

Disasters, Focusing Events, and Sociolegal Studies

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Abstract

This paper discusses natural disaster research from agenda setting and public policy perspectives. I note the lack of such a large contribution of sociolegal research to the broader social science of disaster, and argue that there can be fruitful connections between sociolegal studies and the interdisciplinary and rapidly evolving field of disaster research. Legal scholars have a great deal to contribute to our understanding of social responses and behaviours in the face of these often-frightening events.

Key words

Disasters; agenda setting; Sociolegal studies

Resumen

Este artículo analiza la investigación sobre desastres naturales desde la perspectiva de establecer un calendario y de política pública. Se menciona la falta de una investigación sociojurídica tan completa en el campo más amplio de las ciencias sociales de desastres, y se defiende que pueden darse conexiones fructíferas entre los estudios sociojurídicos y el campo interdisciplinario y en rápida evolución de la investigación de desastres. Los profesores de derecho pueden hacer una gran contribución a nuestra comprensión de las respuestas y comportamientos sociales frente a estos acontecimientos, a menudo aterradores.

Palabras clave

Desastres; creación de un calendario; estudios sociojurídicos

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1. Introduction

Natural disasters, industrial accidents, and terrorism have become major concerns among governments and peoples around the world, as their frequency and socioeconomic costs increase (Keen and Pakkot 2011, Roberts 2009). These costs—and the social disruptions they represent—continue to grow even as the low probability of these events striking in any one place has inhibited careful understanding of the possibility of “worst cases” (Clarke 2005). Events like the Japan tsunami and Fukushima nuclear plant disaster, Hurricane Katrina, the Deepwater Horizon oil spill, and the September 11 attacks have increased thinking about “catastrophic” disasters that render local and sometimes national governments unable to effectively respond to the disaster (Birkland 2009a, Quarantelli 2005). Other events, such as Hurricane Sandy, raise alert communities to the possibility of even worse outcomes from stronger disasters in the future.

Disasters are important because they disrupt the normal, expected workings of society. But, paradoxically, their effects do not often alter existing organizational or stakeholder relationships based on economic or political power. Indeed, in many cases, the differential impact of disasters on the wealthy and the poor simply reflects existing distributions of power and resources, as was seen most starkly in the United States in the immediate aftermath of Hurricane Katrina (Cutter 1996, Laska and Morrow 2006, Norris 2002). Such events can open opportunities to address inequity, but do not often do so.

Disasters and catastrophes can reveal policy failures in two fundamental ways. First, disasters reveal existing distributional inequities that are the result of policy failures, such as a failure to enforce building codes (Mittler 1991, Burby, French, and Nelson 1998, Burby *et al.* 2000). Second, since disasters cause significant losses of life and property, citizens, political leaders, and interest groups (Birkland 1997, 1998) may look for policy failures and ask whether policies to prepare for, mitigate, respond to, and recover from disasters should be improved. They can also lead to questions about the appropriate distribution of responsibility between the central government and the local governments, or, in federal systems, between the national government and the state or provincial and local governments (Birkland and DeYoung 2011). Similar questions arise with respect the different goals of national governments and supragovernmental systems, such as NGOs involved in disaster relief. Disasters are therefore *focusing events* that rapidly expand (and, often, fade) on the news media and on governmental agendas. In the policy literature, focusing events provide a rather short “window of opportunity” (Kingdon 2003) for policy change; we can also think of this window as opening for social and cultural change, and as an opportunity to change the contours of the scholarly community that studies hazards. Any resultant policy or social change can be conceived as attempts to “learn the lessons of” an event, in a process sociologists call “sense-making.” However, these claims of lesson learning are not always substantiated even as they are often contested in political debate (Birkland 2006).

Social scientists often state “there is no such thing as a *natural* disaster” (Hartman and Squires 2006) (My emphasis). A meteorological or geophysical event that happens in a sparsely populated area will not be categorized or defined as a disaster, because there are few people and little human society to disrupt. More narrowly, political scientists say that “all disasters are political” (Selves n.d.) because, both before and after disasters, the classic Lasswellian definition of “politics”—who gets what, when and how—is certainly evident (Lasswell 1958). In democratic societies, we have passionate public debate over how to rebuild parts of cities. By contrast, after a devastating 1972 earthquake, Nicaragua, an authoritarian kleptocracy, failed to rebuild Managua, in particular, because the Somoza regime encouraged corruption and theft of funds from international donors (Cueto 2010). The politics of post-earthquake Nicaragua therefore reflected and reproduced pre-existing conditions of corruption and ineffectiveness. Similarly,

rebuilding structures in Haiti after the 2010 earthquake has been slow, arguably due to chronic political unrest, corruption, and poor infrastructure systems (Bilham 2010). Whether in democracies and in autocracies, it is the rare event that changes underlying politics, and, even in well-functioning systems, the debates over how to rebuild communities and, in some cases, redefine them in the wake of the disaster, are political because power and resources are at stake. These political debates are not solely pursued in what we might narrowly call “political institutions,” but take place across societies, and engage questions of power, legitimacy, and law and legal institutions.

2. Disasters as agenda setting events

The political science literature on agenda setting suggests that societies and political system cannot devote constant attention to all the possible issues before them, so that problems—and their solutions—must compete for attention at the societal and institutional levels (Cobb and Elder 1983, Hilgartner and Bosk 1988). Focusing events can lead interest groups, government leaders, policy entrepreneurs, the news media, or members of the public to identify new problems, or to pay greater attention to existing but problems that were previously perceived to be dormant, potentially leading to a search for solutions in the wake of apparent policy failure (Birkland 1998). At the heart of this activity is the constant search by interest groups for opportunities to advocate policy change based as much on advocacy opportunities as on technically superior analysis (Kingdon 2003, Majone 1989). Claims of policy failure are therefore made by pro-change groups in an attempt to expand an issue to a broader audience.

With event-induced attention to the problem, pro-change groups may mobilize in several ways, including membership drives and appeals for donations. These tactics are much more common in industrial disasters, such as oil spills. Many groups will move to lobby legislators to press for policy change, and their group leaders will be invited to testify before congressional hearings or parliamentary commissions. Group mobilization is quite uncommon after natural disasters, although some groups have filed negligence suits against the authorities that built and maintain the levee system in and around that city.

If an event threatens to reduce the power of advantaged groups to control the agenda, these groups are likely to respond defensively to focusing events (Birkland and Nath 2000). They may argue that an event is not as important as claimed by opposing groups, that existing policy is able to deal with any problems, or that, if new policy is needed, the policy proposed by the contending groups would be ineffective or counterproductive. Groups that are more powerful will work to downplay an event’s significance by providing officials and the public with alternative explanations of the meaning and significance of the event (Birkland 1997, chapter 5).

Public policy theorists continue to wrestle with the policy making implications of focusing events, including the usual debate over definitions of an “event,” drivers of social and policy change as a result of this event, and whether such events really make much of a difference in the long-run trajectory of public policy. But we do know that, in the past fifteen or twenty years, large disasters have become important focusing events for the scientific and social scientific community. Disasters of various types, ranging from the Exxon Valdez oil spill, through various earthquakes in California and Washington State, (in 1989 and 1984, and 2001, respectively), and the hugely damaging hurricanes Andrew (1992), Katrina (2005) and Sandy (2012), drew huge attention to the vulnerability of communities in the United States. The damage and disruption of these events was often equalled or exceeded by huge disasters, such as the 2004 Sumatra earthquake and tsunami, the 2011 earthquake and consequent nuclear disaster at Fukushima, Japan, and earthquakes in Sichuan, China in 2008 and Haiti in 2010.

Clearly, these events focused policy makers' attention. But they also opened the field of disaster research to a much broader group of scholars than had previously engaged in this work. While the roots of this field run to the early and mid 20th century, in sociology and in geography, the field has been propelled forward by scholarly attention to major events. Perhaps the two most important such events for disaster scholars in the United States were Hurricane Katrina and the September 11 terrorist attacks; in other countries, similar terrorist attacks, in London and Madrid, and similar natural disasters, have increased interest to the point where we can say that a global epistemic community – or set of connected epistemic communities – exists and is taking natural and technological hazards very seriously. In simplest terms, focusing events focus the attention of scholars, as well as of policy makers and citizens.

The sociolegal studies community is one such epistemic community that has been mobilized to study disasters. As I show in the remainder of this article, sociolegal scholars are making considerable contributions to our understandings of disasters in terms of human rights, power relations, legal mobilization, and the how law and legal institutions shape the sorts of things that communities can do to reduce their vulnerability. Law and legal institutions also shape how people respond to and recover from disasters.

3. Sociolegal studies, disasters, and focusing events

A sociolegal approach to disasters and agenda setting is important because, as Sarat and Lezaun note:

Legal, political and humanitarian responses are premised on the deep-rooted assumption that we can at least decipher the meanings of disaster, at least correct its causes and prevent future consequences. Whatever explanatory theory one holds..., catastrophic events test our legal, political, and humanitarian resolve and resourcefulness.

This testing is particularly salient with respect to the law. That is the case not only because the breakdown of legal order is one of the clearest signs of catastrophic disruption, but, more importantly, because the law plays a crucial role in drawing lessons from disaster, in providing relief and redress to victims, and in correcting the vulnerabilities that caused or compounded the destruction (Sarat and Lezaun 2009, 1).

Table 1: Representative Articles on Law in Disaster Research Journals

<i>Themes</i>	<i>International J. of Mass Emergencies and Disasters</i>	<i>Natural Hazards Review</i>	<i>Disasters</i>	<i>Journal of Contingencies and Crisis Management</i>
Compensation regimes, liability, and fixing of blame or responsibility	(Huffman 1983)		(Bruggeman, Faure, and Haritz 2011)	(Elliott and McGuinness 2002)
Crisis management				(Jang and Chen 2009)
Disability			(Parr 1987)	
Governance and Management			(Chan 1997)	
Human rights			(Dufour <i>et al.</i> 2004, Young <i>et al.</i> 2004)	
Land Tenure			(Reale and Handmer 2011)	
Law as social institution	(Huffman 1989)			
Mitigation and preparedness	(Lindell 1997)	(Burby 2005)	(Luna 2001)	

Sarat and Lezaun's statement touches on many major themes in sociopolitical studies of disaster: sense making, resilience and resourcefulness, the breakdown of legal order, and learning lessons from disaster. These questions are addressed, individually and collectively by all social scientists that study disasters. Sarat and Lezaun laid down this challenge because these questions have not been taken up in the mainstream journals either in disaster studies or in sociolegal studies. In Table 1 I show representative articles that invoke "law" or legal processes as an important subject for study in four important journals devoted to disaster social science. The few articles that were published focus on the liability, human rights, and compensation and "blame fixing." Very few of these articles make direct reference to important sociolegal questions, including how legal practices and institutions shape societal responses to problems, or how legal institutions can help or hinder effective action in times of rapid change and urgency. A few articles address issues of particular interest to law and society, such as Reale and Handmer's (2011) article on land tenure and vulnerability, and Meyer's (1984) article on "relief workers and violations of humanitarian law," which engages important transnational questions in a field that sometimes focuses on one state at a time. Unsurprisingly in disaster journals, the one theme that three journals had in common is discussions of the legal aspects of disaster preparedness and mitigation.

Clearly, there is plenty of room for sociolegal scholars to share more of their knowledge with the disaster research community. Indeed, this community, being consciously interdisciplinary, would welcome such participation. Indeed, much greater interest—but not discernibly increased interest in publishing in disaster journals—was apparent after Hurricane Katrina. This event opened the window of opportunity for change, sense making, and reconceptualization of disaster that had never occurred before.

Of course, it is unsurprising that sociolegal scholars would want to publish their results in their most important disciplinary or interdisciplinary journals. Still, law and society scholars have not integrated much of the "disaster science" and "agenda setting" literature into their published work, and their work has not penetrated the disaster research field. This is, of course, true in the opposite direction. Very few disaster scholars have sought to publish in standard sociolegal journals. Indeed, a search on the term "disaster" in the full title and abstract of articles indexed in "law and society" journals in JSTOR reveals only 13 articles on the topic.¹ These articles are listed in Table 2.

From this small collection of work on disasters, we can see that, in the North American literature, the greatest intellectual effort has been given to four very useful articles on the origins of disaster relief schemes during the New Deal period (Dauber 2005a, 2005b, Gillman 2005, Landis 1999). These studies are very valuable in that they explain how we have come to have the policy and legal regime that has created disaster relief as an expectation of the U.S. national government, a concept that, even in the early 1950s, was still quite novel. This power to provide aid is strongly grounded in New Deal constitutional jurisprudence.

Two articles note how the administration of justice after disasters, like all social activities, be can be severely disrupted by disasters (Wasby 1998). The administration of justice during a disaster is a remarkably challenging task, because court managers must manage many different people—jurors, prosecutors, defendants and their attorneys, witnesses, and any other people who have any business in the court. They must so while protecting important legal rights, such as representation by counsel, pretrial discovery, speedy trial, and the right to confront

¹ These journals are the *Journal of Law and Economics* 1958-2012; *Journal of Law and Society* 1982-2007; *The Journal of Legal Studies* 1972-2012; *The Justice System Journal* 1974-2009; *Law and Contemporary Problems* 1933-2007; *Law and History Review* 1983-2009; *Law and Human Behavior* 1977-2009; *Law & Social Inquiry* 1988-2007; *Law & Society Review* 1966-2009; *Oxford Journal of Legal Studies* 1981-1998; *Yale Law & Policy Review* 1982-2009.

one's witnesses (Ellard 2007). A notable example is the 1989 Loma Prieta (San Francisco) earthquake, which required the U.S. Ninth Circuit court of appeals to move to temporary office space in San Francisco while its badly damaged courthouse was being built. A perhaps more startling example was the need for the New York State courts in lower Manhattan to manage the emergency that befell their operations on September 11 (Birkland and Schneider 2007). The impact of these disasters extends outside the courtroom. The WTC towers housed over 1400 lawyers and their firms, many of which lost important records that the New York State courts helped to reconstruct from their files. Similar disruption followed Hurricane Katrina, which even more profoundly shook the regional legal community.

Three articles—and four, if we consider liability regimes in the same category—are about regulatory regimes intended to prevent disaster or to regulate dangerous processes (Gunningham and Sinclair 2009, Haines 2009, Horlick-Jones 1995, Kamin and Rachlinski 1995). Other articles focus on the corrupting influence of disaster relief (Leeson and Sobel 2008), on police and official accountability in a crowd-crush disaster at a soccer match (Scraton 1999), and on insurance regimes (Kunreuther 1968), the latter of which might be considered a regulatory matter as well.

Table 2: Articles in Sociolegal Studies about Disaster

Article	Topic
Scraton, Phil, 1999. Policing with Contempt: The Degrading of Truth and Denial of Justice in the Aftermath of the Hillsborough Disaster. <i>Journal of Law and Society</i> , 26 (3), 273-297.	Accountability of the police and officials in a "human" disaster (crowd crush at a soccer game).
Leeson, Peter T. and Sobel, Russell S., 2008. Weathering Corruption. <i>Journal of Law and Economics</i> , 51 (4), 667-681.	Disaster relief is associated with state corruption
Birkland, Thomas A., and Schneider, Carrie A., 2007. Emergency Management in the Courts: Trends After September 11 and Hurricane Katrina. <i>The Justice System Journal</i> , 28 (1), 20-35.	Disasters and the administration of justice
Wasby, Stephen L., 1997. Delay and a Docketing Disaster. <i>The Justice System Journal</i> , 19 (2), 240-242.	Disasters and the administration of justice
Kunreuther, Howard, 1968. The Case for Comprehensive Disaster Insurance. <i>Journal of Law and Economics</i> , 11 (1), 133-163.	Insurance
Kamin, Kim A., and Rachlinski, Jeffrey J., 1995. Ex Post ≠ Ex Ante: Determining Liability in Hindsight. <i>Law and Human Behavior</i> , 19 (1), 89-104.	Liability regimes
Gunningham, Neil, and Sinclair, Darren, 2009. Regulation and the Role of Trust: Reflections from the Mining Industry. <i>Journal of Law and Society</i> , 36 (2), 167-194.	Regulation in the presence of risks and disasters
Haines, Fiona, 2009. Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster. <i>Law & Social Inquiry</i> , 34 (1), 31-60.	Regulation in the presence of risks and disasters
Horlick-Jones, Tom, 1995. Review: Learning from Disaster: Risk Management after Bhopal, edited by Sheila Jasanoff.	Regulation in the presence of risks and disasters

<i>Journal of Law and Society</i> , 22 (3), 416-419.	
Dauber, Michele Landis, 2005. Judicial Review and the Power of the Purse. <i>Law and History Review</i> , 23 (2), 451-458.	The influence of New Deal relief spending and legal doctrines on the idea and growth of disaster relief
Dauber, Michele Landis, 2005. The Sympathetic State. <i>Law and History Review</i> , 23 (2), 387-442.	The influence of New Deal relief spending and legal doctrines on the idea and growth of disaster relief
Gillman, Howard, 2005. Disaster Relief, "Do Anything" Spending Powers, and the New Deal. <i>Law and History Review</i> , 23 (2), 443-450.	The influence of New Deal relief spending and legal doctrines on the idea and growth of disaster relief
Landis, Michele L., 1999. Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State. <i>Law & Society Review</i> , 33 (2), 257-318.	The influence of New Deal relief spending and legal doctrines on the idea and growth of disaster relief

This set of examples is necessarily restrictive, but it does suggest that disaster research has not been a major concern in the law and society community. Nevertheless, there are signs that this is changing as sociolegal scholars begin to understand the importance of the field as risks become more costly and more important in daily life.

Some promising points of departure are found in Austin Sarat and Javier Lezaun's edited volume (Sarat and Lezaun 2009), which contains sound essays on law, bureaucratic accountability and housing policy. And while Sarat and Lezaun make and expansive claims for the role of law and legal scholarship in learning from sudden events like disasters, and putting those lessons into force, the actual literature on policy learning after disasters is not generally promising, the many claims to "lessons learned" notwithstanding (Birkland 2006, 2009b, Donahue and O'Keefe 2007, Gerber 2007). Sarat and Lezaun's call for greater attention to legal reasoning and norms within a broader social context is taken up by Sterett (2012), whose work has sought to understand how displaced people in the United States are treated by a system of disaster relief that constitutes part of the American social welfare system. She argues that the recipients of this relief made their claim to this relief by virtue of their being American citizens, not as "refugees" in the sense of people leaving their country for another, safer one. She ties citizenship to ideas of human rights, a term that is often avoided in domestic discourse about the rights of Americans within the nation's boundaries. This article innovatively ties together the fact of an event, its manifest consequences, and concepts of citizenship and rights, and is published in a journal that receives broad attention in the disaster research field.

Works like these make a significant contribution to our understanding of disasters. The legal practice and sociolegal studies communities have made substantial contributions to understanding the substance of the law as it relates to such disparate matters as bankruptcy (American Bankruptcy Institute Law Review 2007), liability and insurance regimes, questions of property rights, the legal regimes for disaster relief and assistance in disasters, and, in particular, the administration of law and order or what some mistakenly believe to be "martial law" (Davies 2000, Cook 2006). These articles have not found their way into the "mainstream" law and society journals. But have such themes found their way into the standard law reviews? A search of law review articles in the Lexis-Nexis database for articles published beginning in 2000, with the word "disaster" in their title, yielded 530 articles. I performed a very simple content analysis of terms that appeared often in

these titles, and that are of concern to disaster researchers and the results are shown in Table 3.

Articles can fall into more than one topic if they address two or more topics, such as *liability* and the *Deepwater Horizon* oil spill. Clearly, natural disasters were of great concern to law review authors, with particular interest in disaster relief, although the *Deepwater Horizon* gained considerable attention—as much as Hurricane Katrina. Most of the discussion around the oil spill focused on liability and damages, as well as the law of torts. Overall, though, while we can say that lawyers are interested in disasters, these articles did not deeply engage the broader social, political, and economic questions that social scientists address. Rather, these articles focused more on the language of the law and its interpretation, and what that means in terms of government duties and powers, corporate responsibility, and the liability that arises when organizations or institutions fail in their duties. And, as noted above, the legal community is very concerned, like all organizations, with the implications of disasters on their own legal practices, which the September 11 attacks and Hurricane Katrina showed are as vulnerable as any other enterprise. Given the importance of courts and legal procedure, the effects of disaster on the practice of law are nontrivial. There is, of course, considerable value to such literature to the legal community, which, after all, must advocate for its clients and participate in shaping legal doctrine. But this is not, mostly, social science research.

Table 3: Topical Coverage of Law Review Articles on Disaster

Topic	Count
natural disaster	47
hurricane	34
disaster relief	33
Deepwater Horizon	28
Hurricane Katrina	25
liability and damages	20
law practice (recovery from damage done to one's own practice)	17
risk	13
tort	13
insurance	11
catastrophe	8
disaster preparedness	8
disaster recovery	8
terrorism	8
women in disasters	8
damages (legal)	6
Exxon Valdez	6

This overview of the law review literature on disasters is necessarily limited by the use of the term “disaster,” in the title. But we can discern from these data some trends in the study of disasters. These trends and foci of interest appear quite similar to those of the “established” disaster research community, which also tend to focus on individual disasters and on disaster relief. But this literature also contributes to understandings of disaster in terms of risks and liability, including explicitly the notion of torts in the disaster context.

Daniel Farber is a legal scholar whose work has touched on many of these themes, and his work crosses the very permeable boundary between legal studies and policy analysis. For example, he has done significant work on systems of compensation for victims of climate change, which is a very important topic in disaster research because of the increased vulnerability of communities to what were considered “minor” disasters when sea level was lower. (Farber 2011, 2008a, 2008b, 2007a, 2007b). His 2011 article is particularly important as it overtly connects environmental law and disaster law, the connections to which are not clear or often considered even by practitioners in the field.

In Japan, Leflar and his colleagues studied the relationship between survivors, their legal representatives, and the sociolegal system in the aftermath of the Fukushima earthquake and nuclear disaster. They asked, “After an earthquake, tsunami, and nuclear power plant accident of historic proportions, how can lawyers help sort out the mess?” (Leflar *et al.* 2012). Their fieldwork is an excellent example of after-event research that has supported the theory and knowledge base in disaster research. It is also an outstanding ethnographic study that helps us understand not only the lives of the survivors of this disaster, but also the lives of the lawyers that represent these people in a context and culture that often resisted demands for rapid and equitable compensation. These themes transcend time and place in disaster studies, and again point out how the law and legal institutions shape social relations before and after disasters.

In summary, disaster scholars know that the field can grow and contribute to disciplinary and societal concerns only to the extent that the field is truly interdisciplinary (National Research Council Committee on Disaster Research in the Social Sciences 2006). This is known to legal scholars as well. This conference in Oñati spurred the development of a Collaborative Research Network under the auspices of the Law and Society Association (<http://jurisprudenceofdisasters.org/>). According to the group’s web site:

If jurisprudence is understood to be the study of the (historical, philosophical, cultural, social, and political) roots of law and legal institutions, our common research focus is on two related questions:

1. How these roots can combine to create laws actually making disasters more likely to occur; and
2. How they can likewise create laws to correct the imbalances that can result in disastrous events.

As this brief review suggests, progress is well under way to address these questions, although there is yet much more to be done. We know that the sociological scholarship of disaster, could address, among other questions, how the law and legal institutions work to mitigate, or, possibly more likely, work to reproduce the unequal distribution of resources and power that make some people more vulnerable to disaster in the first place. These insights would be powerful and useful in a field that has few legal scholars, beyond law professors and practicing attorneys. I am confident that the research community, which is remarkably open to new ideas and improved analytical concepts and tools, would greatly welcome greater participation of sociolegal scholars, with their impressive record of analytic rigor and ability to tackle vexing social problems. In the end, such collaboration and scholarly attention would not only yield improved social theory, but would also help

lead the way to protect people and their communities by reducing their vulnerability, increasing community resilience, and promoting equity as a fundamental principle of disaster policy.

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