattiace, *Recalling the Johnstown Flood After 100 Years*, L.A. TIMES, May 21, 1989, at 2. The collapse claimed 2,209 lives and spurred numerous false media reports of looting. See *id.*

<sup>276</sup> FLA. H.B. 207 (2005).

<sup>277</sup> Attorney General Crist Hails Sen. Aronberg for Passing of Anti-Looting Bill, U.S. FED. NEWS, May 2, 2005, available at Westlaw, 2005 WLNR 7026493.



2004 hurricanes, Florida homes and business were “left vulnerable to intruders” and that “countless reports of looting” had been made.<sup>278</sup> They also suggested a need to send “a strong message” to those who would steal from disaster victims and to increase penalties for theft during emergencies, because such theft is particularly offensive, as it takes advantage of the vulnerable.<sup>279</sup> The bill was ultimately vetoed by then-Governor Jeb Bush, who described it as “overly broad.”<sup>280</sup>

Even though the foregoing review suggests that most looting laws exist at least in part because legislators believed the disaster mythology—that looting after natural disasters is a pervasive, serious problem, indistinguishable from civil disorder such as riots—looting laws nonetheless might serve important functions that would justify their continued existence or passage in other states. One possible justification is that it may be worthwhile to keep looting laws on the books, even if they only come into play in those unusual situations (perhaps like Katrina), when some combination of circumstances (catastrophic disaster, lack of communication about when help will arrive, or preexisting race and class divisions) makes something beyond sporadic looting more probable.<sup>281</sup> Having enhanced penalties for theft during disasters on the books arguably has little downside and may deter some looters in those unusual circumstances that might otherwise produce widespread looting.<sup>282</sup> Moreover, sociologists do not contend that no looting occurs after natural disasters; rather, they argue that it is typically an outlier behavior.<sup>283</sup> Looting laws thus may have

<sup>278</sup> *Id.* (comments by Rep. Benson) (internal quotation marks omitted).

<sup>279</sup> *See id.*

<sup>280</sup> Letter from Jeb Bush, Fla. Gov. to Glenda E. Hood, Fla. Sec’y of State (June 2, 2005), in J. HOUSE OF REPRESENTATIVES 8–9 (Spec. Sess. Dec. 5, 2005). The rush to enact looting laws in the immediate aftermath of natural disasters is not limited to the United States. After the devastating earthquake in L’Aquila, Italy in April 2006, one of the first official reactions was the announcement that a new looting law would immediately be adopted to impose harsher penalties on looters. Richard Owen, *Italian Government Warns of ‘Severe Penalties’ for L’Aquila Looters*, TIMES ONLINE (LONDON) (Apr. 9, 2009), <http://www.timesonline.co.uk/tol/news/world/europe/article6065171.ece>.

<sup>281</sup> *See supra* note 72.

<sup>282</sup> Some commentators have suggested, however, that an individual’s decision to conform to the law has less to do with weighing penalties and more to do with notions of reciprocity—that is, assessments about whether others in the community are adhering to the same rules. *See* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 75–77 (2003). To the extent that is true, publicizing looting laws as a necessary solution to widespread abuses during disasters may in fact increase the amount of looting that occurs by suggesting to potential looters that other members of the community are not adhering to the rules.

<sup>283</sup> *See* FISCHER, *supra* note 14, at 69 (noting that he “has never suggested that looting never occurs or that the planner should never anticipate its possibility,” but that in a world of limited resources we should focus on problems most likely to occur, not those that occur infrequently). Indeed, the passage of some looting laws may have come about in part because of looting that was actually reported to police in the aftermath of disasters rather than just more general, exaggerated fears of looting. *See Hearings of Texas Senate Subcommit-*

some application even in smaller disasters when only a small amount of looting occurs.

A second justification, related to the first, is that if the public subscribes to the myth that looting is common after disasters, then looting laws may play a role in reassuring worried citizens who are asked to evacuate that the law will protect their property to the greatest possible extent. To the extent that fear of looting motivates some homeowners to risk their lives by disobeying evacuation orders,<sup>284</sup> looting laws may mitigate some of that fear and increase evacuation-order-compliance rates.

A third possible justification is that looting laws are necessary to deal with opportunistic crime perpetrated by those who are not part of the disaster “therapeutic community,”<sup>285</sup> either because they are outsiders who converge on the disaster area or because sufficient time has elapsed since the disaster that the therapeutic community has begun to disintegrate.<sup>286</sup> Some of the reported looting cases prosecuted in Louisiana after Hurricane Katrina might fit this mold. The catastrophic scope of the destruction in New Orleans resulted both in an influx of labor into the area to repair homes and businesses<sup>287</sup> and in a large number of structures that were vacant (and lacked normal security) for extended periods of time. Thus, it is perhaps not surprising that one of the reported prosecutions was for looting by an itinerant construction worker some five months after Katrina, while two other prosecutions were for looting that occurred more than seven months after Katrina.<sup>288</sup> It is far from clear, however, that ei-

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*tee on Flooding and Evacuation* (Mar. 4, 2009), <http://www.senate.state.tx.us/avarchive/ramav.php?ram=0003882> (recounting that Hurricane Ike resulted in increased burglary and theft, including theft of generators from AT&T, and thus necessitated harsher penalties for looting).

<sup>284</sup> See FISCHER, *supra* note 14, at 56 (explaining that fear of looting discourages residents from complying with evacuation warnings).

<sup>285</sup> See *supra* note 26 and accompanying text.

<sup>286</sup> See, e.g., KATHLEEN J. TIERNEY, MICHAEL K. LINDELL & RONALD W. PERRY, *FACING THE UNEXPECTED: DISASTER PREPAREDNESS AND RESPONSE IN THE UNITED STATES* 151 (2001) (“[H]eightedened community consensus is generally characteristic only of the emergency response phase during and immediately following impact; conflict is common both before disaster strikes and during the post-disaster recovery period.”).

<sup>287</sup> See Katharine M. Donato et al., *Reconstructing New Orleans After Katrina: The Emergence of an Immigrant Labor Market*, in *THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE*, *supra* note 8, at 222–23.

<sup>288</sup> See, e.g., *State v. Jones*, 7 So. 3d 59, 60–61 (La. Ct. App. 2009) (affirming defendant’s conviction for looting a private residence in New Orleans in April 2006); *State v. Collier*, 987 So. 2d 869, 870–71 (La. Ct. App. 2008) (affirming defendant’s conviction for attempted looting of a home (rather than burglary) by entry through a sliding glass door that could no longer be locked because of flood damage on the basis of State’s argument that police security was still not back to normal ten months after Katrina); *State v. Lopez*, 971 So. 2d 416, 418 (La. Ct. App. 2007) (affirming conviction of “itinerant construction workers who came to New Orleans after Hurricane Katrina” and looted a Katrina-damaged private residence on February 6, 2006).

ther the language or intent of most looting laws extends to theft that occurs months after the disaster itself.

Another possible justification for such laws is that, even if widespread looting generally does not occur, legislators may want to express a strong community norm that looting during emergencies is verboten (and to provide enhanced penalties for any theft that does occur), as such theft is perceived as a particularly offensive form of preying on the vulnerable.<sup>289</sup> Of course, this characterization of looting assumes opportunistic, antisocial looting rather than requisitioning behavior.

Despite these potential rationales, passing looting laws—particularly as a reaction to recent disasters—is a misallocation of legislative and community resources that also perpetuates disaster mythology. Focusing on passing looting legislation diverts precious legislative attention and community momentum away from more important and effective disaster legislation and response. Moreover, the passage of looting laws perpetuates the overemphasis on security that distorts emergency-response priorities and triggers restrictions on freedom of movement.<sup>290</sup> Indeed, looting laws may even encourage vigilantism and overly aggressive law enforcement both by perpetuating the belief that looting is likely to be a serious problem and by entrenching the inviolability and primacy of private property rights during disasters.<sup>291</sup>

The immediate aftermath of a disaster presents a unique opportunity for communities and their elected officials to implement effective disaster-mitigation measures that either decrease the likelihood of future disasters or reduce the likely costs of those disasters. After a disaster, much infrastructure is already destroyed or otherwise in need of repair, so mitigation measures often can be incorporated at little or no additional cost. Additionally, some of the most important and far-reaching mitigation measures involve relocating infrastructure, a task that is usually fiscally and politically impossible when infrastructure is intact and the risk of disasters seems remote.<sup>292</sup> Moreover, disaster mitigation measures are politically unpalatable in ordinary times because the costs of mitigation are certain and immediate, whereas benefits may not accrue within the political life cycle of any given

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<sup>289</sup> There is a serious question whether many of the existing looting laws do, in fact, provide enhanced penalties for looting, as opposed to simple theft or burglary. See Roger D. Scott, *Looting: A Proposal to Enhance the Sanction for Aggravated Property Crime*, 11 J.L. & POL. 129, 162–63 (1995).

<sup>290</sup> See *supra* Part III.A.1(a)(3).

<sup>291</sup> See *supra* note 82 and accompanying text.

<sup>292</sup> Cf. FARBER ET AL., *supra* note 102, at 38 (quoting environmental planning expert Dr. Robert Twiss for the proposition that “once an area has been developed for housing, it is impossible to reclaim the area for flood control”).

politician.<sup>293</sup> Having just witnessed the destruction natural disasters can inflict, however, communities are more likely to find mitigation measures palatable, or even compelling. The first significant federal disaster mitigation effort, the Hazard Mitigation Grant Program in the Stafford Act, reflects these insights—making federal mitigation funds available to communities that have just endured a federally declared disaster.<sup>294</sup>

The window of opportunity for implementing mitigation measures after a disaster is finite and perhaps quite small.<sup>295</sup> As sociologist Henry Fischer III explains:

The *decay curve* works to reduce the likelihood of a community adopting mitigation measures. Over time, the effects of the event are no longer as salient and individuals become less concerned with the possibility of a disaster striking their community again. While “disaster events do open up the constraint structures that typically restrain the adoption of mitigative adjustments, such effects are temporary.”<sup>296</sup>

Focusing on looting laws in the immediate aftermath of disasters, therefore, distracts from more important mitigation measures and squanders disaster-produced civic will and political capital.

Thus, the limited resources of state legislators and communities should be focused on adopting mitigation measures to prevent future losses rather than diverted to looting laws, which usually respond only to outlier behavior. In contrast to mitigation measures, which have concrete, measurable benefits, looting laws are largely symbolic and have limited practical import, even when a substantial amount of looting behavior is observed. Prior to Katrina, most commentators found little evidence of prosecutions for looting in the aftermath of natural disasters.<sup>297</sup> This author found only a handful of reported cases of looting prosecutions in the aftermath of pre-Katrina natural disasters,

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<sup>293</sup> DENNIS S. MILETI, *DISASTERS BY DESIGN* 160 (1999).

<sup>294</sup> See 42 U.S.C. § 5170(c) (2006).

<sup>295</sup> Some recent empirical work suggests that the mitigation window is short indeed, even after a catastrophic disaster like Katrina. See Andrew Healy & Neil Malhotra, *Citizen Competence and Government Accountability: Voter Responses to Natural Disaster Relief and Preparedness Spending* 30 (June 25, 2009), [myweb.lmu.edu/ahealy/papers/healy\\_prevention\\_070808.pdf](http://myweb.lmu.edu/ahealy/papers/healy_prevention_070808.pdf) (finding that data from New Orleans showing a dramatic decline in the percentage of New Orleanians who ranked flood protection as a top rebuilding concern—from 30% in late 2006 to 2% in mid-2008—suggests that “even an event like Hurricane Katrina is likely to increase the salience of preparedness issues only temporarily”).

<sup>296</sup> FISCHER, *supra* note 14, at 146 (quoting in part THOMAS E. DRABEK, *HUMAN SYSTEM RESPONSES TO DISASTER: AN INVENTORY OF SOCIOLOGICAL FINDINGS* 366 (1986)).

<sup>297</sup> See Green, *supra* note 256, at 1141–42 & n.39. Of course, because most criminal charges result in a plea bargain rather than a trial, the actual number of persons charged for looting behavior may be significantly higher.

only one of which was actually prosecuted under a separate looting offense.<sup>298</sup>

The largest pre-Katrina cluster of reported prosecutions for looting-type crimes appears to have occurred in the aftermath of the July 1977 blackout in New York City, a man-made disaster that seems to have had more in common with race-riot looting in the late 1960s and early 1970s than with a typical natural disaster.<sup>299</sup> Because New York does not have a looting law, these cases were necessarily dealt with and prosecuted under other property-crime statutes.<sup>300</sup>

Even in states with looting laws, many crimes described as looting by court opinions are charged as burglary, malicious damage to property, or some other property crime.<sup>301</sup> Prosecutors may prosecute looting behavior as another property offense because of their lack of familiarity with the looting law or because the looting offense requires proof of additional elements (such as lack of normal security of property or the existence of a declared emergency or disaster) beyond those required for the underlying property crimes.<sup>302</sup>

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<sup>298</sup> See *State v. Redman*, No. 2007 KA 1668, 2008 WL 2065943, at \*2 (La. Ct. App. May 2, 2008) (defendant convicted of four counts of looting and sentenced to twelve years of hard labor for burglarizing homes on September 16, 2004, that had been “evacuated during the course of a storm”); *Commonwealth v. Cooper*, 407 A.2d 456, 457 (Pa. Super. Ct. 1979) (defendant convicted of burglary for looting with codefendants after the Johnston flood of July 1977); *Commonwealth v. Harris*, 409 A.2d 53, 53–54 (Pa. Super. Ct. 1979) (defendant convicted of burglary for looting after Johnstown flood).

<sup>299</sup> See FISCHER, *supra* note 14, at 67 (“[T]he 1977 New York City blackout looting occurred in selective neighborhoods paralleling the conflict pattern of the urban riots during the 1960s.”).

<sup>300</sup> See *People v. Barnes*, 406 N.E.2d 1071, 1072–73 (N.Y. 1980) (burglary conviction for looting during 1977 blackout); *People v. Jones*, 461 N.Y.S.2d 293, 294 (App. Div. 1983) (same); *People v. Gladden*, 420 N.Y.S.2d 739, 740 (App. Div. 1979) (same); *People v. Richardson*, 404 N.Y.S.2d 143 (App. Div. 1978) (reinstating indictment for alleged “looting” during July 1977 blackout); see also *People v. Bneses*, 398 N.Y.S.2d 507, 508 (Sup. Ct. 1977) (noting that defendant was “one of approximately two hundred individuals charged with burglary in the third degree, in connection with alleged looting activity during the blackout of July 13 and 14, 1977”).

<sup>301</sup> For example, Illinois’s looting law was passed in August 1967, yet looting during race riots subsequent to the law’s passage was usually charged as some other property crime. See, e.g., *People v. McCoy*, 279 N.E.2d 417, 418 (Ill. App. Ct. 1972) (looting during April 6, 1968 riots charged as burglary); *People v. Mitchell*, 268 N.E.2d 232, 232 (Ill. App. Ct. 1971) (same); *People v. Robinson*, 278 N.E.2d 137, 137 (Ill. App. Ct. 1971) (same); *People v. Glasgow*, 261 N.E.2d 424, 427 (Ill. App. Ct. 1970) (looting during April 1968 riots charged as burglary over defendant’s untimely objection that he should have been charged with looting); see also *People v. Parks*, 273 N.E.2d 162, 164 (Ill. App. Ct. 1971) (permitting State to charge burglary rather than looting during riot); *People v. Long*, 261 N.E.2d 437, 439 (Ill. App. Ct. 1970) (noting looting laws were not intended to be sole remedy during rioting in reversing trial court’s dismissal of charge for burglary rather than looting).

<sup>302</sup> Scott, *supra* note 289, at 155–57.

In the aftermath of Katrina, there were a number of reported prosecutions for looting.<sup>303</sup> Nevertheless, several instances of looting-type behavior were prosecuted under statutes other than the looting offense.<sup>304</sup> Presumably, the looting behavior that was prosecuted under the specific looting offense also could have been charged as a basic property crime. Property-crime prosecutions may be somewhat less effective than looting prosecutions in deterring future looting be-

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<sup>303</sup> See, e.g., *State v. Alexander*, 983 So. 2d 112, 112 n.1, 113 (La. Ct. App. 2008) (acknowledging that defendant committed attempted looting, but remanding on trial court's erroneous application of Louisiana's habitual offender law); *State v. Cheateam*, 986 So. 2d 738, 739 (La. Ct. App. 2008) (reversing and remanding conviction of looting); *State v. Collier*, 987 So. 2d 869 (La. Ct. App. 2008) (affirming conviction for attempted looting that occurred ten months after Katrina); *State v. Browning*, 956 So. 2d 65, 68, 76 (La. Ct. App. 2007) (affirming defendant's conviction for looting a big screen TV from an audio-video store on September 11, 2005); *State v. Carter*, 976 So. 2d 196, 204 (La. Ct. App. 2007) (affirming conviction and sentencing for looting); *State v. Garst*, 970 So. 2d 1138, 1140 (La. Ct. App. 2007) (noting defendant's arrest for looting); *State v. Harris*, 968 So. 2d 187, 191, 196 (La. Ct. App. 2007) (suggesting in dicta that five-year looting sentence was excessive for defendant convicted of looting hair extensions, alcohol, and cigarettes); *State v. Hines*, 970 So. 2d 1134, 1136, 1138 (La. Ct. App. 2007) (affirming defendant's conviction for looting furniture from a furniture store on September 5, 2005 but remanding sentence for clarification); *State v. Hines*, 970 So. 2d 707, 708 (La. Ct. App. 2007) (vacating defendant's twelve-year sentence for looting furniture because it was imposed pursuant to a plea agreement that was illegally lenient); *State v. Lopez*, 971 So. 2d 416, 418, 420 (La. Ct. App. 2007) (affirming convictions for looting that occurred in February 2006); *State v. Jones*, 970 So. 2d 1143 (La. Ct. App. 2007) (affirming conviction and sentencing for September 2005 looting); *State v. Pearson*, 975 So. 2d 646, 656 (La. Ct. App. 2007) (overturning, on excessiveness grounds, fifteen-year looting sentences given to first-time offenders); *State v. Brister*, 946 So. 2d 258, 261 (La. Ct. App. 2006) (referencing defendant's prior criminal history, including a looting charge that was reduced to attempted theft). A search of the Louisiana State Criminal Trial Court Orders and State Judgments of Conviction database on Westlaw (LA-CRORDERS) for "looting" reveals 108 orders in looting cases, most of them plea bargains (last conducted on Feb. 7, 2011). Most of the sentences reported for the plea bargains are far less than the maximum sentence for both looting and related property crimes. It is difficult to gauge how many other instances of looting-type behavior were charged as other property crimes, as the details and circumstances of the crimes are not available in the electronic databases.

<sup>304</sup> See, e.g., *State v. Spurlock*, 986 So. 2d 89, 91 (La. Ct. App. 2008) (defendant charged with simple burglary for the September 12, 2005 theft of tools out of a shed); *State v. Calloway*, 978 So. 2d 374, 375, 379-80 (La. Ct. App. 2007) (overturning conviction for illegal possession of stolen things having a value greater than \$500 because there was insufficient evidence that defendant knew two vehicles she purchased for \$2,200 were stolen, given the "total chaos" in post-Katrina New Orleans, which included looting, robberies, rapes, fighting, and shortages of food and water), *rev'd*, 1 So. 3d 417, 422-23 (La. 2009) (holding that reasonable juror could have inferred that defendant knew she was in receipt of stolen property from the prevalence of looting in Katrina's aftermath and from the lack of formalities surrounding her purchase of the car in question). Other noncriminal sanctions were also applied to suspected looting. See *River Garden Apartments v. Horton*, 948 So. 2d 396, 398 (La. Ct. App. 2007) (upholding eviction of woman from apartment for possessing "merchandise that appeared to be looted from a nearby Wal-Mart store"); *accord* *River Garden Apartments v. Horton*, 948 So. 2d 399, 402 (La. Ct. App. 2007) (upholding similar eviction of sister).

havior, as the penalties authorized for looting, at least in Louisiana,<sup>305</sup> are higher than those for ordinary property crimes. However, this effect is likely to be minimal given the paucity of prosecutions under any rubric, the likely unfamiliarity of prospective looters with potential penalties, and the fact that looting will usually be sporadic, outlier behavior following natural disasters.

In addition to contributing to misallocation of postdisaster attention, energy, and legislative resources, passage of looting laws may well perpetuate the myth that looting, violence, and general lawlessness are likely to be widespread after natural disasters.<sup>306</sup> Indeed, as the history reflects, passage of such laws typically has been premised on the fear that looting will be a serious, substantial problem after most disasters and on the belief that natural disasters produce civil disorder, much as riots do. When legislators advocate the passage of these laws, they often publicly promote the myth;<sup>307</sup> indeed, the Hawaiian legislature even wrote the myth into the looting bill itself.<sup>308</sup>

Moreover, with the possible exception of Texas's enhancement statute,<sup>309</sup> existing disaster laws make no distinction between antisocial looting (opportunistic criminal behavior preying on the vulnerabilities of other disaster victims) and arguably prosocial looting, or what sociologists describe as appropriating behavior<sup>310</sup> (that is, disaster victims "requisitioning"<sup>311</sup> needed survival supplies that are not otherwise readily available). By failing explicitly to acknowledge the possibility of prosocial looting, looting statutes promote and perpetuate the disaster mythology of widespread looting and antisocial behavior by lumping together all looting behavior and thereby inflating the amount of perceived antisocial behavior.<sup>312</sup> The New Orleans experi-

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<sup>305</sup> Compare LA. REV. STAT. ANN. § 14:62 (2007) (limiting the sentence for "simple burglary" to a fine of no more than \$2,000, or imprisonment with or without hard labor for no more than twelve years, or both), with *id.* § 14:62.5 (allowing for a fine of up to \$10,000, or imprisonment at hard labor up to fifteen years, or both, for those convicted of looting).

<sup>306</sup> Cf. Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 *Nw. U. L. REV.* 1295, 1309 (2003) ("A legal enactment can itself promote availability; if the law responds to the problems associated with hazardous waste dumps or 'hate crimes,' people might well come to see those problems as readily available.").

<sup>307</sup> See, e.g., *supra* notes 261–63 and accompanying text.

<sup>308</sup> See *supra* notes 267–68 and accompanying text.

<sup>309</sup> The Texas looting enhancement specifically states that necessity, as defined elsewhere in the Texas code, is a defense to the enhancement. See TEX. PENAL CODE ANN. § 12.50(d) (West Supp. 2010).

<sup>310</sup> See FISCHER, *supra* note 14, at 66.

<sup>311</sup> See SOLNIT, *supra* note 15, at 39.

<sup>312</sup> Indeed, the California law, CAL. PENAL CODE § 463(c) (West 2010), was designed to take special aim at "petty theft"—theft of less than \$400—even though most requisitioning behavior is likely to fall in this category. See Filante Letter, *supra* note 261 (explaining that the bill increased the penalty for petty theft during emergencies since "it is during these times that homes and businesses are extremely vulnerable due to scare [sic] police resources and power outages").

ence after Katrina is instructive in this regard. After Katrina, a number of individuals received harsh sentences for looting that might arguably be characterized as appropriating behavior.<sup>313</sup> In one such case, the court boldly rejected the defendant's "expressed rationale for the looting, i.e. the need for clean clothes" as "unjustifiable when juxtaposed against the city's need to maintain order, especially during a time of crisis."<sup>314</sup>

The failure of most looting statutes explicitly to consider the possibility of prosocial looting may reflect a number of factors, including the fact that some were drafted with a focus on civil-disorder disasters such as riots, a context in which there is usually no need for requisitioning by citizens to obtain necessary supplies. Another possible explanation is that the disaster mythology leads legislators to assume that antisocial behavior is the norm and therefore that most, if not all, looting behavior is both culpable and morally reprehensible. The disaster mythology may also cause legislators to fear that allowing requisitioning will put a disaster-devastated society on a slippery slope to the total disintegration of societal norms and civil society. Fear of looting contagion, which occurs in looting associated with riots,<sup>315</sup> may thus make legislators reluctant to make any exceptions for appropriating behavior in looting statutes (or at least to articulate such exceptions on the face of the statute rather than relying merely on a general doctrine of justification by necessity).

If states are going to use their limited disaster-response resources to pass looting laws, they would be well-advised to take the opportunity to have a public conversation about what types of requisitioning behavior are acceptable and to write the agreed-upon exceptions into the looting law itself.<sup>316</sup> At least some limited conversation of this type

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<sup>313</sup> See, e.g., *State v. Cheateam*, 986 So. 2d 738, 741–42 (La. Ct. App. 2008) (defendant and codefendants charged with looting backpacks, clothes, and shoes valued at \$368 total from Burlington Coat Factory on September 3, 2005). *But cf.* *State v. Pearson*, 975 So. 2d 646, 649 (La. Ct. App. 2007) (noting police officer's statement that after Katrina there was an "unwritten policy not to arrest people taking survival items or personal hygiene items").

<sup>314</sup> See *State v. Carter*, 976 So. 2d 196, 203–04 (La. Ct. App. 2007). In another case, ultimately reversed by the Louisiana Court of Appeal, the trial court imposed the maximum fifteen-year sentence on three defendants convicted of taking "six cases of beer and four carriers of wine coolers" from a grocery store on September 4, 2005. *Pearson*, 975 So. 2d at 649, 655 (overturning the sentence as excessive). The defendants argued that they should not have received the fifteen-year maximum sentence for looting alcohol, and that the trial court should have considered both their lack of criminal records and the "dire state of the parish in the aftermath of Hurricane Katrina where food, water, and transportation were lacking." *Id.* at 655. The trial judge rejected these arguments, finding that "looting . . . was an awful crime" and declaring, "I think it's important that this Court send a message to the general public that if you're going to loot, don't do it in Jefferson Parish." *Id.* (internal quotation marks omitted).

<sup>315</sup> See Scott, *supra* note 289, at 152.

<sup>316</sup> For my purposes, the exact contours of a requisitioning exception are less important than an acknowledgment in the looting statute that some looting is justified. For



seems to have occurred in conjunction with the 2009 Texas legislation enhancing penalties for theft (and other crimes) during a disaster.<sup>317</sup> States also might want to separately address offenses for looting during civil-disorder disasters (like riots) and looting after natural disasters to make clear that the two are not equivalent.

We would likely do better, in the long run, to experiment with public education campaigns designed to persuade communities that the focus on looting in the aftermath of disasters is misplaced, rather than to continue perpetuating the myth by passing looting laws and citing them as evidence that evacuation is safe because looting patrols, combined with harsh punishments, will deter the many degenerates who are waiting to exploit evacuees.<sup>318</sup> This is particularly so given that the continued perpetuation of the disaster myth tends to distort emergency response and endanger lives.

### C. Institutional Reform: Removing FEMA from DHS

In addition to affecting the substance, interpretation, and implementation of our laws, the disaster mythology of looting and violence

potential factors that could be considered in crafting such an exception, see Green, *supra* note 256, at 1152–61.

<sup>317</sup> See H. RES. ORG., SB 359 H. BILL ANALYSIS, at 2 (Tex. 2009) (“[T]he bill would provide a defense for those who felt they needed to steal water or other necessary supplies in certain cases.”). The statutory reference to necessity was apparently added as a result of an objection, voiced by the ACLU, that the law should account for disaster survivors trying to obtain necessary supplies. See *Hearings Before S. Comm. on Intergovernmental Relations*, 81st Sess. (Tex. Mar. 4, 2009), available at <http://www.senate.state.tx.us/avarchive/ramav.php?ram=00003994> (video).

<sup>318</sup> Sunstein is skeptical of the value of public education in countering emotionally driven (arguably irrational) risk assessments. See CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 125 (2005) (arguing that discussing “low-probability risks tend[s] to heighten public concern” and that the best approach may be to “[c]hange the subject” (emphasis omitted)). Nevertheless, well-designed public information campaigns may be effective tools in countering disaster mythology. Anti-smoking campaigns, for example, have had some effect in decreasing youth smoking rates. See, e.g., Matthew C. Farrelly et al., *Evidence of a Dose–Response Relationship Between “Truth” Antismoking Ads and Youth Smoking Prevalence*, 95 AM. J. PUB. HEALTH 425, 428–30 (2005) (“[D]ata showed a large decline in current youth smoking prevalence overall [ ] for each grade between 1997 and 2002 [and] also indicated that the decline in current smoking prevalence accelerated after the launch of the [anti-smoking] campaign between 2000 and 2002.”); see also Michael P. Vandenbergh, Jack Barkenbus & Jonathan Gilligan, *Individual Carbon Emissions: The Low-Hanging Fruit*, 55 U.C.L.A. L. REV. 1701, 1722 (2008) (“Recent literature reviews have concluded that more than half of the well-designed and funded [public information campaigns aimed at changing behavior to improve the environment] have resulted in significant and positive behavior change . . .”). Additionally, there is likely some truth to Kahan’s contention that emotional risk assessments are value-driven; those kinds of emotional responses can arguably be altered by public information campaigns designed to change the social meaning of particular events, like disasters, in ways that do not threaten cultural identities. See Kahan, *supra* note 101, at 764–65 (arguing that risk education can succeed if it focuses on changing the “social meaning” of the risk and if it “[is] framed in a way that *affirms* rather than denigrates recipients’ cultural identities”).

also affects how we should structure our administrative regimes. In particular, the prevalence and persistence of the disaster mythology of looting and violence—combined with its deleterious effects on disaster response—may give us pause about continuing to house the Federal Emergency Management Agency (FEMA) within the Department of Homeland Security (DHS), an organization tasked primarily with keeping America safe from the deliberate acts of terrorism that spring from the most base and vile elements of human nature. In asking emergency managers to discard disaster mythology, we ask them both to plan for the worst that can happen and, simultaneously, to believe that in the worst of times, the best (rather than the worst) of human nature usually will be manifest. This leap may be even harder to make when emergency managers are embedded in an organization charged with rooting out terrorists and other security threats.

Prior to 2002, FEMA was a cabinet-level agency with direct access to the President.<sup>319</sup> When Congress enacted the Homeland Security Act of 2002,<sup>320</sup> creating DHS in response to the attacks of September 11, 2001, it transformed FEMA into a subordinate component of DHS.<sup>321</sup> The Secretary of DHS then used his broad reorganizational authority to reassign many of FEMA's traditional functions to other DHS directorates.<sup>322</sup> After Katrina, many critics blamed FEMA's anemic response on the subordination of FEMA within an organization devoted primarily to preventing and responding to terrorism.<sup>323</sup> Rejecting calls to return FEMA to its fully independent status, the Post-Katrina Emergency Management Reform Act of 2006<sup>324</sup> did, nonetheless, meet some of these criticisms by elevating FEMA's status within DHS,<sup>325</sup> restoring most of its prior mandates and missions,<sup>326</sup> exempting FEMA from the Secretary's sweeping reorganizational authority,<sup>327</sup> giving FEMA's administrator direct access to the President during emergencies and disasters,<sup>328</sup> and authorizing the President to designate the FEMA administrator as a cabinet member during disasters.<sup>329</sup> Despite these reforms, every new legislative session brings

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<sup>319</sup> See Reorganization Plan No. 3, 43 Fed. Reg. 41,943 (June 19, 1978); Exec. Order No. 12,127, 44 Fed. Reg. 19,367 (Mar. 31, 1979).

<sup>320</sup> Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. §§ 101–557(2006)).

<sup>321</sup> See 6 U.S.C. § 316 (2006).

<sup>322</sup> See HENRY B. HOGUE & KEITH BEA, CONG. RESEARCH SERV., RL33369 FEDERAL EMERGENCY MANAGEMENT AND HOMELAND SECURITY ORGANIZATION: HISTORICAL DEVELOPMENTS AND LEGISLATIVE OPTIONS 20–21 (2006).

<sup>323</sup> See 6 U.S.C. § 111(b)(1); see also *supra* text accompanying notes 303–04.

<sup>324</sup> Pub. L. No. 109-295, 120 Stat. 1355, 1394 (2006) (codified at 6 U.S.C. § 701 (2006)).

<sup>325</sup> See 6 U.S.C. § 316 (2006).

<sup>326</sup> *Id.* § 315.

<sup>327</sup> *Id.* § 316(c)(1).

<sup>328</sup> *Id.* § 313(c)(4).

<sup>329</sup> *Id.* § 313(c)(5)(A).

more calls for returning FEMA to its former cabinet-level status, independent of DHS.<sup>330</sup>

Beyond the typical criticisms leveled at housing FEMA within DHS,<sup>331</sup> the prevalence of the disaster mythology that looting and violence are the norm after disasters (coupled with the detrimental practical consequences of that mythology) may suggest another reason for reestablishing FEMA as a fully independent agency. Given that most of DHS's core missions are focused on terrorism,<sup>332</sup> DHS officials are trained and paid primarily to think about and plan for the worst damage that people can inflict on each other.<sup>333</sup> Doing so necessarily requires indulging a dim view of human nature; indeed, one might say that expecting the worst of human nature is almost part of the job description of most DHS officials. Put differently, DHS officials continuously surrounded by reports of actual and attempted crimes and violence are likely to be particularly prone to "availability" errors in assessing the likelihood that crime and violence will be serious disaster risks.

Embedding natural disaster response in an agency with a worldview so suspicious of human nature seems likely to make countering and rooting out disaster mythology all the more difficult.<sup>334</sup> Even well-educated emergency managers who are fully aware of the pitfalls of disaster mythology may find it difficult to convince DHS

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<sup>330</sup> See, e.g., FEMA Independence Act, H.R. 1174, 111th Cong. (2009) (proposing "[t]o establish the Federal Emergency Management Agency as a cabinet-level independent agency").

<sup>331</sup> Many critics asserted that FEMA's poor Katrina response was due in large part to the marginalization of natural disaster mitigation, planning, and response in an organization focused primarily on terrorism. See, e.g., Eric Holdeman, *Destroying FEMA*, WASH. POST, Aug. 30, 2005, at A17 (arguing that FEMA was "systematically downgraded and all but dismantled by the Department of Homeland Security" and that FEMA's mission and effectiveness suffered when it was "absorbed into the 'homeland security borg'").

<sup>332</sup> See 6 U.S.C. § 111(b)(1) (2006) (detailing the primary responsibilities of DHS). Most of DHS's responsibilities are focused on terrorism, including "prevent[ing] terrorist attacks within the United States," "reduc[ing] the vulnerability of the United States to terrorism," and "minimiz[ing] the damage, and assist[ing] in the recovery, from terrorist attacks." *Id.* Only one of DHS's primary responsibilities explicitly mentions natural disasters: "acting as a focal point regarding natural and manmade crises and emergency planning." *Id.*

<sup>333</sup> Cf. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1366 (2007) (arguing, conversely, that civil agencies are ill equipped to "wage war on terror").

<sup>334</sup> Cf. Cuéllar, *supra* note 20, at 595 (arguing that "organizational changes can exert powerful, underappreciated influence on law's implementation" and that, for example, "[p]ublic health bureaucrats work differently when buried in a Treasury Department dominated by fiscal concerns than when operating in an agency prioritizing health and economic security"). There is, of course, considerable debate about whether changing the structure of agencies has any real impact on agency implementation of legal mandates. See *id.* at 639. However, there is good reason to think that, in general, changes in agency structure do matter, see *id.* at 642-43, and that, in particular, FEMA's submersion in DHS has produced concrete changes in the way FEMA administers its mandate.

superiors that the best response policies are those grounded in the likelihood that most people will respond admirably in the face of disasters.<sup>335</sup> General Honoré, in his testimony to Congress, also noted that one problem with existing disaster response is that the potential need to invoke the Insurrection Act is always put on the table and is a part of every discussion.<sup>336</sup> This phenomenon seems all the more likely to persist if FEMA remains embedded in an agency focused on law enforcement and population control.

This rationale for housing natural disaster planning outside of an umbrella agency focused on terrorism would apply with just as much force to state departments of homeland security. Of course, at both state and federal levels, potential coordination and resource- and information-sharing advantages of planning for terrorism and natural disasters in the same agency must be balanced against the potential for associated difficulties in rooting out the disaster myth and the myth's impact on natural disaster response, but policymakers should consider this latter possibility carefully when structuring or restructuring the agencies involved in both of these tasks.

Moreover, the likelihood that the disaster myth of looting and violence will resonate more strongly with organizations focused on terrorism—and, by extension, warfare—suggests that we should resist calls to make the Department of Defense the lead federal agency for disasters “of extraordinary scope and nature.”<sup>337</sup> Conversely, this possibility may also suggest that we should reject proposals to expand FEMA's role in responding to terrorism by amending the Stafford Act's definition of “major disaster,” which today is focused primarily on natural disasters, to explicitly include acts of terrorism.<sup>338</sup> Shifting FEMA's role toward terrorism response might entrench disaster mythology, just as housing FEMA within DHS does.

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<sup>335</sup> Of course, the preliminary data from 9/11 about the public response to terrorist incidents suggests that the public reacts to terrorist events much as it does to natural disasters—with overwhelming prosocial, helping behaviors, rather than antisocial behaviors or irrational behaviors such as panic or paralysis. See FISCHER, *supra* note 14, at 69–74. If FEMA were able to shed most of the vestiges of disaster mythology, leaving FEMA within DHS might make FEMA a potential advocate for taking accurate account of human response to terrorist incidents, as well.

<sup>336</sup> See *Hearing on Defense Department's Role*, *supra* note 135, at 59–60 (testimony of General Honoré).

<sup>337</sup> See *Lessons Learned*, *supra* note 117, app. A, at 94 (recommending that the DOD “develop plans to lead the Federal response for events of extraordinary scope and nature”).

<sup>338</sup> See, e.g., Emergency Response Act of 2009, S. 2863, 111th Cong. (2009) (proposing that “an outbreak of infectious disease or act of terrorism” qualify as a major disaster under the Stafford Act).

## CONCLUSION

The true nightmare of Katrina was not the anarchy and violence reported to have consumed the city; rather, it was the painfully slow and often misguided response—spurred in part by the disaster myth of widespread looting and violence—that compounded the suffering of Katrina's victims and all but guaranteed that disaster would become catastrophe. If we are to avoid that nightmare scenario in future disasters, we must reform both the design and implementation of our disaster laws to avoid the overemphasis on security and law enforcement that the disaster myth encourages.

Consequently, we should take advantage of relative lulls in the perpetuation of the myth to refocus our disaster law and policy on humanitarian response by amending disaster legislation and emergency-response plans to constrain the discretion of public officials to overemphasize security concerns in a disaster's aftermath. We should also experiment with public education campaigns in advance of disasters to help decrease pressure to pass laws, like looting laws, that reflect and perpetuate the disaster myth and divert attention from more pressing postdisaster priorities. If a community is determined to pass a looting law, the law should grapple on its face with the distinction between prosocial and antisocial looting. Finally, we should consider removing FEMA from DHS, as the latter agency's focus on terrorism will likely further entrench disaster mythology, and we should likewise resist calls to elevate DOD's role in disaster response.

By continuing the dialogue between disaster sociology and disaster law that this Article has begun, we can help ensure that our legal framework for natural disaster response is designed and implemented based on accurate assessments of postdisaster human behavior. As we take the necessary steps to counter the deleterious impact of disaster mythology on our legal system of disaster response, we will be better prepared to meet the challenge of minimizing human suffering in the face of future natural disasters that will surely come.

